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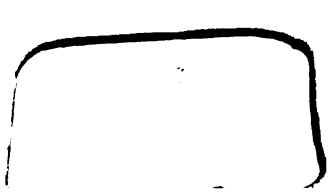

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A TREATISE

ON THE LAW OF

MUNICIPAL CORPORATIONS

BY

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IN THREE VOLUMES

VOL. I

ST. PAUL:
KEEFE-DAVIDSON COMPANY
1905

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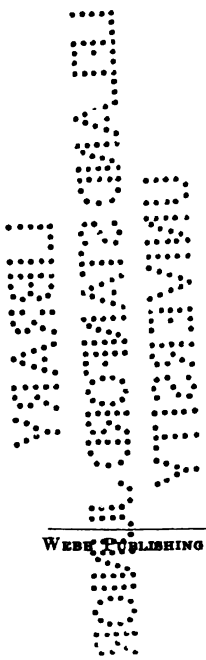

WEBB PUBLISHING CO., PRESS, ST. PAUL, MINN.

PREFACE.

The subject of the present work is considered by the author one of great importance at the present time. To counteract the modern tendencies of governmental agents in exercising powers other than those strictly pertaining to their character, through the construction of many public works and the ownership and maintenance of enterprises usually considered private in their nature, requires an accurate and thorough knowledge of their true character and legal capacities. The extent and character of their control over public property, their power to incur indebtedness and to issue negotiable securities, their right to own and operate public utilities, are questions of the deepest personal concern to everyone. The need of a comprehensive and modern work treating of these and many allied questions with a reference to the latest adjudicated cases is regarded as a justification for the publication of the present volumes.

Particular attention has been given to those subjects connected with the exercise of municipal powers which, in the opinion of the author, are of the present and greatest relative importance.

An effort has been made to state in the text, concisely and accurately, the general principles applicable to a stated question and to give in the notes a reference to the cases considering the subject under which they are cited with, in many instances, an apt quotation from the decision of the court. This particular feature, it is to be hoped, will prove of great assistance to those consulting the work and not having at hand the report from which the quotation is taken. An exhaustive examination and citation of the authorities has been made, and an index has been prepared unusually full and complete. The author trusts that his work will, after more than casual examination and use, merit the approbation of the profession.

H. S. A.

Minneapolis, Minn., August 3, 1905.

TABLE OF CONTENTS.

CHAPTER I.

INTRODUCTORY AND DEFINITIONS.

§ 1. Corporations defined and classified.
2. The classes further distinguished.
3. Quasi public corporations defined.
4. Public and private corporations distinguished.
5. Public corporations classified.
The state as a corporation.
6. Definition of a public corporation.
7. Definition of a municipal corporation.
8. Public quasi corporations defined and distinguished from municipal.

CHAPTER II.

CORPORATE LIFE AND EXISTENCE.

I. Creation and Dissolution of Corporations.

§ 9. The power to create a public corporation.
10. As existing in the national government.
11. The states and their power to create.
12. The exercise of the power.
13. Conditions precedent; population.
14. Conditions precedent; area and physical characteristics.
15. Mode of creation.
By prescription.
16. By implication.
17. By affirmative action.
18. Petition and notice.
The petition.
The notice.
19. The election.
20. Subsequent official action.
21. Incorporation without an election.
22. The charter of a public corporation and its legal nature.

23. Rules of construction.
24. The charter considered as evidence.
25. Acceptance.
26. Distinction between a public quasi and a municipal corporation in this regard.
27. Amendment of the charter.
28. By implication or indirection.
29. Effect of amendments.
30. Repeal of charter.
31. Effect of repeal.
32. Corporate existence, and the doctrine of collateral attack.
33. The dissolution of the corporation and its effects.
34. Forfeiture of charter.

II. Territorial Changes and Their Effect.

§ 35. Boundaries; their enlargement.
Other necessary acts and proceedings.
36. Location or character of territory annexed.
37. Petition for annexation.
38. Notice necessary.
39. Objections to annexation.
40. Official declaration and right of appeal.
41. Effect of annexation upon those concerned.
42. Division of public corporations and the authority.
43. Character of the district divided or disconnected.
44. Mode of division, with official declarations.
45. Effects of annexation or division upon public property and liabilities.
46. Division or adjustment of debts and liabilities.
47. The legal authority; where existing.
48. Agency for apportionment.
49. Character or form of indebtedness.
50. Division of assets.
51. Agency for division of assets.

III. Corporate Name and Boundaries.

§ 52. Existence of a public corporation.
53. Name of the corporation.
54. The seal and its use.
55. Corporate boundaries.
56. Definition of corporate boundaries.
57. Corporate boundaries; how established.
58. Boundary lines; agency for their establishment.
59. Proceedings for the establishment of corporate boundaries and miscellaneous matters in connection therewith.

60. Objections to the establishment of corporate boundaries.
61. Location of corporate boundaries.
62. Appeal from order fixing corporate boundaries.
63. Change of corporate boundary.
64. Judicial recognition.
65. Effect of the establishment or change of a boundary line.
66. Seat of government.
67. Original location of a county seat.
68. Removal of a county seat.
69. Petition for removal.
70. Its form, and averments.
71. Petition and its signers.
72. Signers' right of withdrawal.
73. Petition for removal; its filing. Notice.
74. Official action.
75. Time and manner of election.
76. Qualifications of voters.
77. Votes necessary to a removal.
78. Canvass and return of votes.
79. Contests.
80. Authority of commissioners.
81. Declaration of the result and its effect.

CHAPTER III.

LEGISLATIVE POWER OVER PUBLIC CORPORATIONS AND ITS LIMITATIONS.

§ 82. In general.
83. Legislative control over public funds.
84. Power of the legislature over public revenues.
85. Legislative control over corporate boundaries
86. Over municipal boundaries.
87. Legislative power over public property.
88. Over corporate contracts.
89. Legislative control over trust property held by public corporations.
90. The power of the legislature to compel the payment of debts.
91. Retention of jurisdiction.
92. Constitutional limitations on legislative power.
93. Limitations on the passage of what is termed "special legislation."
94. Constitutionality of laws classifying public corporations.
95. Other constitutional objections.
96. The impairment or destruction of vested rights as a limitation.
97. Control over the corporation in its private capacity.

CHAPTER IV.

CORPORATE ELECTIONS.

§ 98. Corporate elections.
99. Notice.
100. Time and place of holding.
101. The town meeting; its powers.
102. Its powers, continued.
103. Purpose for which held; levy of taxes; election of officers.
104. The town meeting; right and authority for holding.
105. Officers and their duties.
106. Voters and their qualifications.
107. Miscellaneous matters.

CHAPTER V.

THE POWERS OF PUBLIC CORPORATIONS.

I. In General

§ 108. General powers.
109. Implied.
To enact ordinances.
Public offices.
To acquire and hold property
The police power.
Miscellaneous implied power.
110. Discretionary and imperative powers.
Their exercise
111. Corporate powers; their extent and nature.
112. Their delegation.
113. Rules of construction.
114. Rule of strict construction; how modified.

II. The Police Power.

§ 115. Definitions.
116. General limitations upon its exercise.
117. Constitutional limitations.
118. The preservation of public health.
119. Public agencies for the preservation of health.
120. Boards of health; their jurisdiction and powers.
Vaccination.
121. Their liability.
122. Quarantines and quarantine regulations.

123. Police power respecting the regulation of occupations.
124. Inspection of foods.
125. Regulations as to the construction and use of buildings.
126. Regulation and abatement of nuisances.
127. The protection of public morals.
128. Regulations controlling or suppressing gambling.
129. The police power; further illustrations of its exercise.
130. The exercise of the police power in regulating the sale and consumption of intoxicating liquors.
131. The police power; miscellaneous illustrations of its valid exercise.
132. The exercise of the police power continued; the exaction of license fees.
133. The exercise of the police power; further illustrations.
134. Establishment of public markets.
135. Public markets; the power to regulate.
136. The right to authorize private markets.
137. The control of nuisances.
138. Their abatement and removal.
139. Objections to the removal or abatement of nuisances.

III. The Power to Incur Indebtedness Other than by the Issue of Bonds.

§ 140. The corporate power to incur indebtedness.
141. Must be expressly given; it cannot be implied.
142. To what extent discretionary if expressly given.
143. Implied power of the courts to compel the payment of debts.
144. Manner of its exercise; body authorized.
145. The power limited by the purpose or use of funds to be raised.
146. The construction of buildings a public purpose.
146a. Illustrations of a "public purpose" continued; the support of the poor; water supply.
146b. "Public purposes" continued; light.
147. The construction of internal improvements.
(a) In general.
(b) Railway aid.
148. Express limitations on power to incur indebtedness.
149. Same subject continued.
150. Retroactive effect of limitations.
151. Construction of statutory and other limitations.
152. Definition of the word "indebtedness" or "debt" as used in limiting laws.
153. Indebtedness must be a legal demand.
154. Debts of territorially co-existing public corporations.
155. Assessment or valuation to be considered.
156. Indebtedness further defined; warrants issued in anticipation of taxes levied.

157. Expenses incurred in excess of current revenue or income.
158. Net debt; deduction of uncollected taxes.
159. Future payments under executory contracts not usually regarded as "debts."
160. Unearned interest not considered a "debt."
161. Deduction of assets to determine net debt.
162. Corporate indebtedness; its payment from a special fund.
163. Its payment through the levy of taxes.
164. Manner of levying taxes.
165. Provision for payment at time debt was incurred.
166. Debt; mode of payment.
167. Time and place of payment.
168. Enforcement of a debt by action.

IV. The Power of Public Corporations to Incur Indebtedness Through the Issue of Negotiable Securities.

§ 169. Power to issue negotiable securities.
(a) Must be expressly given.
(b) De facto corporate existence necessary.
170. The power to issue must be expressly given; it cannot be implied.
171. Ratification of void issue of negotiable bonds.
172. The issue of bonds; their purpose.
173. Refunding bonds.
174. Obligations issued for the purpose of funding a bonded indebtedness.
175. The issue of negotiable securities for the construction or improvement of highways.
176. The construction of municipal lighting plants.
177. To secure a water supply.
178. Railway aid securities.
179. Construction of drains and sewers.
180. The construction of bridges.
181. The erection of public buildings.
182. For making local improvements.
183. Internal improvements.
184. The power to issue and the conditions precedent to its exercise.
185. Performance of conditions precedent required of railway companies.
186. Conditions precedent to issue.
(a) The notice or order for an election.
(b) Its form.
(c) Its service.
187. Petition.
188. The calling of an election by ordinance.
189. The election.

190. Questions not necessary for submission to the electors.
191. The election; time and manner of holding.
192. Voters and their qualifications.
193. Canvass of election returns.
194. Necessary votes.
195. Negotiable securities; delivery.
196. Necessity for registration.
197. Official signatures and seals.
Sealing.
198. Form.
Times of issue and maturity.
Rate of interest.
199. Recitals of authority.
200. The ratification of void securities.
201. Negotiable bonds; their validity.
202. As affected by adverse decisions of a state court.
203. Validity of issue in excess of legal authority.
204. Legality as affected by subsequent legislation.
205. Securities of public corporations; their legal character.
206. Validity of negotiable securities. The doctrine of estoppel.
207. The same subject.
208. Estoppel through the payment of interest.
209. The doctrine of recitals.
The decisions of state courts upon questions of commercial law not controlling.
210. Estoppel not applying to recitals of law.
211. Distinction between power to issue and irregularity in its exercise.
212. The doctrine as applied to bonds containing no recitals of authority.
213. Bona fide holder.
214. Coupons; their legal character.
215. Time and place of payment.
216. Negotiable securities; sale.
217. Their payment.
218. Time of payment.
219. Medium of payment.
220. To whom payable.
221. The payment of interest.
222. The rule as to the payment of void bonds.
223. Payment of securities through provisions for a sinking fund.
224. The duty to levy taxes for the payment of interest or principal of negotiable bonds.
225. Rights of a holder to maintain an action.

V. Warrants and Miscellaneous Evidences of Indebtedness.

§ 226. Warrants; definition; by whom drawn.
227. Fund from which payable.
228. Formal issue.
229. Audit and allowance of claims as preliminary to issuance.
230. Their legal character.
231. Form.
232. Wording.
233. Validity.
(a) In general.
(b) Warrants invalid because of purpose for which issued.
(c) Invalidity resulting from character.
(d) Refunding.
234. Interest payable.
235. Actions on warrants.
236. Their payment.
237. Presentation for payment.
238. Payment; the amount.
239. Manner of payment.
240. Time of payment.
241. To whom payable.
242. Miscellaneous forms of indebtedness.
243. The same subject; legal character.
244. Form and phraseology.
245. Mode and time of payment.

VI. The Power to Contract.

§ 246. In general.
247. The implied power to contract.
248. Ultra vires contracts.
249. For want of authority.
250. Because of purpose or result.
251. Contracts protected by constitutional provisions.
252. Contracts ultra vires because of constitutional provisions.
253. The same subject continued.
254. Contracts ultra vires because contravening some exclusive right.
255. Contracts ultra vires because of a beneficial interest resulting to the public officers executing them.
256. Contracts ultra vires because of fraud or bribery.
257. Contracts ultra vires because extending beyond official term.
258. Ultra vires contracts; their enforcement.
259. Availability of the doctrine of estoppel.
260. Contracts; their formal execution.
261. Presumption of legality.
262. Mode of contracting; letting to the lowest bidder.

263. Acceptance of bids.
264. Rejection of bid.
265. Notice.
266. Specifications of services or supplies required.
267. Discretionary power in officers to reject or accept bids.
268. The same subject continued.
269. Discretionary power of officials to award to lowest bidder or otherwise.
270. Change of contract.
271. Parties to the proceedings.
272. Conditions imposed.
273. Contracts; how made; in writing.
274. How made; orally.
275. By whom made.
276. As authorized by legislative bodies.
277. Contracts made by departments.
278. Made by public officials.
279. The ratification of an illegal contract.
280. Ratification of a contract ultra vires.
281. Legislative ratification of ultra vires contracts.
282. Ratification of illegal contracts.
283. Modification of a contract.
284. Avoidance or rescission of contract.
285. Contracts; their construction.
286. Arbitration clauses.
287. Corporate contracts; their performance.
(a) In general.
(b) Manner of performance.
(c) Time of performance.
(d) Other conditions.
(e) Performance by the public corporation as a party to the contract.
288. A contract; its performance; acceptance of work.
289. Fraud as rendering a contract invalid.
290. The right of the parties to maintain an action based upon a contract.
291. Delay in the performance of a contract.
292. The assignment of a contract.
293. Rights of parties.
294. Payment of contract obligations.
295. Extras.
296. Public contracts; actions.
297. Bond required of contractors.
298. Rights of sureties.
299. Subcontractors.

CHAPTER VI.

PUBLIC REVENUES; THEIR COLLECTION AND DISBURSEMENT.

I. TAXATION.

§ 300. Definition and nature.
301. Municipal power to tax.
302. The authority.
303. Limitations upon the power.
(a) Limitations as to rate or amount.
(b) Limitations as to purpose.
304. Purpose of taxation.
(a) Railway aid.
305. The payment of debts.
(a) Of judgments.
(b) Of bonds and interest.
(c) Obligatory payments on contracts.
(d) The payment of warrants and claims.
306. Taxation for the support of public schools.
307. School taxes; amount required.
308. Diversion of funds.
309. The construction of roads.
310. The levy of taxes for the establishment or maintenance of plants for the supply of water and light.
311. The exercise of the power.
312. The authority to tax and upon what based.
313. Exemptions.
(a) Public property exempt.
(b) Other exemptions.
(c) Contract exemptions.
(d) Exemptions arising because of purpose for which property is used.
314. Taxes; their levy and assessment.
315. Basis or authority for tax levy.
316. Agency of tax levy.
317. Apportionment of taxes.
318. Tax levies; preliminary proceedings.
319. Mode of levy and assessment.
320. Loss of power.
321. Errors in proceedings.
322. The power; when exercised.
323. The duty obligatory.
324. Equalization of tax levies.
325. Taxpayers' rights.
326. Lien and priority.
327. Collection of taxes.
Personal liability.

328. Actions; questions raised.
(a) The same subject.
329. Use of proper remedy by taxpayers to prevent collection illegal taxes.
330. Compromise of taxes.
331. Right to prescribe and collect penalties.
332. Irregularities.
333. Enforcement of lien.
334. Summary proceedings.
335. The payment of taxes.
To whom and when.
336. Their refunding.
II. Special Assessments.
337. Definition and explanation of the term.
338. The exercise of the power to levy.
(a) The power a continuing one.
(b) Cannot be delegated.
339. Limitations upon the power.
340. Purpose for which exercised.
(a) What not considered local improvements.
(b) What regarded as local improvements.
341. Extent of exercise.
Discretionary power of municipal authorities to make improvements.
342. Discretionary power with reference to locating limits of taxing district.
343. Property subject to local assessments.
(a) Statutory exemptions.
(b) Contract exemptions.
(c) Exemption from local assessment because of use by common carriers.
(d) Property exempt because of its location.
(e) Public property; when exempt.
344. The manner of determining local assessments; conversely benefits.
345. According to frontage.
346. Assessment based upon location.
347. Levy based upon ascertained benefits.
(a) Ascertainment of benefits.
(b) Appeal from appraisal of commissioners.
(c) Right of appeal.
348. What considered as benefits.
Illustrations of benefits.
349. Levy based upon area or comparative value of property.
350. Individual liability.
351. Estoppel of taxpayer.
352. Place of assessment.
353. Acquiring jurisdiction; preliminary proceedings.
354. Same subject continued.

355. Execution of a contract.
356. Preliminary investigation or estimates.
357. Same subject continued.
358. Jurisdiction acquired through the introduction and passage of an ordinance.
(a) Legality of ordinances.
(b) Form.
(c) A local improvement ordinance must be reasonable.
359. Resolutions.
360. Petition by property owners.
(a) Petition not necessary where cost is paid from general funds.
361. Declaration of necessity.
362. Construction of the improvement.
363. Notice to property owners.
364. When given.
365. How given and to whom.
366. Result of a failure to give notice.
367. Variance of proceedings from notice given.
368. Benefits the basis of assessment.
369. Presumption of validity.
370. Estoppel of public corporations.
371. Form of reports, assessment rolls and other necessary papers.
372. Opportunity for investigation and examination.
373. The right of correction and review.
374. Parties to appeal proceedings.
375. Review by the courts.
376. Review by other bodies.
377. The right of appeal or review; manner and time of exercise.
378. Conclusiveness of decision.
379. Review and correction.
380. What questions raised on appeal and review.
381. Estoppel of property owner.
(a) By laches.
(b) By course of action.
382. The same subject; propositions negatively stated.
383. Right of appeal as based on omission to tax other property.
384. Excessive assessment.
385. Judicial confirmation of an assessment roll.
386. Reassessment or supplemental assessment.
387. Curative legislation.
388. Collateral attack.
389. Lien and priority of special assessments.
390. The same subject continued.
391. Collection of special assessments.
392. Manner and amount of collection.
393. Same subject; summary proceedings.
394. Time of collection.

395. The rights of property owners.
396. Personal liability.
397. Recovery of invalid assessments.

ANALYSIS OF VOLUMES TWO AND THREE.

(For detail see those volumes.)

Chapter

VI. PUBLIC REVENUES; THEIR COLLECTION AND DISBURSEMENT (Cont'd.).

III. License Fees and Poll Taxes.
IV. The Disbursement of Public Revenues.

VII. GOVERNING BODIES.

I. Legislative.
II. Executive.
III. Judicial.

VIII. PUBLIC OFFICE AND OFFICERS.

I. Commencement and Nature of Official Life.
II. Termination of Official Life.
III. Powers, Duties, and Rights.

IX. PUBLIC PROPERTY.

I. Its Acquirement.
II. Its Control and Use.
III. Its Disposition.

X. LIABILITY OF PUBLIC CORPORATIONS FOR NEGLIGENCE.

XI. SOME PUBLIC DUTIES.

I. Educational.
II. Charitable and Corrective.

XII. ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

MUNICIPAL CORPORATIONS.

CHAPTER I.

INTRODUCTORY AND DEFINITIONS.

§ 1. Corporations defined and classified.
2. The classes further distinguished.
3. Quasi public corporations defined.
4. Public and private corporations distinguished.
5. Public corporations classified.
6. Definition of a public corporation.
7. Definition of a municipal corporation.
8. Public quasi corporations defined and distinguished from municipal.

§ 1. Corporations defined and classified.

The idea that an association or combination of natural persons, or things, may possess powers and properties distinct and different from, as well as some in common with, natural persons, has been a necessary and a favorite one in all systems of jurisprudence. One of the divisions, therefore, found in the earliest known codified law, is that of persons into natural and juridical, the latter including that "artificial person" existing only in contemplation of law, the logical sequence of existing conditions; and since that time all systems have recognized this artificial person.

The definition of a corporation most widely known and quoted is that of Chief Justice Marshall in the Dartmouth College Case: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed,

individuality,—properties by which a perpetual succession of many persons are considered as the same and may act as a single individual."[1]

Other definitions and descriptions have been given by textbook writers and judges during the course of many years. The definition above has been criticised as being a description rather than a definition, but it is, as stated, without doubt the best known and one of the clearest.[2]

The definition prepared by Austin Abbott for the Century Dictionary is concise in its terms: A corporation is "an artificial person created by law, or under authority of law, from a group or succession of natural persons, and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members."

Some of the characteristics of a corporation as compared with a natural person are suggested by the definition of Chief Justice Marshall, and include, as the most important, the idea of immortality. The corporation exists for the time limited in the charter irrespective of the individual lives of those who may compose it; its powers and rights, its duties and obligations, remaining the same, though its members may be constantly changing. It is a legal person distinct from its members.

The second characteristic worthy of note in the present discussion is that, while in a corporation, in the absence of statutory or constitutional provisions, the members are not personally liable for corporate debts, in a partnership—that other association of persons—each member is individually liable for the debts of the firm; and natural persons sui juris are liable to the fullest extent for debts contracted by them. A late authority says: "The only characteristic which in all cases distinguishes a corporation from unincorporated associations is the merging of the individuals who compose the corporation into a distinct artificial existence. If

[1] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 636.

[2] Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; Gregg v. Sanford, 65 Fed. 154; Andrews Bros. Co. v. Youngstown Coke Co., 86 Fed. 585; Levee Inspectors of Chicot County v. Crittenden, 94 Fed. 616; Thomas v. Dakin, 22 Wend. (N. Y.) 71; Sir James Smith's Case, 4 Mod. 52; Fletsam v. Hay, 122 Ill. 293; Liverpool Ins. Co. v. State of Massachusetts, 77 U. S. (10 Wall.) 566; People v. Assessors of Watertown, 1 Hill (N. Y.) 620; In re Gibbs' Estate, 157 Pa. 59; 1 Kyd, Corp. 70; Bouvier, Law Dict. "Corporations;" 1 Clark

this feature exists, an association is a corporation, but not otherwise. An association does not become a corporation merely because it is so called; nor, on the other hand, is it any the less a corporation because it is not so called. Whether it is a corporation depends upon the powers and faculties conferred upon it."

The occasion of the creation of a corporation is chiefly for the resulting convenience, economy, unity and continuity in the transaction of business or management of property. Certain powers and functions can be exercised better by an artificial body than natural persons; and the state or sovereign may better exercise over this collective body, this artificial person, its rights of control and regulation, than over a number of individuals. Great and advantageous economies in business can be effected by combinations of energy and capital.

As indicative of the view taken of corporations by business men, the definition of the late Jay Gould is interesting. He describes a corporation as "a body of men who unite, associate, and concentrate their ability, capital and intelligence in the undertaking of a work, great or small, which any one of them would individually be unwilling to undertake. If there are losses, they agree to bear each his proportion; if there are profits, they agree to divide them." This definition, as will be seen later, applies more strictly to a private corporation.[3]

Corporations have been classified according to the functions which they may perform, their purpose of creation, the number of members comprising them, or upon the element of capital stock. The only classification which concerns the present work is that first suggested, namely, the division based upon functions performed. This was broadly suggested in the Dartmouth College Case in the opinion of Justice Story: "Public corporations are generally esteemed such as exist for public political purposes only, —such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests. But strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government."[4]

& M. Private Corp. § 1; 1 Thompson, Corp. § 1 et seq.; vol. 7, § 8140; Angell & A. Corp. (11th Ed.) § 30 et seq.; Bl. Comm. Book IV., 18; Standard Dict. "Corporation."

[3] Taylor, Corp. § 23 et seq.

[4] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 668.

The basis of the classification arises from a difference in the nature of the duties required and powers exercised, and has existed since the first recognition of artificial persons by the sovereign. This division or classification is that of public and private.

In a California case,[5] Chief Justice Sawyer in writing the opinion said in defining a corporation and discussing its nature: "So, also, there are several classes of corporations, such as public municipal corporations, the leading object of which is to promote the public interest; corporations technically private, but yet of a quasi public character, having in view some great public enterprise, in which the public interests are directly involved to such an extent as to justify conferring upon them important governmental powers, such as an exercise of the right of eminent domain. Of this class are railroad, turnpike, and canal companies; and corporations strictly private, the direct object of which is to promote private interests, and in which the public has no concern, except the indirect benefits resulting from the promotion of trade, and the development of the general resources of the country. They derive nothing from the government, except the right to be a corporation, and to exercise the powers granted. In all other respects, to the extent of their powers, they stand upon the footing of natural persons, having such property as they may legally acquire, and holding and using it ultimately for the exclusive benefit of the stockholders. In this last class, the stockholders, and those dealing with the corporation are the only parties directly and immediately interested in their acts, so long as the corporation confines itself within the general scope of its powers. The rights of the corporation, the corporators, and of strangers dealing with the corporation, may, in some respects, vary according to the circumstances surrounding a given transaction." The California Code, sec. 284, provides, "Corporations are either public or private; public corporations are formed or organized for the government of a portion of the state; all other

[5] Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 577; McLoud v. Selby, 10 Conn. 390; Herbert v. Benson, 2 La. Ann. 770; Police Jury of Bossier v. Shreveport Corp., 5 La. Ann. 661; Andrews v. Estes, 11 Me. 267; Gaskill v. Dudley, 47 Mass. (6 Metc.) 546; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Com. v. Green, 4 Whart. (Pa.) 531, 598; Cole v. East Greenwich Fire Engine Co., 12 R. I. 202; Appleton v. Water Com'rs of New York, 2 Hill (N. Y.) 432; 1 Thompson, Corp. p. 19.

corporations are private." The weight of authority and the most recent cases endorse the classification by Chief Justice Sawyer given above.

§ 2. The classes further distinguished.

The distinction between the three classes named in the last section is perhaps sufficiently given in the definitions referred to; but a further and short discussion of substantial differences may not be out of place.

Chief Justice Marshall, in the Dartmouth College Case, in reply to the argument advanced that a private corporation may affect the public interest, or the transaction of its business may result to the advantage or the benefit of the public, and therefore should be considered a public corporation, states: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration, of the grant. * * * The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund, for the security and application of which it was created. There can be no reason for implying, in a charter given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations."[6]

The mere fact, then, that a private corporation transacts business affecting the public interests or of a public nature, does not necessarily change its character; neither does the fact that the state may own shares of stock, or all the stock, of such corporation.[7]

[6] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 637, 638.

[7] Bank of U. S. v. Planters' Bank of Georgia, 9 Wheat. (U. S.) 904; Bank of Alabama v. Gibson's Adm'rs, 6 Ala. 814; Mahony v. Bank of Arkansas, 4 Ark. 620; State Bank v. Clark, 8 N. C. (1 Hawks) 36; State Bank v. Gibbs, 3 McCord (S. C.) 377; Hutchinson v. Western & A. R. Co., 53 Tenn. (6 Heisk.) 634.

In discussing the difference between a quasi corporation and an assembly, Chief Justice Gibson says in substance: "A quasi corporation is one created by law for convenience, having capacity to sue and be sued, with the power of corporate succession."[8]

§ 3. Quasi public corporations defined.

Public corporations are agencies of the state; and quasi public corporations are private corporations in all their essential characteristics, but so affecting the interests of the public in the transaction of their business as to give to the state the right, subject to charter provisions,[9] to interfere with or control their management and operation to a greater extent than usual with private corporations.

The doctrine announced was not held squarely in the Munn Case because unnecessary, but it is one of the earliest and best cases on this point, as its broad assertion of the right of public control has undoubtedly influenced courts everywhere in their conclusions in cases where the question has squarely arisen. The other cases cited are little more than an application of the Munn doctrine and directly involve the point discussed. The announcement of the doctrine of public control in the Munn Case did not contain any limitations upon its exercise. The power, however, is not one which can be exercised by the state unrestrained, but due regard must be had for constitutional provisions protecting property and vested rights. The power of public control is not synonymous with the right of confiscation. The later cases decided by the supreme court of the United States, while not lessening the weight of the Munn Case as an authority upon the right of public control, emphatically assert the principles just suggested. The Reagan and Smyth Cases are especially instructive in this respect.

§ 4. Public and private corporations distinguished.

The rights and powers, the duties and obligations, of a public corporation, as compared with those of a private corporation, are

[8] Com. v. Green, 4 Whart. (Pa.) 531, 598.

[9] Munn v. State of Illinois, 94 U. S. 113; Chicago, B. & Q. R. Co. v. State of Iowa, 94 U. S. 155; Stone v. State of Mississippi, 101 U. S. 814; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Louisville & N. R. Co. v. State of Kentucky, 161 U. S. 695; Smyth v.

marked. This is true because of the entirely different purposes for which they are respectively created. A public corporation, as has been said, is an agency of the state, of the sovereign; it is organized to carry out some local political want as auxiliary to the sovereign power; it is a governmental agent created for the benefit of all affected; it is created and exists through the mere will of the legislature as the delegated agency of the sovereign and is independent of all contract as between itself and the sovereign. On the other hand, a private corporation is organized primarily for the benefit, generally pecuniary, of its members; for the advantage of the few as compared with the many. This distinction is very clearly and concisely stated in an early decision in North Carolina, where the court say: "The purpose in making all corporations is the accomplishment of some public good; hence the division into public and private has a tendency to confuse and lead to error in the investigation; for unless the public are to be benefited it is no more lawful to confer 'exclusive rights and privileges' upon an artificial body than upon a private citizen. The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this body a portion of the power of the legislature is delegated, to be exercised for the public good, and subject at all times to be modified, changed or annulled. Other corporations are the result of contract. The legislature is not the only party interested; for although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation with certain powers and capacities. The expectation of benefit to the public is the moving consideration on one side, that of expected remuneration for the outlay is the consideration on the other. It is a contract, and therefore cannot be modified, changed or annulled without the consent of both parties. Counties are an instance of the former, railroad and turnpike companies of the latter, classes of corporations."[10]

Ames, 169 U. S. 466; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575; Attorney General v. Old Colony R. Co., 160 Mass. 96; State v. Columbus Gaslight & Coke Co., 34 Ohio St. 572.

In another case it is said: "The government of cities and towns, like that of the police jury of parishes, formed one of the subdivisions of the internal administration of the state, and was absolutely under the control of the legislature. * * * The laws which establish and regulate municipal corporations are not contracts, but ordinary acts of legislation, and that the powers they confer are nothing more than mandates of the sovereign power, and that those laws may be repealed or altered at the will of the legislature, except so far as the repeal or change may affect the rights of third persons acquired under them."[11]

The most important difference between public and private corporations is that in the one case, as suggested in the North Carolina decision, there is but one party to the transaction. No contract relation exists as between the inhabitants of the territory organized and the state, and the charter or organization for this territory may be altered, amended or repealed at the pleasure of the sovereign. This is not true, except within certain well-recognized legal limitations, in respect to the private corporation. Its charter is a contract, subject only to the law of the land, governing the construction and enforcement of contracts. In the Dartmouth College Case Chief Justice Marshall uses language often quoted: "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and of course be controlled by the legislature. The incorporating act neither gives nor prevents this control."[12]

§ 5. Public corporations classified.

There is found upon an examination of the reported cases a classification of public corporations based upon fundamental

[10] Mills v. Williams, 33 N. C. (11 Ired.) 558; Bush v. Shipman, 5 Ill. (4 Scam.) 186; Doane v. Chicago City R. Co., 51 Ill. App. 353; School Town of Monticello v. Kendall, 72 Ind. 91; Bardstown & L. R. Co. v. Metcalfe, 61 Ky. (4 Metc.) 199.

[11] Police Jury of Bossier v. Shreveport Corp., 5 La. Ann. 661; People v. McFadden, 81 Cal. 489; Kahn v. Sutro, 114 Cal. 316.

characteristics and differences, namely, public, municipal and public quasi corporations.[13]

These three classes have been generally recognized, though, owing to a confusion of ideas and a failure to comprehend the fundamental reasons for the division, the placing of the same governmental organization in the same class has not been uniform by the courts. This is not altogether their fault, for different state constitutions and statutes have placed in different classes the same governmental organization. The essential difference between these classes is in the varying power of local action or initiative. This diminishes in passing from public corporations to public quasi corporations, and accompanying this decrease in power is found a corresponding diminution of duty and liability.[14]

The state as a corporation. At the common law and in England today, the king is regarded by statute as a corporation sole for the purpose of succession and to preserve the possessions of the crown. In this country, for many purposes, both the state and national governments must be considered as corporations. In a New York case the court said: "A state is a legal being capable of transacting some kinds of business like a natural person, and such a being is a corporation."[15] The United States is a corporation, for it may enter into contracts, take, hold and convey property, sue, and, if it consents, be sued.[16]

This same truth applies to the different states and territories of the Union.[17]

However, in Georgia it was held that a state was not a corporation within the meaning of an act of Congress requiring pay-

[13] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 638.

[14] Regents of University v. Williams, 9 Gill & J. (Md.) 365; People v. Morris, 13 Wend. (N. Y.) 325; Penobscot Boom Corp. v. Lamson, 16 Me. 224; Regents of University v. McConnell, 5 Neb. 423.

[15] People v. Assessors of Watertown, 1 Hill (N. Y.) 620; State of Indiana v. Woram, 6 Hill (N. Y.) 33.

[15] State of Indiana v. Woram, 6 Hill (N. Y.) 33.

[16] Dugan v. U. S., 3 Wheat. (U. S.) 172.

[17] Briscoe v. Bank of Kentucky, 11 Pet. (U. S.) 257; McDonogh's Ex'rs v. Murdoch, 15 How. (U. S.) 367; Beers v. State of Arkansas, 20 How. (U. S.) 527; Ter. v. Hildebrand, 2 Mont. 426; People v. Assessors of Watertown, 1 Hill (N. Y.) 620; Delafield v. State of Illinois, 2 Hill (N. Y.) 159; Governor v. Allen, 27 Tenn. (8 Humph.) 176; Dikes v. Miller, 25 Tex. Supp. 281.

ment of a duty by "every person, firm, company or corporation owning or possessing, or having the care or management of any railroad, canal, steamboat, ship," etc., "engaged or employed in the business of transporting passengers or property for hire."[18]

§ 6. Definition of a public corporation.

The term "public corporation" will be used in this work as a generic one, and includes both municipal corporations proper and public quasi corporations. The distinction between the two is difficult of detection at times, varying with the idea as it existed in the mind of the court writing a particular opinion. Broadly speaking, the term "public corporation" may include the state. It certainly includes all public governmental agents or political or governmental subdivisions, whatever their powers or obligations, their rights or their duties, may be, though some of them may not have, strictly speaking, all of the powers and capacities of a corporation. The attributes of a corporation attach in a varying degree, and yet they all will be included in the class. Other definitions of public corporations are, "The investing of the people of a place with the local government thereof," and those found in the other cases cited in the note.[19]

A recent text book[20] defines a public corporation as "one that is created for a political purpose with political power to be exercised for purposes connected with the public good in the administration of civil government. It is an instrument of the government, subject to the control of the legislature, and its members are officers of the government appointed for the discharge of public duties. In other words a public corporation is a corpo-

[18] State v. Atkins, 35 Ga. 315.

[19] Cuddon v. Eastwick, 1 Salk. 143; Falconer v. Campbell, 2 McLean, 195, Fed. Cas. No. 4,620; Dean v. Davis, 51 Cal. 406; Tinsman v. Belvidere Delaware R. Co., 26 N. J. Law (2 Dutch.) 148; Bennett's Branch Imp. Co.'s Appeal, 65 Pa. 242; 7 Thompson, Corp. § 8140; Standard Dict. "Corporation;" Sir James Smith's Case, 4 Mod. 52; Trustees for Vincennes University v. State of Indiana, 14 How. (U. S.) 268; Rundle v. Delaware & R. Canal Co., 14 How. (U. S.) 80; State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; Society for Propagation of the Gospel v. Town of New Haven, 8 Wheat. (U. S.) 464; Bank of Alabama v. Gibson's Adm'rs, 6 Ala. 814; People v. Williams, 56 Cal. 647; Reclamation Dist. No. 542 v. Turner, 104 Cal. 334; Inhabitants of Yarmouth v. Inhabitants of North Yarmouth, 34 Me. 411.

[20] Clark & M. Private Corp. § 31.

ration created merely for purposes of government, and a private corporation is one that is created for other purposes than those of government."

§ 7. Definition of a municipal corporation.

A municipal corporation has been defined by Judge Dillon as "the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate, specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper."[21]

Bouvier defines one as "a public corporation created by government for political purposes and having subordinate and local powers of legislation."[22]

"A corporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government," is still another definition given. A correct one should also convey the idea that organized territory of itself does not constitute a municipal corporation, but that it includes also the people residing within that district.[23]

An excellent descriptive definition is given in a recent work:[24] "Municipal corporations are of a twofold character,—the one public as regards the state at large in so far as they are its agents in government; the other private in so far as they are to provide local necessities and conveniences for their own communities. And the fact that the legislature has blended the public and private functions of a municipal corporation in one grant of power does not destroy the clear and well settled distinction between them. In its governmental character the corporation is made by the state a local depository of certain limited and prescribed

[21] Dillon, Mun. Corp. (4th Ed.) § 20.

[22] Bouvier, Law Dict.

[23] Kelly v. City of Pittsburgh, 104 U. S. 78; City of Galesburg v. Hawkinson, 75 Ill. 152; People v. Bennett, 29 Mich. 451; Heller v. Stremmel, 52 Mo. 309; People v. Morris, 13 Wend. (N. Y.) 325; Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; City of Philadelphia v. Fox, 64 Pa. 180; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166.

[24] 20 Am. & Eng. Enc. Law (2d Ed.) p. 1131, and cases cited.

political powers, to be exercised for the public good of the state. In its proprietary character the theory is that the powers are not conferred chiefly from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."[25]

§ 8. Public quasi corporations defined and distinguished from municipal.

Public quasi corporations have been defined as: "It is universally agreed that all those subdivisions of state territory, such as counties, townships, school districts, and like bodies, which are created by the legislature for public purposes and without regard to the wishes of their inhabitants, are to be included in the class known as 'quasi corporations.' They are in essence local branches of the state government, though clothed with a corporate form in order that they may the better perform the duties imposed upon them. Generally they comprise large areas of territory which are but sparsely settled, and the relations of life and business existing within them are extremely simple."[26]

As illustrating the different legal character assigned to municipal or public administrative and political organizations, see the cases below.[27]

[25] State v. Denny, 118 Ind. 449; Soper v. Henry County, 26 Iowa, 264; Marion County Com'rs v. Riggs, 24 Kan. 257; City of Wellington v. Wellington Tp., 46 Kan. 213; Parker v. Scogin, 11 La. Ann. 629; Small v. Inhabitants of Danville, 51 Me. 359; People v. Common Council of Detroit, 28 Mich. 228; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Lehigh Water Co.'s Appeal, 102 Pa. 515; Atkins v. Town of Randolph, 31 Vt. 226.

[26] Williams, Mun. Liab. Tort, § 2, citing El Paso County Com'rs v. Bish, 18 Colo. 474; White v. Chowan Com'rs, 90 N. C. 437; Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; Chosen Freeholders of Sussex County v. Strader, 18 N. J. Law (3 Har.) 108; Cooley, Const. Lim. 247.

[27] A fire district organized under Pub. St. Mass. c. 35, §§ 40-61, a quasi corporation. Praut v. Inhabitants of Fire Dist. in Pittsfield, 154 Mass. 450.

A fire district a quasi corporation. Wood v. Quimby, 20 R. I. 482, 40 Atl. 161.

Board of park commissioners a quasi public corporation. West Chicago Park Com'rs v. Western Union Tel. Co., 103 Ill. 33. See, also, as holding such board a municipal corporation, the case of West Chicago Park Com'rs v. City of Chicago, 152 Ill. 392.

An irrigation district a public

A corporation possesses certain rights and powers, and there may be imposed upon it by the sovereign certain duties and obligations. Between the two classes of public corporations under discussion a marked difference is found in these respects. This follows from various causes, one of which is the fact that as a

rather than a municipal corporation. Directors of Fallbrook Irr. Dist. v. Abila, 106 Cal. 355; Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411.

Boards of Health in N. Y. not corporations with power to sue and be sued. Gardner v. Board of Health of New York, 10 N. Y. (6 Seld.) 409; People v. Monroe County Sup'rs, 18 Barb. (N. Y.) 567.

Water Commissioners appointed under New York Laws of 1834, c. 256, not a corporation. Appleton v. Water Com'rs of New York, 2 Hill (N. Y.) 432.

Highway Commissioners a quasi corporation. Lange v. Soffell, 33 Ill. App. 624; Town of Denver v. Myers, 63 Neb. 107, 88 N. W. 191; Road Com'rs for St. Peter's Parish v. McPherson, 1 Spears (S. C.) 218.

A board of trustees organized to construct and operate a canal for commercial purposes, and supplying power, heat and light, held not a municipal corporation. State v. Douglas County Com'rs, 47 Neb. 428, 66 N. W. 434.

Board of supervisors of a county, as such board and apart from county, held not a corporation. Boyce v. Cayuga County Sup'rs, 20 Barb. (N. Y.) 294.

Judges authorized to take bonds, held as to such bonds not to confer a corporate character. Justices of Cumberland v. Armstrong, 14 N. C. (3 Dev.) 284.

A state university is a public corporation. University of North Carolina v. Maultsby, 43 N. C. (8 Ired. Eq.) 257; Trustees of University v. Winston, 5 Stew. & P. (Ala.) 17.

The governor of a state as the head of the executive department a quasi corporation. Governor v. Allen, 27 Tenn. (8 Humph.) 176.

A county held not a corporation within the meaning of an act giving corporations the power of funding their indebtedness. Pulaski County v. Reeve, 42 Ark. 54.

A county not a corporation for municipal purposes. San Mateo County v. Coburn, 130 Cal. 631, 63 Pac. 78, 621.

A county held a corporation under eminent domain provision in the constitution. Chester County v. Brower, 117 Pa. 647, 12 Atl. 577. Generally not a municipal corporation. In re College Ave. Bridge, 9 Pa. Dist. R. 15. A public corporation. Maury County v. Lewis County, 31 Tenn. (1 Swan) 236. A municipal corporation within Laws Wis. 1895, c. 138; Lund v. Chippewa County, 93 Wis. 640, 67 N. W. 927.

Counties quasi corporations only. Granger v. Pulaski County, 26 Ark. 37; Ray County v. Bentley, 49 Mo. 236; Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; People v. Sacramento County Sup'rs, 45 Cal. 692.

A county a corporation, but people within it not. People v. Myers, 15 Cal. 33.

County of Sacramento not a municipal corporation. People v.

rule the government of a public quasi corporation is imposed by the sovereign upon the people residing within certain geographical limits, without consulting their desires or wishes. On the other hand, the government or charter of a municipal corpora-

Sacramento County Sup'rs, 45 Cal. 692.

A county a public corporation, Coles v. County of Madison, 1 Ill. (Breese) 154; but a mere quasi corporation in Goodnow v. Ramsey County Com'rs, 11 Minn. 31 (Gil. 12); Hannibal & St. J. R. Co. v. Marion County, 36 Mo. 294; Reardon v. St. Louis County, 36 Mo. 555; Schweiss v. First Judicial Dist. Ct., 23 Nev. 226, 45 Pac. 289; Donalson v. San Miguel County, 1 N. Mex. (1 Gild.) 263.

County commissioners in Ohio a continuing corporation. Scioto Com'rs v. Gherky, Wright (Ohio) 493.

A county a municipal corporation for the issuance of bonds. Ter. v. Hopkins, 9 Okl. 133.

County commissioners a quasi corporation. Vankirk v. Clark, 16 Serg. & R. (Pa.) 286; Irwin v. Northumberland County Com'rs, 1 Serg. & R. (Pa.) 505; Lyon v. Adams, 4 Serg. & R. (Pa.) 443.

Counties held corporations in Kentucky. May v. Mercer County, 30 Fed. 246. In Ohio. May v. Logan County Com'rs, 30 Fed. 250. In Nevada under the constitution municipal corporations. Vincent v. Lincoln County, 30 Fed. 749. In California. Nash v. El Dorado County, 24 Fed. 252.

A board of levee inspectors a municipal corporation. Levee Inspectors of Chicot County v. Crittenden, 94 Fed. 613, 36 C. C. A. 418.

A levee district is neither a municipal nor private corporation, but a governmental agent. People v. Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 342-676.

The Tennessee statutes creating taxing districts do not make them municipal corporations. Williams v. Taxing Dist. of Shelby County, 84 Tenn. (16 Lea) 531.

A township a quasi corporation. Town of Valverde v. Shattuck, 19 Colo. 104, 34 Pac. 947; Sebrell v. Fall Creek Tp., 27 Ind. 86. A municipal corporation. Sprague v. Baldwin, 18 Pa. Co. Ct. R. 568; State v. Douglas County Com'rs, 47 Neb. 428.

A borough a public municipal corporation. Borough of Ridley Park v. Citizens' Elec. Light & Power Co., 9 Pa. Super. Ct. 615; Borough of Lansdowne v. Delaware County & P. Elec. R. Co., 9 Pa. Super. Ct. 621.

Definition of a town. Murray v. Menefee, 20 Ark. 561.

Certain towns in Connecticut created corporations by the Constitution. Webster v. Town of Harwinton, 32 Conn. 131.

A town a public quasi corporation. People v. Village of Harvey, 142 Ill. 573, 32 N. E. 295; Inhabitants of Fourth School Dist. v. Wood, 13 Mass. 193; Shronk v. Penn Tp. Sup'rs, 3 Rawle (Pa.) 347; Hopple v. Trustees of Brown Tp., 13 Ohio St. 311; Woodruff v. Town of Glendale, 23 Minn. 537.

The word "town" held to be a generic term including cities: Van Riper v. Parsons, 40 N. J. Law, 1;

tion proper is usually suggested by the sovereign and adopted or accepted by the people residing within a certain district. The fact that the government or organization is imposed in the one case and adopted or accepted in the other leads to the correlative part of the proposition, namely, the relative duties and obliga-

Whitall v. Chosen Freeholders of Gloucester County, 40 N. J. Law, 302.

Towns regarded as public quasi corporations. Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; People v. Morris, 13 Wend. (N. Y.) 325. But not included in the term "municipal corporations." Eaton v. Manitowoc County Sup'rs, 44 Wis. 489.

State contributions to the support of an asylum founded and owned by a county held not to make it a state or public institution. Chalfant v. State, 37 Ohio St. 60.

A board of school commissioners a municipal corporation. Horton v. Mobile School Com'rs, 43 Ala. 598; Mobile School Com'rs v. Putnam, 44 Ala. 506; School Dist. No. 7 v. Reeve, 56 Ark. 68, 19 S. W. 106.

Trustees of public schools a public corporation. Bush v. Shipman, 5 Ill. (4 Scam.) 186; Trustees of Schools v. Tatman, 13 Ill. 27.

Trustees of school districts or school townships not municipal corporations with power to issue bonds. Trustees of Schools v. People, 63 Ill. 299; People v. Dupuyt, 71 Ill. 651; People v. Trustees of Schools, 78 Ill. 136.

In Iowa a school district is a municipal corporation. Curry v. District Tp. of Sioux City, 62 Iowa, 102; Winspear v. District Tp. of Holman, 37 Iowa, 542.

In Kansas a quasi corporation. Beach v. Leahy, 11 Kan. 23.

School commissioners a quasi corporation. O'Neal v. School Com'rs of Washington County, 27 Md. 227; Littlewort v. Davis, 50 Miss. 403; Farnum's Petition, 51 N. H. 376.

The board of education of Rochester, N. Y., is a corporation to a qualified extent. People v. Lathrop, 19 How. Pr. (N. Y.) 358.

Common school districts not corporations within the meaning of Ohio Const. art. 13, § 1. State v. Powers, 38 Ohio St. 54.

A board of school directors a civil corporation. State v. Bremond, 38 Tex. 116. A school district held a municipal corporation in State v. Grimes, 7 Wash. 270; but not in Stroud v. City of Stevens Point, 37 Wis. 367.

Overseers of the Poor in New York, a corporation sub modo. Rouse v. Moore, 18 Johns. (N. Y.) 407; Governor v. Gridley, 1 Miss. (Walk.) 328; Pomeroy v. Wells, 8 Paige (N. Y.) 406; Van Keuren v. Johnston, 3 Denio (N. Y.) 183.

A body charged with the administration of ministerial and financial duties pertaining to a county held to be a quasi corporation. Levy Ct. of Washington County v. Coroner, 69 U. S. (2 Wall.) 501.

In New Mexico, under Comp. Laws 1897, § 1564, town boards of education held to be municipal corporations. Board of Education of Eddy v. Bitting, 9 N. Mex. (9 Gild.) 588.

A levy court a quasi corporation.

tions of the two classes of corporations. And we find upon an examination of the authorities that the duties and obligations resting upon the public quasi corporations are less in number, and these less burdensome, than those which devolve upon the municipal corporation proper. The people residing within a municipal corporation are given a greater latitude and degree of local self government, in adopting measures looking to their local advantage, than those residing within a public quasi corporation; and as their powers and duties are not thrust upon them, but acquired voluntarily to a large extent, it follows as just and proper that their obligations and duties be in the same measure increased and of a higher character. A full discussion will be found under the proper subject in the succeeding sections of this work.[28]

Levy Ct. of Washington County v. Coroner, 69 U. S. (2 Wall.) 501.

The provisional governments adopted for the management of towns and cities in the Territory of Oklahoma prior to Act Cong. May 2, 1890, are held to be mere voluntary associations in Oklahoma City v. T. M. Richardson Lumber Co., 3 Okl. 5.

[28] One of the leading cases discussing these differences is that of Hamilton County Com'rs v. Mighels, 7 Ohio St. 109. The court in part say: "As before remarked, municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them.

"Counties are local subdivisions of a state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

CHAPTER II.

CORPORATE LIFE AND EXISTENCE.

I. Creation and Dissolution of Corporations.

§ 9. The power to create a public corporation.
10. As existing in the National government.
11. The states and their power to create.
12. The exercise of the power.
13. Conditions precedent; population.
14. Conditions precedent; area and physical characteristics.
15. Mode of creation.
16. By implication.
17. By affirmative action.
18. Petition and notice.
19. The election.
20. Subsequent official action.
21. Incorporation without an election.
22. The charter of a public corporation and its legal nature.
23. Rules of construction.
24. The charter considered as evidence.
25. Acceptance.
26. Distinction between a public quasi and a municipal corporation in this regard.
27. Amendment of the charter.
28. By implication or indirection.
29. Effect of amendments.
30. Repeal of charter.
31. Effect of repeal.
32. Corporate existence, and the doctrine of collateral attack.
33. The dissolution of the corporation and its effects.
34. Forfeiture of charter.

II. Territorial Changes and Their Effect.

§ 35. Boundaries; their enlargement.
36. Location or character of territory annexed.
37. Petition for annexation.
38. Notice necessary.
39. Objections to annexation.
40. Official declaration and right of appeal.
41. Effect of annexation upon those concerned.
42. Division of public corporations and the authority.
43. Character of the district divided or disconnected.

44. Mode of division, with official declarations.
45. Effects of annexation or division upon public property and liabilities.
46. Division or adjustment of debts and liabilities.
47. The legal authority; where existing.
48. Agency of apportionment.
49. Character or form of indebtedness.
50. Division of assets.
51. Agency for division of assets.

III. Corporate Name and Boundaries.

§ 52. Existence of a public corporation.
53. Name of the corporation.
54. The seal and its use.
55. Corporate boundaries.
56. Definition of corporate boundaries.
57. Corporate boundaries; how established.
58. Boundary lines; agency for their establishment.
59. Proceedings for the establishment of corporate boundaries and miscellaneous matters in connection therewith.
60. Objections to the establishment of corporate boundaries.
61. Location of corporate boundaries.
62. Appeal from order fixing corporate boundaries.
63. Change of corporate boundary.
64. Judicial recognition.
65. Effect of the establishment or change of a boundary line.
66. Seat of government.
67. Original location of a county seat.
68. Removal of a county seat.
69. Petition for removal.
70. Its form and averments.
71. Petition and its signers.
72. Signers' right of withdrawal.
73. Petition for removal; its filing. Notice.
74. Official action.
75. Time and manner of election.
76. Qualifications of voters.
77. Votes necessary to a removal.
78. Canvass and return of votes.
79. Contests.
80. Authority of commissioners.
81. Declaration of the result and its effect.

I. Creation and Dissolution of Corporations.

§ 9. The power to create a public corporation.

From the fact that all corporations are artificial persons, it follows that they must be created by a sovereign power, or the

state. They may be organized or incorporated pursuant to general directions found in the constitution of the state, the provisions of general enabling acts or statutes, or through or by means of a special act or special charter granted by the legislature of the state when not in contravention of a constitutional provision prohibiting the passage of special legislation.

A brief resume of constitutional provisions regarding the creation of corporations will be found in the subjoined note.[1]

[1] An extended discussion of the constitutional provisions in some states will be found in the notes in Dillon, Mun. Corp. (4th Ed.) pp. 79 et seq., and Beach, Pub. Corp. pp. 59 et seq.

Alabama: Corporations may be formed under general laws, but shall not be created by special act, except for municipal, manufacturing, mining, immigration, industrial and educational purposes, or for constructing canals, or improving navigable rivers and harbors of this state, and in cases where in the judgment of the general assembly the objects of the corporations cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered, amended or repealed. Const. 1875, art. 14, § 1.

Arkansas: The general assembly shall pass no special act conferring corporate powers, except for charitable, educational, penal or reformatory purposes, where the corporations created are to be and remain under the patronage and control of the state. Const. 1874, art. 12, § 2.

California: Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. Const. 1849, art. 4, § 31.

Colorado: No charter of incorporation shall be granted, extended, changed or amended by special law except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state; but the general assembly shall provide by general laws for the organization of corporations hereafter to be created. Const. 1876, art. 15, § 2.

Florida: The legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining and other useful companies or associations as may be deemed necessary. Const. 1868, art. 4, § 22.

Illinois: The general assembly shall not pass local or special laws in any of the following enumerated cases; that is to say for * * * incorporating cities, towns or villages, or changing or amending the charter of any town, city or village. Const. 1870, art. 4, § 22.

No corporation shall be created by special laws * * * except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state, but the general assembly shall provide by general laws for the organization of all corporations

This is true of all classes of corporations, including the various subdivisions of public corporations. As the latter are govern-

hereafter to be created. Const. 1870, art. 11, § 1.

Indiana: Corporations, other than banking, shall not be created by special act, but may be formed under general laws. Const. 1851, art. 11, § 13.

Iowa: The general assembly shall not pass local or special laws in the following cases * * * for the incorporation of cities and towns. Const. 1857, art. 3, § 30.

Kansas: Corporations may be created under general laws. Const. 1859, art. 12, § 1.

Provision shall be made by general law for the organization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit shall be so restricted as to prevent the abuse of such power. Const. 1859, art. 12, § 5.

Louisiana: Corporations shall not be created in this state by special laws except for political or municipal purposes. Const. 1845, art. 123.

Maine: Corporations shall not be created by special act except for municipal purposes, etc. Const. (Amend. 1876) art. 4, § 14.

Maryland: The general assembly shall not pass local or special laws in any of the following enumerated cases. * * * The general assembly at its first session after the adoption of this constitution shall pass general laws * * * where a general law can be made applicable. Const. 1867, art. 3, § 33.

Michigan: Corporations may be formed under general laws but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed. Const. art. 15, § 1.

Minnesota: No corporation shall be formed under special acts except for municipal purposes. Const. 1857, art. 10, § 2.

Mississippi: Corporations shall be formed under general laws only. Const. 1890, art. 7, § 178.

Missouri: The general assembly shall not pass any local or special law * * * creating corporations or amending, renewing, extending or explaining the charter thereof. Const. 1875, art. 4, § 53.

Nebraska: No corporation shall be created by special law * * * except those for charitable, educational, penal or reformatory purposes which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. Const. 1875, art. 11, § 1 (Misc.).

Nevada: The legislature shall pass no special act in any manner relating to corporate powers, except for municipal purposes; but corporations may be formed under general laws, and all such laws may, from time to time, be altered or repealed. Const. 1864, art. 8, § 1.

New Jersey: General laws. Const. 1875 (as amended) art. 4, § 7, par. 11.

New York: Corporations may be formed under general laws; but shall not be created by special act except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the

mental agents, incorporated or organized for the sole purpose, so far as their public duties are concerned, of aiding the state in the administration of government, the necessity or expediency of incorporating them should be decided, having reference to the advantages and interests of the whole people, as well as those within the lines of the proposed corporation.[2]

The organization of municipal corporations whereby their members exercise political rights and duties is a marked feature of American government. It is based on the fundamental idea that the people are the source of all power and have the inherent right to exercise it whenever they see fit to do so. "This is with us no mere rhetorical declamation, but a foundation principle upon which our political institutions rest." As local matters can best

corporation cannot be attained under general laws. Const. 1846, art. 8, § 1.

North Carolina: Corporations may be formed under general laws but shall not be created by special act except for municipal purposes. Const. 1876, art. 8, § 1.

North Dakota: The general assembly shall not pass any special law, incorporating cities, towns or villages. Const. 1889, § 69, par. 33.

Ohio: Corporations may be formed under general laws and all such laws may be altered or repealed. Const. 1851, art. 13, § 2.

Oregon: Corporations may be formed under general laws but shall not be created by special laws, except for municipal purposes. Const. 1857, art. 11, § 2.

Pennsylvania: The general assembly shall not pass any special law incorporating cities, towns, or villages or changing their charters. Const. 1873, art. 3, § 7.

Rhode Island: Created by special act. Const. (as amended) art. 4, § 17.

South Carolina: Corporations may be formed under general laws. Const. 1868, art. 12, § 1.

South Dakota: Municipal corporations shall be formed under general laws and may be divided into not exceeding four classes. Const. 1889, art. 10, § 1.

Tennessee: No corporation shall be created, or its powers increased or diminished, by special laws. Const. 1870, art. 11, § 8.

Texas: Municipal corporations are organized by general or special law according to population. Const. 1876, art. 11.

West Virginia: The legislature shall not pass any law incorporating cities, towns, or villages containing a population of less than 2,000. Const. 1872, art. 6, § 39.

Wisconsin: Corporations shall not be created by special act save for municipal purposes. Const. 1848, art. 11, § 1.

In Connecticut, Delaware, Georgia, Kentucky, Massachusetts, Montana, New Hampshire, Vermont and Virginia, the subject is left to legislative discretion, there being no constitutional provisions bearing upon the subject.

[2] In re Millville Borough, 10 Pa. Co. Ct. R. 321.

be regulated by the people of the locality, we have it so, rather than allow the central power to govern in these respects. This policy runs back into our earliest history, is seen in all state legislation, and is guarantied by a greater number of state constitutions. In this connection a quotation from De Tocqueville may not be amiss: "Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach; they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty."[3]

Formerly in England public corporations were created by a royal charter or act of parliament. This necessarily led to the granting of favors or exemptions to some, not enjoyed or possessed by others, and abuses crept into the granting of charters to such an extent that in 1835, as a reformatory measure, the municipal corporations act of 5 and 6 Wm. IV. c. 76, was passed. From time to time amendments were made to this act as suggested by defects in the original bill, and in 1882 by 45 and 46 Vict. c. 50 (L. R. 18, Stat. 205), the act of 1835 with its various amendments was remodeled and consolidated, and since that date all public corporations in England, of whatever grade, have been incorporated under the same conditions and possess the same general powers.

In the United States the power to create corporations is lodged in the Federal government and in the various state governments as quasi independent sovereigns.[4]

§ 10. As existing in the National government.

The theory which sustains the right of the Federal government to create a corporation, either public or private, is that, while not one of the enumerated sovereign powers or ends of government, it may be the means of carrying into effect those granted. This power was denied the Federal government at first, but the

[3] De Tocqueville, Democracy in America, c. 5; People v. Hurlbut, 24 Mich. 44; People v. Common Council of Detroit, 28 Mich. 228; State v. Noyes, 30 N. H. 292.

[4] McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; Daly v. National L. Ins. Co., 64 Ind. 1.

doctrine is firmly established, and we find Congress passing laws creating or incorporating municipal and public quasi corporations in the District of Columbia and other territory under the sole jurisdiction of the Federal government. It has not yet attempted to create or organize such corporations within the territorial limits of the different states.[5]

The municipal corporation, the District of Columbia, was organized under act of Congress of February 21, 1871 (16 Stat. 419). Its validity being called in question, the supreme court of the United States uses the following language: "A municipal corporation in the exercise of all of its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality, but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action."[6]

§ 11. The states and their power to create.

The states, being quasi independent sovereigns or governments not of enumerated powers, possess the usual attributes of such sovereignty, including the creation of artificial persons; and in the exercise of this power it has been held that no precise form of words is necessary to create a corporation. If the intent of the legislature is clearly established, that is sufficient.[7]

[5] Madison Federalist, Sept. 14, 1787; Jefferson's Memoirs (1829) 523, 526; House Documents, 50th Cong., 1st Sess. House Report Number 530. "Bill to incorporate the Maritime Canal Company of Nicaraugua." Barnes v. District of Columbia, 91 U. S. 540; Stoutenburgh v. Hennick, 129 U. S. 141; Deitz v. City of Central, 1 Colo. 323; Burnes v. City of Atchison, 2 Kan. 454; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. Bank of U. S., 9 Wheat. (U. S.) 738; Thomson v. Union Pac. R. Co., 76 U. S. (9 Wall.) 579.

[6] Barnes v. District of Columbia, 91 U. S. 540.

[7] 2 Kent, Comm. 27; Mahony v. Bank of the State, 4 Ark. 620; Peo-

It is impossible within the limits of this work to discuss in detail all the constitutions, general and special acts, under which public corporations may be or have been created. A brief reference to many of the more important cases will be found in the note.[8]

The states, as already suggested, being sovereign and independent except as limited by the constitution of the United States, have the power to create corporations for public purposes, with all the means of self-government, including that of levying taxes for local purposes,[9] and the possession of this power implies the further right to create them with such limitations and omissions as the legislative body may see fit to make.[10]

And it has even been held that a grant from the sovereign authority, of lands to be held for public purposes of a municipal nature, to a body of men, with their associates and successors, confers a quasi corporate capacity.[11]

The power, however, to incorporate, possessed by the legislature, since it is itself one delegated, cannot usually be delegated to subordinate bodies or officers, either legislative, judicial or

ple v. City of Riverside, 70 Cal. 461; Stebbins v. Jennings, 27 Mass. (10 Pick.) 172; New Boston v. Dunbarton, 12 N. H. 409; Bow v. Allenstown, 34 N. H. 351, 372; Thomas v. Dakin, 22 Wend. (N. Y.) 9, 84; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 326; State v. Covington, 29 Ohio St. 102; Goshorn v. Ohio County Sup'rs, 1 W. Va. 308.

[8] See § 9, note 1, with extended references. Sessions v. State, 115 Ga. 18, 41 S. E. 259 (construing Acts Ga. 1872, p. 248); Town of Decorah v. Bullis, 25 Iowa, 12 (Act of 1858 concerning incorporation of towns and cities held not to apply to Decorah, Iowa).

The town of West Covington. Maltus v. Shields, 59 Ky. (2 Metc.) 553; Watts v. Village of Port Deposit, 46 Md. 500.

The town of Mankato. Village of Mankato v. Meagher, 17 Minn. 265 (Gil. 243).

Port Gibson, Mississippi. Port Gibson v. Moore, 21 Miss. (13 Smedes & M.) 157.

Carson City, Nevada. State v. Swift, 11 Nev. 128; Oklahoma City v. T. M. Richardson Lumber Co., 3 Okl. 5; Douglass v. Town of Harrisville, 9 W. Va. 162.

[9] Hope v. Deaderick, 27 Tenn. (8 Humph.) 1; Nichol v. City of Nashville, 28 Tenn. (9 Humph.) 252; Sessions v. State, 115 Ga. 18, 41 S. E. 259; Carr v. McCampbell, 61 Ind. 97; Owen v. Sioux City, 91 Iowa, 190, 59 N. W. 3; Cheaney v. Hooser, 48 Ky. (9 B. Mon.) 330; State v. Stuht, 52 Neb. 209, 71 N. W. 941.

[10] State v. Stuht, 52 Neb. 209, 71 N. W. 941; Redell v. Moores, 63 Neb. 219, 88 N. W. 243; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494.

[11] Den d. Town of Bath Com'rs v. Boyd, 23 N. C. (1 Ired.) 194; Denton v. Jackson, 2 Johns. Ch. (N. Y.)

ministerial in their character, though the rule would not apply to purely clerical, mechanical or ministerial acts.[12]

§ 12. The exercise of the power.

The constitution of a state is the written expression of the sovereign will. Early constitutions as a rule contained no provisions for the organization of public corporations, limiting or defining the power of the legislature in this respect. Those adopted of late years, however, or recent amendments, usually provide in terms for their creation. Where they fail in this last regard, however, they direct the passage of general laws by the legislature effecting the same result and delegating to that body the usual discretion as to the details of such incorporation.[13]

In Wisconsin the legislature may delegate this power when and how it sees fit, the constitution of that state providing that "the legislature may confer on the boards of supervisors of the several counties such powers, of a local, legislative and administrative character, as they shall from time to time prescribe." Existing statutes delegated to the county boards of the several counties the power to set off, organize, vacate and change the boundaries of the towns in their respective counties. A special act provided for the division of a county into three towns and recited that none of the towns should be divided until the question was submitted to the legal electors of the towns to be affected. It was held not unconstitutional as a discrimination between counties, for the legislature had power to resume the authority it had conferred upon the county boards.[14]

In the absence of constitutional provisions or of general laws, some states have adopted, as their settled policy, the creation of public corporations by the passage of special acts granting charters containing special powers and privileges to the inhabitants of a particular district.

320; Town of North-Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; People v. Schermerhorn, 19 Barb. (N. Y.) 540.

[12] People v. Bancroft, 2 Idaho, 1077, 29 Pac. 112. But see contra, State v. Forest County, 74 Wis. 610.

[13] See section 9; Brooks v. Fischer, 79 Cal. 173; Darcy v. City of San Jose, 104 Cal. 642; City of Americus v. Perry, 114 Ga. 1004, 40 S. E. 1004; People v. Cooper, 83 Ill. 585; Wyandotte v. Wood, 5 Kan. 603. Compare Kilgore v. Magee, 85 Pa. 401.

[14] State v. Forest County, 74 Wis. 610.

Public corporations may, then, be organized or created under constitutions or general laws pursuant to constitutional provisions fixing universal terms and conditions upon which they may be organized, or special acts conferring special powers and privileges. The legislature, in the absence of constitutional provisions, possesses the power, as the legislative branch or body of the sovereign, to pass laws general or special in their nature, subject only to constitutional restrictions applying to all legislation.[15]

In the notes will be found references to a number of cases discussing and determining the validity of special acts, some of these questioned upon the constitutional ground of special legislation, others for reasons applying to legislation in general, and still others for some inherent vice,[16] the limits of this work pre-

[15] Rathbone v. Kiowa County Com'rs, 27 C. C. A. 477, 83 Fed. 125; Rauer v. Williams, 118 Cal. 401; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51; Ayeridge v. Social Circle Com'rs, 60 Ga. 404; State v. Steunenberg, 5 Idaho, 1, 45 Pac. 462; City of Wardner v. Pelkes (Idaho) 69 Pac. 64; Guild v. City of Chicago, 82 Ill. 472; People v. Pike, 197 Ill. 449; Larcom v. Olin, 160 Mass. 102; People v. Bennett, 29 Mich. 451; State v. City of Thief River Falls, 78 Minn. 15, 78 N. W. 867; State v. County Court of Vernon County, 53 Mo. 128; State v. City of Camden, 50 N. J. Law, 87, 11 Atl. 137; State v. City of Somers' Point, 52 N. J. Law, 32, 18 Atl. 694; Day v. City of Morristown, 63 N. J. Law, 353, 46 Atl. 1098; Socorro County Com'rs v. Leavitt, 4 Gild. (N. M.) 37, 12 Pac. 759; Blanchard v. Bissell, 11 Ohio St. 96; In re Incorporation of Village of Edgewood, 130 Pa. 348, 18 Atl. 646; Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921; King County Com'rs v. Davies, 1 Wash. St. 290, 24 Pac. 540; Walworth County v. Village of Whitewater, 17 Wis. 193; City of Janesville v. Markoe, 18 Wis. 350; Jones v. Kolb, 56 Wis. 263; Chicago & N. W. R. Co. v. Langlade County, 56 Wis. 614.

[16] Fowle v. Common Council of Alexandria, 3 Pet. (U. S.) 398; Lockhart v. City of Troy, 48 Ala. 579; City of Santa Rosa v. Coulter, 58 Cal. 537; People v. McFadden, 81 Cal. 489; Popper v. Broderick, 123 Cal. 456, 56 Pac. 53; Rauer v. Williams, 118 Cal. 401; State v. Stark, 18 Fla. 255; Lake v. State, 18 Fla. 501; Middleton v. City of St. Augustine, 42 Fla. 287, 29 So. 421; Potwin v. Johnson, 108 Ill. 70; Cummings v. City of Chicago, 144 Ill. 563, 33 N. E. 854; Von Phul v. Hammer, 29 Iowa, 222; In re City of Council Grove, 20 Kan. 619; Brown v. Milliken, 42 Kan. 769; Huer v. City of Central, 14 Colo. 71, 23 Pac. 323; State v. Lewelling, 51 Kan. 562, 33 Pac. 425; City of Covington v. District of Highlands, 24 Ky. L. R. 433, 68 S. W. 669; Adams v. Forsyth, 44 La. Ann. 130, 10 So. 622; Yellowstone County Com'rs v. Northern Pac. R. Co., 10 Mont. 414;

venting a fuller discussion; but as an illustration, in Georgia a special act undertaking to establish the corporate limits of a town, if indefinite, uncertain and incomplete in the description of the territory to be embraced, was not given effect.[17]

§ 13. Conditions precedent; population.

A discussion of the power of the legislature to pass laws classifying cities, towns and villages, and providing for the organization of such corporations upon complying with or coming within the conditions fixed, will be found in the chapter relating to legislative power over public corporations and its limitations. In the creation of corporations, however, it can be said that a legislature may have the power, either as proceeding from the constitution of the state or as possessed originally and delegated by the people, to pass laws for the organization of public corporations dependent on the residence, within certain geographical limits, of a certain number of people.[18] And in determining

City of St. Louis v. Shields, 62 Mo. 247; Holliday v. Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Owen v. Baer, 154 Mo. 434; Copeland v. City of St. Joseph, 126 Mo. 417, 29 S. W. 281; State v. Ruhe, 24 Nev. 251, 52 Pac. 274; Ross v. Winsor, 48 N. J. Law, 95; Wanser v. Hoos, 60 N. J. Law, 482; Goldberg v. Dorland, 56 N. J. Law, 364, 28 Atl. 599; Broking v. Van Valen, 56 N. J. Law, 85, 27 Atl. 1070, general and special legislation; Arthur v. Village of Glens Falls, 66 Hun (N. Y.) 136; Rodman-Heath Cotton Mills v. Town of Waxhaw, 130 N. C. 293, 41 S. E. 488; Town of Denver v. City of Spokane Falls, 7 Wash. 226; Elder v. Incorporators of Central City, 40 W. Va. 222, 21 S. E. 738. See, also, cases cited in preceding note.

[17] Warren v. Branan, 109 Ga. 835.

[18] Sanders v. Sehorn, 98 Cal. 227; City of Wardner v. Pelkes (Idaho) 69 Pac. 64; People v. Gaulter, 149 Ill. 39, 36 N. E. 576; Poor v. People, 142 Ill. 309; People v. Martin, 178 Ill. 611; People v. Marquiss, 192 Ill. 377, 61 N. E. 352; People v. Pike, 197 Ill. 449; Allen v. Hostetter, 16 Ind. 15; Wilkison v. Board of Children's Guardians of Marion County, 158 Ind. 1, 62 N. E. 481; O'Bryan v. City of Owensboro, 24 Ky. L. R. 469, 68 S. W. 858; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613; State v. Stuht, 52 Neb. 209, 71 N. W. 941; Mortland v. State, 52 N. J. Law, 521, 20 Atl. 673; Attorney-General v. Borough of Anglesea, 58 N. J. Law, 372, 33 Atl. 971; Grey v. City of Dover, 62 N. J. Law, 40, 40 Atl. 640; City of Dover v. Grey, 62 N. J. Law, 647, 42 Atl. 674; In re Henneberger, 155 N. Y. 420; Harness v. State, 76 Tex. 566; Ewing v. State, 81 Tex. 172; McCrary v. City of Comanche (Tex. Civ. App.) 34 S. W. 679; Thompson v. State, 23 Tex. Civ. App. 370; Watson v. Corey, 6 Utah, 150, 21 Pac. 1089; Town of South Morgantown v. City of Mor-

the population of the district in proceedings to incorporate, only those can be included as "actual residents" of such territory who are in a place with the intent to establish, or who have already established, their domicile there.[19]

In cases where the question of actual population of the territory to be organized is raised, it is determined by the latest Federal or official census of the state.[20]

The word "town" as used in New Jersey Public Laws of 1895, p. 551, § 1, in the phrase "incorporated city or town," means any municipal corporation above the grade of township and below that of city, this act providing for the incorporation of districts containing certain population.[21]

§ 14. Conditions precedent; area and physical characteristics.

The area of a district contemplating incorporation may be the determining element or condition,[22] or the physical characteristics of territory to be organized.[23]

gantown, 49 W. Va. 729, 40 S. E. 15; State v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501; Fremont County Com'rs v. Perkins, 5 Wyo. 166, 38 Pac. 915.

[19] State v. Robertson, 41 Kan. 200; State v. Mote, 48 Neb. 683, 67 N. W. 810. See, also, Attorney General v. Borough of Anglesea, 58 N. J. Law, 372.

[20] Kumler v. San Bernardino County Sup'rs, 103 Cal. 393; Gett v. Sacramento County Sup'rs, 111 Cal. 366; People v. Gaulter, 149 Ill. 39; Martin v. Ivins, 59 N. J. Law, 364, 36 Atl. 93.

[21] Stout v. Borough of Glen Ridge, 59 N. J. Law, 201, 35 Atl. 913.

[22] State v. County of Dorsey, 28 Ark. 378; Guebelle v. Epley, 1 Colo. App. 199, 28 Pac. 89; Town of Cicero v. City of Chicago, 182 Ill. 301; People v. Marquiss, 192 Ill. 377, 61 N. E. 352; State v. St. John, 21 Kan. 591; State v. Garfield County Com'rs, 54 Kan. 372; Kansas Town & Land Co. v. City of Smith Center, 6 Kan. App. 252, 51 Pac. 801; Rice v. Ruddiman, 10 Mich. 125; Warren v. Barber Asphalt Paving Co., 115 Mo. 572; Maury County v. Lewis County, 31 Tenn. (1 Swan) 236; Brown v. Hamlett, 76 Tenn. (8 Lea) 732; Bridgenor v. Rodgers, 41 Tenn. (1 Cold.) 259; Cheatham County v. Dickson County (Tenn. Ch. App.) 39 S. W. 734; State v. Broach (Tex. Civ. App.) 35 S. W. 86; State v. Larrabee, 1 Wis. 200; State v. Merriman, 6 Wis. 17; State v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

[23] Fullington v. Williams, 98 Ga. 807; Christ v. Webster City, 105 Iowa, 119, 74 N. W. 743; Gray v. Crockett, 30 Kan. 138; State v. McReynolds, 61 Mo. 203; State v. Fleming, 158 Mo. 558, 59 S. W. 118; State v. Dimond, 44 Neb. 154, 62 N. W. 498. See, also, citations in the following note.

Where this last element determines the legal organization of or annexation to municipalities or public quasi corporations of territory, a successful result seems to depend upon the nature of the land. Is it fit for agricultural purposes or "farming land," and so far distant from the center of the city or town that it will not enjoy any of the advantages supposed to be derived from municipal organization, such as fire and police protection? And further, answering this proposition in the negative, is the value of the land enhanced to such an extent by the existence near it of a large center of population as to justly impose upon it a part of the burdens accompanying municipal organization?[24]

[24] Indiana Imp. Co. v. Wagner, 138 Ind. 658, 38 N. E. 49; Stephens v. Felton, 99 Ky. 395; State v. Village of Minnetonka, 57 Minn. 526, 59 N. W. 972; State v. Village of Fridley Park, 61 Minn. 146, 63 N. W. 613; Giboney v. City of Cape Girardeau, 58 Mo. 141; Kansas City v. Marsh Oil Co., 140 Mo. 458; City of Plattsburg v. Riley, 42 Mo. App. 18; Meriwether v. Campbell, 120 Mo. 396, 25 S. W. 392; State v. Mote, 48 Neb. 683; McClay v. City of Lincoln, 32 Neb. 412, 49 N. W. 282; Stout v. Borough of Glen Ridge, 59 N. J. Law, 201; In re Borough of Little Meadows, 35 Pa. 335; In re Borough of Duquesne, 147 Pa. 58, 23 Atl. 339; Borough of Blooming Valley, 56 Pa. 66; In re Incorporation of Village of Edgewood, 130 Pa. 348; In re Incorporation of Wilkinsburg Borough, 131 Pa. 365; In re Borough of Taylor, 160 Pa. 475; In re Incorporation of Borough of Prospect Park, 166 Pa. 502.

Truckmen who raise small fruits, etc., for sale to townspeople, are not farmers within the meaning of Act of Pa., April 1st, 1863, and therefore are not entitled to have their lands excluded from boundaries of a proposed borough. In re Tullytown Borough, 11 Pa. Co. Ct. R. 97; In re Collingdale, 11 Pa. Co. Ct. R. 105; In re Borough of Larsville, 13 Pa. Co. Ct. R. 351; Pelletier v. City of Ashton, 12 S. D. 366, 81 N. W. 735.

Land not laid off into lots or blocks, and agricultural land within the corporate limits, held properly included. State v. Town of Baird, 79 Tex. 63; Thompson v. State, 23 Tex. Civ. App. 370; McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Ewing v. State, 81 Tex. 872.

The inclusion of a large quantity of agricultural land does not render a special act incorporating a city void. Nalle v. City of Austin, 23 Tex. Civ. App. 595, 42 S. W. 780; State v. Hoard, 94 Tex. 527, 62 S. W. 1054; Judd v. State, 25 Tex. Civ. App. 418, 62 S. W. 543. In the latter case from seventy-five to eighty per cent of the land included in the petition was agricultural and the incorporation held invalid. Ferguson v. City of Snohomish, 8 Wash. 668. As to effect of special act, Phillips v. City of Huntington, 35 W. Va. 406; State v. Lamoureux, 3 Wyo. 731; Smith v. Sherry, 50 Wis. 210. A vacant tract of land not adjoining an existing village

In Pennsylvania, under an act of the legislature providing for the incorporation of any town or village containing 300 inhabitants, no authority exists for the incorporation into a borough of two or more distinct villages together with a tract of open farm country.[25]

Upon an examination of the authorities cited, the general rule seems to be well established that farm land situated so far distant from organized territory as to be incapable of receiving the advantages derived from municipal organization, including fire and police protection, cannot be annexed, nor, in the first instance, in the absence of sufficient population, organized into a municipal corporation. Land, however, used for garden or "truck" purposes, or immediately adjacent to the boundaries of an organized city or town, receiving the benefits above indicated, may properly be included in or annexed to a center of population. The courts hold that such territory should pay for the advantages and protection it receives by reason of its location. In all cases the territory proposed to be incorporated or annexed should be what is variously termed in different statutes "contiguous" or "adjacent" land.[26]

§ 15. Mode of creation.

To a certain extent the mode of creation has been discussed in a preceding section. No particular form of words is necessary to create a corporation. The essential is an existing intent on the part of the state or a legislative body that a public corporation shall be created. Following logically from this statement, then, we may have three modes of creation: by prescription, by implication, and by affirmative action.

By prescription. A public corporation exercises certain powers and we find imposed upon it certain duties and obligations. There may not be in existence an express act of the sovereign giving to the inhabitants of a certain district the right to exercise these powers, affected by their corresponding duties and obligations, but the cases hold in many instances that where an active corporation has existed for some time it will be presumed that at

cannot be incorporated into it by the legislature for the sole purpose of taxation. See, also, Russ v. City of Boston, 157 Mass. 60.

[25] In re Borough of West Philadelphia, 5 Watts & S. (Pa.) 281.

[26] Duckstad v. Polk County Com'rs, 69 Minn. 202, 71 N. W. 933.

the time of the organization of such territory the affirmative permission of the sovereign was given. The people within certain geographical limits may have exercised, in other words, all the rights which usually appertain to a particular organization for such a length of time that their legal right to do so will not be questioned;[27] and because, as said in an Illinois case, "municipal corporations are created for the public good—are demanded by the wants of the community; and the law, after long-continued use of corporate powers, and the public acquiescence, will indulge in presumptions in favor of their legal existence."[28] The state may also, by long acquiescence in the continued exercise of corporate powers by the inhabitants of a certain district, be estopped or precluded from questioning or raising the legal existence as a corporation of such territory.[29]

[27] Greene v. Dennis, 6 Conn. 293; Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; People v. Farnham, 35 Ill. 562; State v. Bunker, 59 Me. 366; Prentiss v. Davis, 83 Me. 364; People v. Maynard, 15 Mich. 463; Village of Arapahoe v. Albee, 24 Neb. 242, 38 N. W. 737; City of Omaha v. City of South Omaha, 31 Neb. 378, 47 N. W. 1113; but contra, in New Boston v. Dunbarton, 12 N. H. 409; Wallace v. Fletcher, 30 N. H. 434; Bow v. Allenstown, 34 N. H. 351; Robie v. Sedgwick, 35 Barb. (N. Y.) 319; 2 Kent, Comm. 277; Barnes v. Barnes, 6 Vt. 388; State v. Williams, 27 Vt. 755; Town of Londonderry v. Town of Andover, 28 Vt. 416.

[28] Jameson v. People, 16 Ill. 257.

In Massachusetts the supreme court held in 1809 that the existence of a municipal corporation could be proved by reputation; otherwise many towns and parishes would lose all their corporate rights and privileges. Dillingham v. Snow, 5 Mass. 547; Stockbridge v. West Stockbridge, 12 Mass. 400. See, also, Trott v. Warren, 11 Me. 227; Bassett v. Porter, 58 Mass. (4 Cush.) 487; New Boston v. Dunbarton, 15 N. H. 201.

[29] State v. Leatherman, 38 Ark. 81. The recognition of a municipal corporation by state officers for nine years sufficient to prevent a state from questioning the legal existence of the corporation.

Pidgeon v. McCarthy, 82 Ind. 321. In Indiana where Wm. Henry Harrison drafted a map of Vincennes adding some land which he marked "General Harrison's Reserve," which was assessed and taxed by the city for over fifty years without question, it was held that under these circumstances the fact that this tract was not legally a part of the corporate territory could not be shown. Back v. Carpenter, 29 Kan. 349; Bow v. Allenstown, 34 N. H. 351; Sherry v. Gilmore, 58 Wis. 324. Twenty years sufficient to protect corporate organization from collateral attack. See, also, Austrian v. Guy, 21 Fed. 500; People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067; Mendenhall v. Burton, 42 Kan. 570. But see State v. Fleming, 147 Mo. 1, and Worley v. Harris, 82 Ind. 493.

§ 16. By implication.

The creation of a public corporation through implication is slightly different from its creation by prescription, though both modes presuppose the existence of an intent on the part of the sovereign to create such a public corporation. The element of time differentiates them. The inhabitants of a certain district may have exercised the usual powers for such a length of time that the granting of them will be presumed. On the other hand, the inhabitants of such territory may not have exercised these powers for such a length of time as will give to them the right through prescription, but the legislature may by some act recognize the legal incorporation or existence of such district, and therefore, as the courts have held, the corporation will be created by implication.[30]

[30] Anon., 1 Salk. 191; Conservators of River Tone v. Ash, 10 Barn. & C. 349; Russell v. Devon County, 2 Term. R. 672; Society for the Propagation of the Gospel v. Towns of Pawlet & Clarke, 4 Pet. (U. S.) 480-502; Levy Court v. Coroner, 69 U. S. (2 Wall.) 501; Blair v. West Point Precinct, 2 McCrary, 459, 5 Fed. 265; Tatum v. Tamaroa, 9 Biss. 475, 14 Fed. 103; Dean v. Davis, 51 Cal. 406; Town of Enterprise v. State, 29 Fla. 128, 10 So. 740.

In Georgia it was held, however, that a district organized as a "town" would not become a "city" by the mere use of the word "city" in acts referring to such town. Savannah, F. & W. R. Co. v. Jordan, 113 Ga. 687, 39 S. E. 511; and Holmberg v. Jones, 7 Idaho, 752, 65 Pac. 563, holds that a county cannot be created by implication or intendment.

People v. Farnham, 35 Ill. 562; Bradley v. Case, 4 Ill. (3 Scam.) 608; State v. Stevens, 21 Kan. 210.

Even in cases where the original organization was fraudulent in its character, this doctrine obtains. State v. Pawnee County Com'rs, 12 Kan. 426-440; Stebbins v. Jennings, 27 Mass. (10 Pick.) 172; Prentiss v. Davis, 83 Me. 364; State v. Tosney, 26 Minn. 262.

But the case of Smith v. Anderson, 33 Minn. 25, holds that legalizing the acts of certain county officers does not ipso facto organize the county so as to entitle it to a register of deeds. State v. Spaude, 37 Minn. 322, 34 N. W. 164; Gaskill v. Dudley, 47 Mass. (6 Metc.) 552; New Boston v. Dunbarton, 12 N. H. 409, 15 N. H. 201; Bow v. Allenstown, 34 N. H. 351; Broking v. Van Valen, 56 N. J. Law, 85, 27 Atl. 1070; Green v. Seymour, 3 Sandf. Ch. (N. Y.) 285; Town of Bath Com'rs v. Boyd, 23 N. C. (1 Ired.) 194; Town of Trenton Com'rs v. McDaniel, 52 N. C. (7 Jones) 107; McIntyre Poor School v. Zanesville Canal & Mfg. Co., 9 Ohio, 203; Mathews v. State, 82 Tex. 577, but see In re Campbell, 1 Wash. 287.

It has also been held that where a town is organized under a void act, its incorporation will be ren-

§ 17. By affirmative action.

The third way in which a public corporation may be created is by what may be termed express affirmative action on the part of the sovereign, and, as has been already stated, this may be accomplished pursuant to constitutional provision, general enabling statutes, or special act. The discussion which follows will not attempt to distinguish as between the three modes, but will follow the decisions and state the necessary steps to be taken by the people in attempting to incorporate under legal authority.[31]

§ 18. Petition and notice.

The petition. That certain territory, wherever found, become incorporated under authority of law, the first requisite may be the preparation and filing of a petition with the proper officer,[32]

dered legal by subsequent legislation. State v. Berry, 13 Wash. 708.

City of Bridgeport v. Housatonic R. Co., 15 Conn. 475. The legislature by a confirmatory law may make valid an act of the corporation which was void for want of power given by the original charter. The common-law rule that a void act cannot be made good cannot be true of sovereignty, it was said.

People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067. The existence of the county of Baline was recognized by four different acts of the legislature, by the supreme court, and by the executive department of the state. It exercised all the powers and functions of a county government for four years. The state was held estopped from questioning the regularity and validity of its incorporation.

[31] See notes under § 9.

State v. O'Connor, 81 Minn. 79, 83 N. W. 498. Minn. Const., art. 4, § 36, applies only to cities having an incorporated existence at the time of its adoption, and further held not necessary for the legislature to prescribe a general frame work for a city charter.

City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190. A provisional municipal organization made in Oklahoma before the act of congress providing a territorial government, had no legal existence.

Wells v. Burbank, 17 N. H. 393. The grant of a charter for a township does not create a town corporation, though the grantees are a quasi corporation for the sale and partition of their lands.

Reeves v. Anderson, 13 Wash. 17. The power to "frame a charter" given by the constitution of the state of Washington, art. 11, § 10, to a city containing a population of 20,000 or more, is a continuing right vested in the electors and does not become exhausted.

[32] People v. Town of Berkeley, 102 Cal. 298; Vance v. Rankin, 95 Ill. App. 562; People v. Marquiss, 192 Ill. 377, 61 N. E. 352; Indiana Imp. Co. v. Wagner, 138 Ind. 658, 38 N. E. 49; State v. Hertsch, 136 Ind. 293; Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W.

containing the necessary averments of the signers' wishes,[33] with an accurate and definite description of the boundaries limiting and inclosing the proposed organization.[34] When such petition, properly drawn and duly signed, is filed, its subsequent change, either by alteration of the boundaries or the withdrawal of signatures, avoids the incorporation.[35]

The notice. It is a fundamental rule of law that before action or proceedings of any character can be legally taken affecting the rights, either property or political, of an individual, he must have notice of the pendency of such proposed action or proceedings. This rule of law applies to the present question. A proposed municipal or public quasi corporation necessarily includes the property of a large number of individuals. The law gives them a right to be heard upon all matters pertaining to or affecting their rights. The necessary petition preliminary to the organization of a public corporation, under authority of law, must be brought home either by actual or constructive notice to the attention of all possessing rights within the limits of the territory included. The notice of the filing of a petition for an election to determine the question of incorporation must contain substantially the legal requirements;[36] it must be signed by the

1031; State v. Sillon, 21 Kan. 207; State v. Red Lake County Com'rs, 67 Minn. 352, 69 N. W. 1083; State v. Campbell, 120 Mo. 396; State v. Fleming, 147 Mo. 1, 44 S. W. 758; State v. Jenkins, 25 Mo. App. 484; State v. Dimond, 44 Neb. 154, 62 N. W. 498; State v. Borough Commission of Ocean Beach, 48 N. J. Law, 375; Borough of Glen Ridge v. Stout, 58 N. J. Law, 598, 33 Atl. 858; In re Pine Hill, 33 N. Y. Supp. 181; Devore's Appeal, 56 Pa. 163; In re Borough of Taylorsport (Pa.) 13 Atl. 224; In re Borough of Versailles, 159 Pa. 43; In re Borough of Flemington, 168 Pa. 628; Burnes v. City of Edgerton, 143 Mo. 563, 45 S. W. 293.

[33] People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; City of Wardner v. Pelkes (Idaho) 69 Pac. 64. Petition for incorporation not void because of miscitation of statute.

Town of Somonauk v. People, 178 Ill. 631; People v. Pike, 197 Ill. 449; Attorney General v. Rice, 64 Mich. 385, 31 N. W. 203; In re Borough of Blooming Valley, 56 Pa. 66.

[34] City of Wardner v. Pelkes (Idaho) 69 Pac. 64; State v. Young, 61 Mo. App. 494; Wood v. Quimby, 20 R. I. 482; Furrh v. State, 6 Tex. Civ. App. 221, 24 S. W. 1126; State v. Hoard, 94 Tex. 527, 62 S. W. 1054; Huff v. Preuitt (Tex. Civ. App.) 53 S. W. 844.

[35] State v. Campbell, 120 Mo. 396, 25 S. W. 392.

[36] Smith v. Skagit County Com'rs, 45 Fed. 725; People v. City of Riverside, 70 Cal. 461; State v. Frost, 103 Tenn. 685.

proper officers, as provided by law;[37] and be either filed, posted or published for the length of time required by controlling statutory provisions.[38]

§ 19. The election.

After the petition for election has been properly prepared and notice given, the voters of the district proposed to be incorporated pass upon the question at an election called by the legal officers at the time and in the manner as directed by law.[39] At such election an official enumeration of the inhabitants within the proposed district is not necessary if the proper officers make a record, relative to the number of inhabitants, in their proceedings declaring the result of the election,[40] and only duly qualified voters are permitted to pass upon the questions submitted.[41]

Under Minnesota Laws of 1893, c. 143, all the propositions in regard to the creation of the new county must be submitted to the electors. Only one of these, however, can be adopted.[42]

In California it was held where after the election the board

[37] Smith v. Skagit County Com'rs, 45 Fed. 725; People v. Snedeker, 30 App. Div. 1, 51 N. Y. Supp. 768.

[38] Butler v. Walker, 98 Ala. 358; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; State v. Town of Winter Park, 25 Fla. 371; Town of Woo-Sung v. People, 102 Ill. 648. But it is held in Iowa that no notice is necessary to property owners within the territory proposed to be incorporated or annexed until after the court acts judicially in the matter. Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031.

Smith v. Crutcher, 92 Ky. 586; Gardner v. Christian, 70 Hun (N. Y.) 547; People v. Carpenter, 24 N. Y. 86; City of Guthrie v. Ter., 1 Okl. 188; Ruohs v. Town of Athens, 91 Tenn. 20.

[39] People v. Gunn, 85 Cal. 238; Slate v. City of Blue Ridge, 113 Ga. 646, 38 S. E. 977; State v. Town of Westport, 116 Mo. 582, 22 S. W. 888; State v. Town of Tipton, 109 Ind. 73, 9 N. E. 704.

[40] Smith v. Skagit County Com'rs, 45 Fed. 725.

[41] People v. Hecht, 105 Cal. 621; State v. McGowan, 138 Mo. 187, 39 S. W. 771; State v. Honerud, 66 Minn. 32; State v. Crow Wing County Com'rs, 66 Minn. 519; State v. Red Lake County Com'rs, 67 Minn. 352, 69 N. W. 1083; In re Village of Sag Harbor, 32 Misc. 624, 67 N. Y. Supp. 574; State v. Parler, 52 S. C. 207, 29 S. E. 651; Segars v. Parrott, 54 S. C. 1, 31 S. E. 677, 865; Cocke v. Gooch, 52 Tenn. (5 Heisk.) 294; State v. Weingarten, 92 Wis. 599, 66 N. W. 716; Freemont County Com'rs v. Perkins, 5 Wyo. 166.

[42] State v. Red Lake County Com'rs, 67 Minn. 352, 69 N. W. 1083.

learned that only a part of the one hundred petitioners required by law were bona fide residents, that it could not be compelled to canvass the returns.[43]

Where ballots read "against corporation" instead of "against village organization under the general law," it was held improper in Illinois to refuse to count them,[44] and where a certificate of inspectors at such an election failed to show the reason why three votes were rejected, this did not invalidate it.[45]

§ 20. Subsequent official action.

Upon the affirmative vote of the number required by law to organize certain territory into a public corporation, the statutes of a state generally require action by some official body or public officer declaring the result,[46] and following such declaration the district as an incorporation comes into existence.[47] This official action is generally held to be judicial in its character,[48] not ministerial; and the correctness of findings by such body or official upon questions coming within their jurisdiction usually cannot be raised on appeal nor in an attack on the validity of corporate acts after organization.[49]

The manner and time of meeting by such official or body, and adjournments, are discretionary.[50] Neither is it necessary that a permanent official record, in detail, be made of their proceedings.[51] Sometimes duties devolving upon such body may be performed by their successors,[52] and the strict rules obtaining in

[43] Page v. Los Angeles County Sup'rs, 85 Cal. 50.

[44] People v. Hanson, 150 Ill. 122, 36 N. E. 998, 37 N. E. 580. See, also, State v. Town of Westport, 116 Mo. 582.

[45] State v. Lammers, 113 Wis. 398, 86 N. W. 677, 89 N. W. 501.

[46] Ruohs v. Town of Athens, 91 Tenn. 20, 18 S. W. 400; State v. Goodwin, 69 Tex. 55, 5 S. W. 678; Huff v. Preuitt (Tex. Civ. App.) 53 S. W. 844.

[47] Ter. v. Town of Jerome (Ariz.) 64 Pac. 417; Taylor v. City of Ft. Wayne, 47 Ind. 274; State v. Bilby, 60 Kan. 130, 55 Pac. 843; In re Summit Borough, 114 Pa. 362, 7 Atl. 219.

[48] Seabrook v. Fowler, 67 N. H. 428; Word v. Schow, 29 Tex. Civ. App. 120, 68 S. W. 192; Grunert v. Spalding (Wis.) 78 N. W. 606.

[49] Hill v. City of Kahoka, 35 Fed. 32; Kansas Town & Land Co. v. City of Kensington, 6 Kan. App. 247, 51 Pac. 804; Appeal of Gross, 129 Pa. 567, 18 Atl. 557.

[50] People v. Town of Linden, 107 Cal. 94, 40 Pac. 115.

[51] People v. Garner, 47 Ill. 246.

[52] Davenport & R. I. Bridge R. & Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497.

regular courts will not control the introduction of evidence before them.[53]

§ 21. Incorporation without an election.

The creation of a public corporation or a change of grade through affirmative action may result from the casting of the required number of votes at an election held in the manner and under the authority suggested by preceding paragraphs, or the statutes may give to a board of supervisors, county commissioners, or other official body, or some public officer, the power to pass upon the regularity and sufficiency of the proceedings for incorporation, and declare the legal result.[54] In such cases a petition signed by the required percentage of the qualified residents of that territory, and presented to the proper tribunal, if complying with all the provisions of the statute, induces official action with the same result. The questions usually raised, when this last condition exists, go to the power or jurisdiction of an official or an official body to entertain the petition and pass upon the facts therein recited, the proceedings, and presentation of evidence,[55] the legal nature of their decisions[56] irrespective of the character of the body, whether ministerial or judicial, and various ministerial and clerical duties[57] to be performed by the official or body, such as the filing or acknowledgment of a plat or map of the proposed corporation, the petition, the official record of their proceedings, with its averments.[58] Further and important questions are often raised, namely, the sufficiency of the official order declaring the incorporation and the fact of its filing or record.[59]

[53] Matthews v. Otsego County Sup'rs, 48 Mich. 587.

[54] Mendenhall v. Burton, 42 Kan. 570, 22 Pac. 558; In re Borough of Osborne, 101 Pa. 284; Ford v. Farmer, 28 Tenn. (9 Humph.) 152; Ryan v. Evans, 49 Tex. 364.

[55] Matthews v. Otsego County Sup'rs, 48 Mich. 587.

[56] Hill v. City of Kahoka, 35 Fed. 32; Attorney General v. Page, 38 Mich. 286; Rousey v. Wood, 63 Mo. App. 460; State v. Fleming, 147 Mo. 1, 44 S. W. 758; In re Borough of Taylor, 160 Pa. 475; State v. Goowin, 69 Tex. 55, 5 S. W. 678.

[57] Davenport & R. I. Bridge R. & Terminal Co. v. Johnson, 188 Ill. 472, 59 N. E. 497; Inhabitants of Plantation No. 9 v. Bean, 40 Me. 218; Appeal of Gross, 129 Pa. 567, 18 Atl. 557.

[58] Kansas Town & Land Co. v. City of Kensington, 6 Kan. App. 247; State v. Peterson (Tex. Civ. App.) 29 S. W. 415; State v. Broach (Tex. Civ. App.) 35 S. W. 86.

[59] Ter. v. Town of Jerome (Ariz.)

§ 22. The charter of a public corporation and its legal nature.

The charter of a corporation is its legal authority to exist and exercise its powers as such. It may be a written instrument, or its existence may not be actual but presumed, through either the doctrines of prescription or implication.

One of the fundamental differences, it might be said the essential difference, between a public and a private corporation, is that in the case of a private corporation the charter is regarded as a contract under that clause in the constitution of the United States forbidding the states from passing any law impairing the obligation of a contract. The charter of a public corporation is not considered a contract, nor does it come within the doctrine of the Dartmouth College Case.[60]

The reason for this difference of holding may be briefly stated: A public corporation, a municipal corporation considered in its character as a public corporation, and a public quasi corporation, are each and all regarded as agencies of the government. They are involuntary political or civil divisions of the state created by authority of law to aid in the administration of government. Whatever of power they possess, or whatever of duty they are required to perform, originates in the authority creating them. They are organized, mainly for the interest, advantage and convenience of the people residing within their territorial boundaries and the better to enable the government, the sovereign,

64 Pac. 417; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115; Taylor v. City of Ft. Wayne, 47 Ind. 274; State v. Tucker, 48 Mo. App. 531; Woods v. Henry, 55 Mo. 560; People v. Snedeker, 30 App. Div. 1, 51 N. Y. Supp. 768; In re Summit Borough, 114 Pa. 362.

[60] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518; Butler v. Pennsylvania, 10 How. (U. S.) 402; State Bank of Ohio v. Knoop, 16 How. (U. S.) 369; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Newton v. Mahoning County Com'rs, 100 U. S. 548; Hewison v. City of New Haven, 37 Conn. 475; Cain v. Brown, 111 Mich. 657; Prince v. Crocker, 166 Mass. 347; Berlin v. Gorham, 34 N. H. 266; State v. Holden, 19 Neb. 249; City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law (4 Zab.) 385; Mills v. Williams, 33 N. C. (11 Ired.) 558; Sharpless v. City of Philadelphia, 21 Pa. 147; City of Erie v. Erie Canal Co., 59 Pa. 174; City of Philadelphia v. Fox, 64 Pa. 169; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12; Reeves v. Anderson, 13 Wash. 17; Washburn v. City of Oshkosh, 60 Wis. 453. See, also, all cases cited in the notes to this section.

to extend to them the protection to which they are entitled, and the more easily and beneficently to exercise over them its authority. The powers which they exercise in their public capacity are powers of the state, and the duties with which they are charged are duties of the state.[61]

The rights conferred upon the people residing within the limits of these organizations are political in their character, and it has been said that "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right as against the government in any individual or body of men." Entirely different conditions exist and principles apply to private corporations so familiar to all that it is unnecessary to repeat them.[62]

Not being a contract, therefore, the state has the power to alter, amend, change or repeal the charter of a public corporation at will. "A municipal corporation (in a broad sense) may be viewed in different aspects; that which it has to the citizen and that which it bears to a state. Seen in the latter relation it is a revocable agency constituted for the purpose of carrying out in detail such objects of the government as may be properly intrusted to a subordinate; having no vested right to any of its forms or franchises, and entirely under the control of the legislature, which may enlarge or circumscribe its territorial limits or functions, may change or modify its various departments, or extinguish it with the breath of arbitrary power."[63]

[61] Askew v. Hale County, 54 Ala. 639.

[62] People v. Morris, 13 Wend. (N. Y.) 325.

[63] 1 Hare, Const. Law, p. 628; Meriwether v. Garrett, 102 U. S. 472; Terrett v. Taylor, 9 Cranch (U. S.) 43; City of Covington v. Com. of Kentucky, 173 U. S. 231, 19 S. Ct. 383.

Allen v. McKean, 1 Sumn. 276, Fed. Cas. No. 229. The fact that the purpose of the corporation is an object of national concern and a proper subject for legislation does not render it a public institution, nor does the fact of incorporation change the character of the institution in that respect or give the legislature any power over it. The right to change civil institutions is not founded on their being incorporated but on their being the instruments of government created for its purposes.

The grant of political power gives to the legislature the right to modify or repeal it. University of Alabama v. Winston, 5 Stew. & P. (Ala.) 17; Hewison v. City of New Haven, 37 Conn. 475; Shorter v. Smith, 9 Ga. 517; County of Richland v. County of Lawrence, 12 Ill. 1; City of Louisville v. Uni-

A legislative body cannot part with its powers or delegate them to subordinate agencies so as to be unable to exercise them on all suitable occasions.[64] In the Hartford Bridge Case just cited, the supreme court of the United States held that the legislature of a state might lawfully repeal or discontinue a ferry franchise granted to a municipal corporation. Judge Woodbury remarked that towns and cities which are public municipal and political bodies "are incorporated for public and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes."[65] The power to alter, amend or repeal the charter of a public corporation must necessarily exist without limitation in the sovereign, otherwise there would be "numberless petty governments existing within the state, forming a part of it, but independent of the control of the sovereign power."

versity of Louisville, 54 Ky. (15 B. Mon.) 642; Layton v. City of New Orleans, 12 La. Ann. 515; Bradford v. Cary, 5 Me. (5 Greenl.) 339; City of Hagerstown v. Dechert, 32 Md. 369; Cobb v. Kingman, 15 Mass. 197; Trustees of Public Schools v. Taylor, 30 N. J. Eq. (3 Stew.) 618; Berlin v. Gorham, 34 N. H. 266; Weeks v. Gilmanton, 60 N. H. 500; Davidson v. City of New York, 27 How. Pr. (N. Y.) 342; Town of Marietta v. Fearing, 4 Ohio, 427; People v. Morris, 13 Wend. (N. Y.) 325; Howell v. Eldridge, 21 Wend. (N. Y.) 679; Gray v. City of Brooklyn, 2 Abb. Dec. (N. Y.) 267; Morris v. State, 62 Tex. 728; Bass v. Fontleroy, 11 Tex. 698; McCallie v. City of Chattanooga, 40 Tenn. (3 Head) 317.

In the Meriwether v. Garrett Case (102 U. S. 472) Justice Field said, "There is no contract between the state and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them."

The doctrine stated in the text is so conclusively established and so widely held by all courts that it is considered useless to multiply citations.

[64] Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511.

[65] See, also, Trustees of Schools v. Tatman, 13 Ill. 30; City of New Orleans v. Hoyle, 23 La. Ann. 740.

"Public or municipal corporations are established for the local government of towns or particular districts. The special powers conferred upon them are not vested rights as against the state, but being wholly political, exist only during the will of the general legislature; otherwise there would be numberless petty governments existing within the state and forming part of it, but independent of the control of the sovereign power. Such powers may at any time be repealed or abrogated by the legislature, either by a general law operating upon the whole state, or by a special act altering the powers of the corporation."[66]

On the other hand, the grant of authority from the state to a private corporation is considered a contract, within the rule as announced in the Dartmouth College Case, subject only to change or repeal by the sovereign upon the terms and conditions which may be found within the instrument itself or which exist in the general laws as a part of it. This doctrine is so firmly established in the jurisprudence of the United States that a mere reference to it is sufficient, and authorities will be found in every state in the Union sustaining it.

§ 23. Rules of construction.

The better rule for the construction of the charter of a public corporation, and that sustained by the weight of authority, is what may be termed the rule of strict construction. The corporation takes nothing by its charter but what is plainly and unequivocally granted. This is especially true of all those powers, the exercise of which, if liberally considered, might lead to the placing of illegal, unjust or burdensome obligations upon the taxpayers of the community. The officers of public corporations are notoriously slack in their administration of public affairs.

"It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects

[66] Sloan v. State, 8 Blackf. (Ind.) 361; Armstrong v. Dearborn County Com'rs, 4 Blackf. (Ind.) 208; People v. Morris, 13 Wend. (N. Y.) 325.

of the grant. Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."[67] If there is doubt as to the existence of power, the exercise of that power should be denied. However, it has been held that if contracts have been made and labor and material furnished upon a particular construction of a city charter with the general acquiescence of the inhabitants, that construction will be sustained if possible though it may differ from the rule given above.[68]

And as a further modification of this rule it has been held by the supreme court of the United States that "although neither privileges, powers nor authorities can pass by an act of incorporation unless they be given in unambiguous words, and an act giving special privileges must be construed strictly, in a case where a sentence is capable of two distinct meanings, it must be construed according to the subject-matter contemplated by the legislature, as a whole, and its manifest intention and design not defeated."[69] In this connection it is also well to state that the rule of strict construction is not applied to such a degree as to defeat the purposes for which the corporation was organized;[70] and this is especially true if, in the adoption of a more liberal rule, a power can be exercised which, as Judge Cooley

[67] Minturn v. Larue, 23 How. (U. S.) 435; Thompson v. Lee County, 3 Wall. (U. S.) 327; Thomas v. City of Richmond, 12 Wall. (U. S.) 349; Jefferson v. Bank of Skelly, 1 Black (U. S.) 436; Douglass v. City of Placerville, 18 Cal. 643; In re Bulger, 45 Cal. 553; Brooks v. Fischer, 79 Cal. 173; Bradley v. New York & N. H. R. Co., 21 Conn. 294; McGarty v. Deming, 51 Conn. 422; Clark v. City of Davenport, 14 Iowa, 494; City of Leavenworth v. Norton, 1 Kan. 432; City of Covington v. Boyle, 69 Ky. (6 Bush) 204; Tyler's Ex'r v. Elizabethtown, 72 Ky. (9 Bush) 510; Leonard v. City of Canton, 35 Miss. 189; Day v. City of Morristown, 63 N. J. Eq. 353, 46 Atl. 1098; Parker v. Baker, 1 Clark, Ch. (N. Y.) 223; Bank of Pennsylvania v. Com., 19 Pa. 144; Ex parte Coombs, 38 Tex. Cr. App. 648, 44 S. W. 854; Reeves v. Anderson, 13 Wash. 17.

[68] Memphis v. Brown, 97 U. S. 300.

[69] Curtis v. County of Butler, 24 How. (U. S.) 435; Gelpcke v. Dubuque, 68 U. S. (1 Wall.) 220; Moran v. Miami County Com'rs, 2 Black (U. S.) 722; City & County of St. Louis v. Alexander, 23 Mo. 483.

[70] Thomason v. Ashworth, 73 Cal. 73; San Diego v. Granniss, 77 Cal. 511; Smith v. City of Madison, 7 Ind. 86; Kyle v. Malin, 8 Ind. 34; Torrent v. City of Muskegon, 47 Mich. 115.

said in a Michigan case, "in its exercise concerns only the municipality and can wrong or injure no one."[71]

The general rule applies with all its force to words of exemption in the charter.[72] Charter powers, it is clear, cannot be extended by an unusual or unauthorized construction of its terms, and it is equally certain that no public corporation can itself, by giving such construction, or interpretation, acquire powers not granted.[73] Words should be taken in their ordinary sense and meaning as affected by local conditions, and, where no superior or controlling reasons exist for holding otherwise, that cardinal and elementary principle in the interpretation of statutes should be also applied, namely, that the true intent and meaning of the words used is to be ascertained by an examination of the grant of power as a whole.[74]

§ 24. The charter considered as evidence.

It is generally held that the act of incorporation or charter of a public corporation or municipality is a public act of which the courts will take judicial notice, but acts, votes and ordinances are not public matters and must be specially pleaded and proved.[75] But in Iowa it is held that when a city or town is incorporated by special act, the courts will take judicial notice of its incorporation; otherwise when it is incorporated under a general act. There the court says the fact of its corporate character must be pleaded and proved.[76]

Where an original city charter contained an express provision declaring it a public act, it was held, in a New Jersey

[71] City of Port Huron v. McCall, 46 Mich. 565.

[72] Borough of Truro v. Reynalds, 1 Moore & S. 272; Lord Middleton v. Lambert, 1 Adol. & E. 401.

[73] Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; Ritterskamp v. Stifel, 59 Mo. App. 510; City of Brookfield v. Kitchen, 163 Mo. 546. But see Frazier v. Warfield, 13 Md. 279.

[74] Chicago Dock & C. Co. v. Garrity, 115 Ill. 155; Webber v. City of Chicago, 148 Ill. 313; District Tp. of Dubuque v. City of Dubuque, 7 Iowa, 262; Holland v. City of Baltimore, 11 Md. 186; Com. v. Dejardin, 126 Mass. 46; Verdin v. City of St. Louis, 131 Mo. 26; Ruschenberg v. Southern Elec. R. Co., 161 Mo. 70; Kirkham v. Russell, 76 Va. 956.

[75] Beaty v. Knowles, 4 Pet. (U. S.) 152; People v. Potter, 35 Cal. 110; Stier v. City of Oskaloosa, 41 Iowa, 353; Briggs v. Whipple, 7 Vt. 15; Winooski v. Gokey, 49 Vt. 282.

[76] Hard v. City of Decorah, 43 Iowa, 313.

case,[77] that supplements or amendments to it would be treated likewise as public acts, and would be judicially noticed without pleading, although they might not contain the same provision. In the framing of a city charter, it has been decided that where two of the fifteen freeholders chosen to prepare it, as provided by the constitution, were ineligible, the remaining thirteen were competent to organize and act as such board;[78] and where the charter of a municipal corporation contained a mistake, the supreme court of New Hampshire held[79] that it could not be corrected by a court of law in a suit between individuals.

§ 25. Acceptance.

A public corporation being so emphatically and distinctly a governmental agent under the control and absolute will of the state, it follows that there is no necessity for provisions in a proposed charter or act of organization looking to or providing for its acceptance by the people residing within the limits of the territory affected.

In this respect the law again is the direct antithesis of that relating to the acceptance of the charter of a private corporation by its incorporators. The charter of a private corporation cannot be arbitrarily forced upon its members by the state, and their acceptance is one of the essentials of a legal private corporation. To this rule there is no dissent.[80] Although the prin-

[77] Hawthorne v. City of Hoboken, 32 N. J. Law, 172. See, also, Stephens & C. Transp. Co. v. Central R. Co., 33 N. J. Law, 229; Bowie v. City of Kansas, 51 Mo. 454.

[78] People v. Hecht, 105 Cal. 621.

[79] Proprietors of Enfield v. Permit, 5 N. H. 280.

[80] 7 Thompson, Corp. § 8160; 1 Clark & M. Private Corp. § 44, and cases cited; 1 Cook, Stock & S. § 640; Ellis v. Marshall, 2 Mass. 269; Inhabitants of Hampshire County v. Inhabitants of Franklin County, 16 Mass. 76; 2 Kent, Comm. 277; Lexington & W. C. R. Co. v. Chandler, 54 Mass. (13 Metc.) 315; Wright v. Tukey, 57 Mass. (3 Cush.) 297; Haslett's Ex'rs v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Lincoln & K. Bank v. Richardson, 1 Me. (1 Greenl.) 81. Contra, as to public corporations: Dillon, Mun. Corp. (3d Ed.) § 44; State v. Curran, 12 Ark. 321; People v. Wren, 5 Ill. (4 Scam.) 269; Warren v. City of Charlestown, 68 Mass. (2 Gray) 104; State v. Haines, 35 Or. 379, 2 Mun. Corp. Cas. 430; Morford v. Unger, 8 Iowa, 82; Fire Department v. Kip, 10 Wend. (N. Y.) 267; People v. City of Butte, 4 Mont. 174; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Berlin v. Gorham, 34 N. H. 266; People v. Stout, 23 Barb. (N. Y.)

ciple that a charter is a law and will take effect without the consent of those who are to be governed and whose property may be affected by it is well established, yet, it is customary, in the granting of charters to municipal corporations proper, to permit a vote of the people upon the question of acceptance,[81] and this fact leads, as will be learned, to material differences in the liabilities of such corporations as compared with those where the instrument of government is arbitrarily imposed. An acceptance is usually evidenced by a vote of the people given at an election held at the time and in the manner prescribed by law,[82] though some cases hold that it may be implied from acts done by the people under some provision of the proposed charter.[83]

§ 26. Distinction between a public quasi and a municipal corporation in this regard.

An essential distinction or difference between a public or a public quasi corporation and a municipal corporation is logically considered here.

"Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties (and the same applies to other public and public quasi corporations) are local subdivisions of a state created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces; the latter is superimposed by a sovereign and paramount authority.

349; State v. Babcock, 25 Neb. 709. When acceptance may be requisite: Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381.

[81] People v. McFadden, 81 Cal. 489; People v. Salomon, 51 Ill. 37; Clarke v. Rogers, 81 Ky. 43; Call v. Chadbourne, 46 Me. 206; Prince George's County Com'rs v. Village of Bladensburg, 51 Md. 465; City of St. Louis v. Russell, 9 Mo. 507; State v. Noyes, 30 N. H. 279; City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law (4 Zab.) 385; Foote v. City of Cincinnati, 11 Ohio, 408; Bull v. Read, 13 Grat. (Va.) 78.

[82] See cases cited in preceding note; City of Brunswick v. Finney, 54 Ga. 317; Stephens v. People, 89 Ill. 337; State v. Tosney, 26 Minn. 262; State v. Town of Westport, 116 Mo. 582; People v. City of Butte, 4 Mont. 174; Smith v. McCarthy, 56 Pa. 359; Ewing v. State, 81 Tex. 172.

[83] Rex v. Hughes, 1 Man. & R. 625, 7 Barn. & C. 708; City of

"A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."[84]

The doctrine of this case is sustained without exception by the authorities, and it follows from an examination of the citations that the charter of a public or a public quasi corporation may be, and usually is, arbitrarily imposed upon the people residing within a certain district;[85] while, on the other hand, there exists, or may exist, as already stated, the necessity of an acceptance or an assent by the people affected to the imposition of a charter or other organic form of government upon a municipality.[86] The history and mode of organization of Eng-

Lafayette v. Jenners, 10 Ind. 70; Taylor v. Newberne Com'rs, 55 N. C. (2 Jones Eq.) 141.

[84] Hamilton County Com'rs v. Mighels, 7 Ohio St. 109; citing Ward v. Hartford County, 12 Conn. 406; Boalt v. Williams Com'rs, 18 Ohio, 10; Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs, 1 Ohio St. 89.

[85] Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Swett v. Sprague, 55 Me. 190. As to a "city of the second class." State v. Holden, 19 Neb. 249; State v. Babcock, 25 Neb. 709; Berlin v. Gorham, 34 N. H. 266; State v. Haines, 35 Or. 379, 58 Pac. 39; Wood v. Quimby, 20 R. I. 482, 40 Atl. 161; Blessing v. City of Galveston, 42 Tex. 641; Lum v. City of Bowie (Tex.) 18 S. W. 142.

[86] Rex v. Mayor of Bridgewater, 11 Mod. 291; Rex v. Larwood, 1 Ld. Raym. 29; City of Brunswick v. Finney, 54 Ga. 317; Slate v. City of Blue Ridge, 113 Ga. 646, 38 S. E. 977; State v. Hertsch, 136 Ind. 293, 36 N. E. 213; Poor v. People, 142 Ill. 309; Morford v. Unger, 8 Iowa, 82; State v. Olinger (Iowa) 72 N. W. 441; Stone v. City of Charlestown, 114 Mass. 214; Ray v. De Butts, 180 Mass. 155, 61 N. E. 887; City of Jackson v. Shlomberg, 70 Miss. 47, 11 So. 721; State v. Govan, 70 Miss. 535, 12 So. 959; City of St. Louis v. Russell, 9 Mo. 507; Ewing v. Hoblitzelle, 85 Mo. 64; Kelly v. Meeks, 87 Mo. 396; People v. City of Butte, 4 Mont. 174; State v. Noyes, 30 N. C. (10 Fost.) 279; City of Paterson v. Society for Establishing Useful Manufactures, 24 N.

lish municipalities must be considered in determining the relevancy and force of English citations.

No specific form of acceptance of a charter under the old methods of creation was provided, and the courts therefore held that any unequivocal act showing a desire and intention to accept the same would be sufficient, provided it was done by a majority of the grantees,[87] and the assent of the incorporators at large might be presumed from long acquiescence in the acts and declarations of the officers of the municipality.[88]

§ 27. Amendment of the charter.

The legislature, in the absence of constitutional restriction, has the power to amend, alter or repeal, directly or indirectly, the charters of all public corporations, the sole limitation upon this rule being that the rights or existing creditors or contract obligations to third parties cannot be impaired or destroyed.[89] The amendment of an existing charter may be effected through the passage of legislation directly amending charter provisions, in case of municipal corporations, subject to the vote of the peo-

J. Law (4 Zab.) 385; De Hart v. Atlantic City, 62 N. J. Law, 586, 41 Atl. 687; Corning v. Greene, 23 Barb. (N. Y.) 33; Bank of Chenango v. Brown, 26 N. Y. 467; People v. Stout, 23 Barb. (N. Y.) 349; Com. v. Cullen, 13 Pa. 133; In re Vacation of Henry St., 123 Pa. 346; State v. Bean, 26 Tex. Civ. App. 605, 65 S. W. 202; State v. Lamoureux, 3 Wyo. 731, 30 Pac. 243.

[87] Rex v. Hughes, 7 Barn. & C. 708. See, also, Russell v. McLellan, 31 Mass. (14 Pick.) 63; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64-71; Taylor v. Newberne Com'rs, 55 N. C. (2 Jones Eq.) 141; Owen v. Purdy, 12 Ohio St. 73.

[88] Com. v. Cullen, 13 Pa. 133. This case is also authority for the proposition that a failure to elect officers does not work a dissolution while the capacity to elect remains.

[89] Von Hoffman v. City of Quincy, 4 Wall. (U. S.) 535; Lee County v. Rogers, 7 Wall. (U. S.) 181; Butz v. City of Muscatine, 8 Wall. (U. S.) 575; Broughton v. Pensacola, 93 U. S. 266; Mount Pleasant v. Beckwith, 100 U. S. 514; Port of Mobile v. Watson, 116 U. S. 289; Brewis v. City & Village of Duluth, 13 Fed. 334; Pacific Imp. Co. v. City of Clarksdale, 20 C. C. A. 635, 74 Fed. 528; Amy v. City of Selma, 77 Ala. 103; Smith v. Morse, 2 Cal. 524; City of Olney v. Harvey, 50 Ill. 453; Boyd v. Chambers, 78 Ky. 140; Ross v. Wimberly, 60 Miss. 345, overruling Port Gibson v. Moore, 21 Miss. (13 Smedes & M.) 157; Scaine v. Inhabitants of Belleville, 39 N. J. Law, 526; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; State v. City of Milwaukee, 25 Wis. 122.

ple of the municipality, in the same manner as the acceptance of or assent to the original charter.[90]

The act amending a charter of a corporation may be so drastic in its terms that it will be necessary, in order to transfer to the new the particular powers of the old corporation, to provide an

[90] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Essex Board v. Skinkle, 140 U. S. 334; Baader v. City of Cullman, 115 Ala. 539; People v. City of Coronado, 100 Cal. 571; Blanchard v. Hartwell (Cal.) 62 Pac. 509; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Wiggin v. City of Lewiston (Idaho) 69 Pac. 286; Covington v. City of East St. Louis, 78 Ill. 548; Guild v. City of Chicago, 82 Ill. 472; Crook v. People, 106 Ill. 237; Martin v. People, 87 Ill. 524; Eichels v. Evansville St. R. Co., 78 Ind. 261; Davis v. Woolnough, 9 Iowa, 104; Elliott v. City of Louisville, 101 Ky. 262, 40 S. W. 690; City of Annapolis v. State, 30 Md. 112; Powell v. Jackson Common Council, 51 Mich. 129; Elliott v. City of Detroit, 121 Mich. 611, 84 N. W. 820; State v. Copeland, 66 Minn. 315, 69 N. W. 27; Flynn v. Little Falls Elec. & Water Co., 74 Minn. 180, 77 N. W. 38, 78 N. W. 106.

Hopkins v. City of Duluth, 81 Minn. 189, 83 N. W. 536. Const. art. 4, § 36, providing that new charters or amendments should be submitted for ratification to the voters of the city whose charter it was proposed to change, not a violation of art. 4, § 4, Constitution of the United States providing that "the United States shall guarantee to every state in this Union a republican form of government."

Sellick v. Town of Fayette, 3 Mo. 99; State v. City of St. Louis, 73 Mo. 435; City of Westport v. Kansas City, 103 Mo. 141; City of St. Louis v. Dorr, 145 Mo. 466; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Kansas City v. Stegmiller, 151 Mo. 189, 52 S. W. 723; State v. Union, 33 N. J. Law, 350; State v. City of Passaic, 38 N. J. Law, 171; Attorney-General v. Shepard, 62 N. H. 383; Wallace v. Trustees, 84 N. C. 164; Armitage v. Fisher, 4 Misc. 315, 24 N. Y. Supp. 650; People v. Dooley, 171 N. Y. 74; Philadelphia v. Fox, 64 Pa. 169; William's Appeal, 72 Pa. 214; State v. Denny, 4 Wash. 135, 29 Pac. 991; Wade v. City of Tacoma, 4 Wash. 85, 29 Pac. 983.

The extension of the limits of a city held not an amendment to its charter. State v. Warner, 4 Wash. 773; Pierce v. City Clerk of Spokane, 7 Wash. 132; Reeves v. Anderson, 13 Wash. 17; State v. Doherty, 16 Wash. 382.

Roby v. Sheppard, 42 W. Va. 286. A special statute amending charter of town of more than 2,000 inhabitants by annexing territory included in another town is not an amendment of the charter of the latter town, in violation of Const. art. 6, § 39.

Shank v. Town of Ravenswood, 43 W. Va. 342; Thompson v. City of Milwaukee, 69 Wis. 492, 34 N. W. 402.

Smith v. Sherry, 50 Wis. 210. Under Wisconsin Const. art. 4, §§ 31-32, as amended in 1871, the legislature has no power by special act to amend town or village charter granted prior to 1871.

Adams v. City of Beloit, 105 Wis. 363, 81 N. W. 869; Oshkosh Water-

enabling clause empowering the new corporation to act in the particular case or a general clause embracing the particular case.[91]

§ 28. By implication or indirection.

An amendment is often effected by the passage of acts controlling or relating to certain powers or duties of a municipality, and which in their terms are different from existing charter provisions regulating the same matters; the courts hold in these cases that the effect of such legislation is to amend or change the provisions of existing law.[92] Amendments or repeals by implication are not favored by the courts, however, and unless the

works Co. v. City of Oshkosh, 109 Wis. 208, 85 N. W. 376.

Kansas City v. Stegmiller, 151 Mo. 189. An amendment of a city charter takes effect from the date of its approval, unless otherwise provided by law.

In the case of Meriwether v. Garrett, 102 U. S. 472, Mr. Justice Field said: "The right of the state to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer and these may be enlarged, abridged or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them." And in the dissenting opinion of Mr. Justice Strong is found the following language as illustrative of the doctrine first stated in this section:

"It can make no difference that the city of Memphis was a municipal corporation. Its charter as such does not affect the nature of its obligations to its creditors, or its cestuis que trust, or impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual, with the same rights and duties, and with the same liabilities, as attend such persons. Over its public duties, it may be admitted, the Legislature has plenary authority. Over its private obligations it has not."

[91] Fowle v. Common Council of Alexandria, 3 Pet. (U. S.) 398; City of Savannah v. Steamboat Co. of Georgia, R. M. Charlt. (Ga.) 342.

[92] Baader v. City of Cullman, 115 Ala. 539, 22 So. 19; In re House Resolution Relating to House Bill

intent clearly appears[93] or the legislation is so inconsistent that all cannot stand,[94] such an effect will not be given to it. Judge Cooley has said:[95] "Repeals by implication are not favored, and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." The principles above clearly apply where the charter of the municipality exists as special legislation and the amendment or repeal is claimed to be affected by a general law or vice versa.[96] The adoption of an amendment to a state constitution is usually considered to amend or repeal all legislation whether

116, 12 Colo. 289. Contra, Horn v. State (Ga.) 40 S. E. 297.

Williamson v. City of Keokuk, 44 Iowa, 88. A statute entitled as an amendment embracing objects foreign to the charter of the city is void under constitutional provision requiring the objects of the law to be expressed in the title.

Ford v. Town of North Des Moines, 80 Iowa, 626; Warren v. City of Evansville, 106 Ind. 104; State v. Olinger (Iowa) 72 N. W. 441; Socorro County Com'rs v. Leavitt, 4 Gild. (N. M.) 37; State v. Zimmerman, 86 Minn. 353, 90 N. W. 783; State v. De Bar, 58 Mo. 395; Worthley v. Steen, 43 N. J. Law, 542; City of St. Louis v. Dorr, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976.

Additional powers will be regarded as supplemental to the charter, not as an admendment or revision. Sheridan v. City of Salem, 14 Or. 328, 12 Pac. 925; State v. Wall, 47 Ohio St. 499; Erie v. Flint, 8 Pa. Co. Ct. R. 482; State v. District of Narragansett, 16 R. I. 424; King County Com'rs v. Davies, 1 Wash. St. 290.

Act of May 23, 1874, dividing cities into classes, held not to affect the city of Wilkesbarre incorporated before the passage of this act. Phoenix v. Reynolds, 13 Phila. (Pa.) 522.

[93] Thomason v. Ashworth, 73 Cal. 73; People v. Londoner, 13 Colo. 303; State v. Spaude, 37 Minn. 322; Bowyer v. City Council of Camden, 50 N. J. Law, 87; Socorro County Com'rs v. Leavitt, 4 Gild. (N. M.) 37; Moran v. Long Island City, 101 N. Y. 439.

[94] Bond v. Hiestand, 20 La. Ann. 139; City of Cumberland v. Magruder, 34 Md. 381; Flynn v. Little Falls Elec. & Water Co., 74 Minn. 180; People v. O'Neil, 109 N. Y. 251; Buford v. State, 72 Tex. 182.

[95] Const. Lim. (6th Ed.) 182.

[96] McGarty v. Deming, 51 Conn. 422; City of Griffin v. Inman, 57 Ga. 370; City of East St. Louis v. Maxwell, 99 Ill. 439; Hammond v. Haines, 25 Md. 541; Fish v. Branin, 23 N. J. Law (3 Zab.) 484; Bodine v. Common Council of Trenton, 36 N. J. Law, 198; In re Com'rs of Central Park, 50 N. Y. 493; City of Harrisburg v. Sheck, 104 Pa. 53.

general or special, inconsistent or in conflict with it.[97] The rights, however, of third parties, either as creditors or as holding contract obligations, cannot be impaired or destroyed by attempts at amendment or repeal whether by legislative act or constitutional amendment.[98]

§ 29. Effect of amendments.

The discussion of the effect of such amendments or changes by the courts is interesting. It has been held by the supreme court of the United States that neither the identity of a municipal corporation nor its right to hold property devised to it is destroyed by a change of its name, an enlargement of its area, or an increase of the number of its corporators.[99]

An act incorporated a town with "all the rights, privileges and powers conferred upon" another town by an act of an earlier date. Afterwards additional powers were conferred upon this last named town by an amendatory act. It was held that the first named town obtained no additional powers by virtue of such amendatory act.[100]

Although the legislature may by special act amend an existing charter, it cannot, under the guise of such amendment, extend the limits of a municipality so as to destroy the corporate existence of adjoining towns incorporated under the general

[97] City of East St. Louis v. Amy, 120 U. S. 600; Donahue v. Graham, 61 Cal. 276; City of Hagerstown v. Dechert, 32 Md. 369; Trustees of Public Schools v. Taylor, 30 N. J. Eq. (3 Stew.) 618.

[98] Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Baader v. City of Cullman, 115 Ala. 539; Board of Councilmen of Frankfort v. Mason, 100 Ky. 48; Morris v. State, 62 Tex. 728. See, also, chapter on legislative power over public corporations and its limitations and §§ 29-31, post.

[99] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1.

In Broughton v. City of Pensacola, 93 U. S. 266, the court said that a change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or substitution of a new charter in place of the old one, embracing substantially the same corporators and the same territory, would not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation or to relieve it from its previous liabilities.

Seward v. City of Wilmington, 2 Marv. (Del.) 189, 42 Atl. 451; O'Connor v. City of Memphis, 74 Tenn. (6 Lea) 730; Boyd v. Chambers, 78 Ky. 140. See, however, Meriwether v. Garrett, 102 U. S. 472.

[100] Tatum v. Tamaroa, 14 Fed. 103.

law.[101] And in Louisiana it is held that public acts empowering incorporated towns to amend their charters do not authorize them thereby to extend their privileges or alter the existing authority of the state or parish over their inhabitants.[102] Again it is held that a power granted to municipal corporations to amend their charters does not impliedly give additional rights of taxation.[103]

In a Pennsylvania case the court said that "to create a charter is to make one which never existed before; to renew one is to give vitality to one which has been forfeited, or has expired; and to extend one is to give an existing charter more time than originally limited."[104] The effect of an amendment naturally increases or diminishes the powers of a corporation, either in the manner and time of their exercise, their number, or the limits within which old powers may be exercised. Where, by an amendment, political or governmental rights, questions or conditions are affected, the rule unquestionably is that by superior law the amendment can be made and the right to do this is uncontrolled except by constitutional provisions. If, however, the property or vested rights of third parties arising through the existence of a contract obligation or the grant of a remedy are impaired, lessened or destroyed, the right of amendment does not exist so far as it may violate constitutional provisions protecting such rights. The effect under such circumstances is closely allied to that resulting from the repeal of charters and the cases are largely considered under that section.

§ 30. Repeal of charter.

The subject of the amendment or change of the organic act creating a public corporation has been briefly considered in the preceding paragraphs, and it can be said that the right to repeal such organic act or charter exists with the same force and to the same extent.[105] Some municipal corporations, owing to consti-

[101] In re Extension of Boundaries of Denver, 18 Colo. 288, 32 Pac. 615.

[102] Cook v. Dendinger, 38 La. Ann. 261.

[103] Nelson v. Town of Homer, 48 La. Ann. 258.

[104] Moers v. City of Reading, 21 Pa. 188.

[105] State v. City of Mobile, 24 Ala. 701; State v. City of Savannah, R. M. Charlt. (Ga.) 250; Smith v. Village of Adrian, 1 Mich. 495; Lynch v. Lafland, 44 Tenn. (4 Cold.) 96.

tutional provision however cannot be arbitrarily deprived of their charters, but in the absence of such the above rule is general. A repeal of the charter or particular provisions may be effected through the passage of legislation operating in express terms,[106] or again, as in the case of an amendment to the charter of a public corporation, the repeal may be effected through the application of the doctrine of implication.[107] The courts, however, do not favor the repeal of existing laws and charters by

[106] People v. Bagley, 85 Cal. 343. Through the incorporation of a municipality under the Statutes of California of 1883, p. 93, the old charter is superseded or repealed.

Southport v. Ogden, 23 Conn. 128; Brackett v. People, 72 Ill. 593; Hagerstown v. Dechert, 32 Md. 369.

Tierney v. Dodge, 9 Minn. 166 (Gil. 9). A provision in the general law is repealed through the passage of a charter for a municipality controlling the same subject-matter, where the intention of the legislature to that effect is clearly expressed.

Harris v. City of Water Valley, 78 Miss. 659, 29 So. 401; City of St. Louis v. Life Ass'n of America, 53 Mo. 466. As contrary to the rule see State v. Branin, 23 N. J. Law (3 Zab.) 484, and State v. Clarke, 25 N. J. Law (1 Dutch.) 54.

A few early New York cases hold that the passage of general statutes imposing penalties for specific acts does not necessarily operate as a repeal of a municipal ordinance. In fixing penalties for the same act unless irreconcilably inconsistent, both may stand together. City of New York v. Hyatt, 3 E. D. Smith (N. Y.) 156; Russ v. City of New York, 12 N. Y. Leg. Obs. 38; People v. Daley, 37 Hun (N. Y.) 461.

In Trustees of Erie Academy v. City of Erie, 31 Pa. 515, it is held that a change in the form of government of a public corporation does not necessarily abrogate existing laws passed by such corporation.

Tripp v. City of Yankton, 10 S. D. 516, 74 N. W. 447. A city failing to organize under laws of South Dakota of 1890, c. 37, still retains its special charter theretofore granted.

Burk v. State, 73 Tenn. (5 Lea) 349. Where a town organizes as a corporation under the general law, and subsequently is granted a special charter, upon its repeal it is no longer an "incorporated" town.

Somo Lumber Co. v. Lincoln County, 110 Wis. 286, 85 N. W. 1023.

[107] Martin v. Board of Election Com'rs of San Francisco, 126 Cal. 404; Braman v. City of New London, 74 Conn. 695, 51 Atl. 1082; Horn v. State (Ga.) 40 S. E. 297; Mattox v. State, 115 Ga. 212, 41 S. E. 709; Guild v. City of Chicago, 82 Ill. 472; Allen v. People, 84 Ill. 502; Crook v. People, 106 Ill. 237; Kelly v. Gahn, 112 Ill. 23; State v. Harris, 10 Iowa, 441. Contra, City of Covington v. District of Highlands, 24 Ky. L. R. 433, 68 S. W. 669; Camp v. City of Minneapolis, 33 Minn. 461. A special act consolidating two cities held not to extend the ordinances of each city over the consolidated city, but to confine their operation within their former territorial limits until changed by the new city council. State Board of

implication and the authorities hold without substantial dissent that unless the intention of the legislature to repeal a charter or one of its provisions is clearly shown by all the circumstances and conditions attendant upon the legislation, a repeal by implication will not be allowed.[108]

In Washington an act was passed in 1893, providing for the reincorporation of all cities and towns which had maintained organized governments under the void law of March 27, 1890. This law was held valid because, as was said, "it does not seek to legalize void incorporations but to legislate as to existing constituted bodies maintaining the character of municipal corporations under claim of authority."[109]

§ 31. Effect of repeal.

In Tennessee the city of Memphis and other cities were abolished by legislative enactment, and taxing districts, public quasi corporations, were established with most of the powers of the dissolved municipal corporations. Creditors brought suit to enforce their claims and the court held that these taxing districts were in practical effect municipal corporations and as such they had both the liabilities and the rights of the municipal corporations they were organized to supersede.[110]

Education v. City of Aberdeen, 56 Miss. 518.

The express repeal of a charter does not revive an original charter but destroys the corporate existence of the village. State v. Village of Reads, 76 Minn. 69, 78 N. W. 883.

In North Carolina the same doctrine is held. Lilly v. Taylor, 88 N. C. 489. Jersey City v. Jersey City & B. R. Co., 20 N. J. Eq. (5 C. E. Green) 360; Erie v. Bootz, 72 Pa. 196; McFate's Appeal, 105 Pa. 323.

As to organization into taxing districts, under Tennessee Code, § 1667, of towns or cities whose charters have been repealed, see Pepper v. Smith, 83 Tenn. (15 Lea) 551; Ruohs v. Town of Athens, 91 Tenn. 20, 18 S. W. 400; O'Connor v. City of Memphis, 74 Tenn. (6 Lea) 730.

Buford v. State, 72 Tex. 182; Harness v. State, 76 Tex. 566.

[108] Smith, Mun. Corp. § 99, and many cases there cited; Cooley, Const. Lim. 183; People v. Clunie, 70 Cal. 504; McGarty v. Deming, 51 Conn. 422; City of Griffin v. Inman, 57 Ga. 370; City of East St. Louis v. Maxwell, 99 Ill. 439; Bond v. Hiestand, 20 La. Ann. 139; City of Cumberland v. Magruder, 34 Md. 381; Fish v. Branin, 23 N. J. Law (3 Zab.) 484. See, also, cases cited in § 28.

[109] Laws 1893, c. 80; Town of Medical Lake v. Smith, 7 Wash. 195; Town of Medical Lake v. Landis, 7 Wash. 615; City of Pullman v. Hungate, 8 Wash. 519; State v. City of Centralia, 8 Wash. 659.

[110] Uhl v. Commissioners of Tax-

In Alabama the state legislature dissolved the city of Mobile and created the corporation of the Port of Mobile. This included substantially the same area and population as the city which it superseded. The port was vested with all the property of the city and the act of incorporation followed immediately the act of dissolution. Creditors of the city brought suit against the port and in deciding that the port was liable the supreme court of the United States said: "Where the legislature of a state has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts, repeals its charter and dissolves the corporation and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the general mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter * * * is the successor of the former and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new."[111] How-

ing Dist., 74 Tenn. (6 Lea) 610; Lea v. State, 78 Tenn. (10 Lea) 478; State v. Taxing Dist., 84 Tenn. (16 Lea) 240. As emphasizing certain phases of the litigation, the result of such legislation, see Meriwether v. Garrett, 102 U. S. 472.

[111] Port of Mobile v. Watson, 116 U. S. 289. In Broughton v. City of Pensacola, 93 U. S. 266, it was said by Mr. Justice Field that "When a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs; and in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its re-organization." In O'Connor v. City of Memphis, 74 Tenn. (6 Lea) 730, the supreme court of Tennessee held that "neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these things combined, will destroy the identity, continuity or succession of the corporation if the people and territory reincor-

ever clearly it is established that the legislature has the right to alter, amend or repeal the charter of a public corporation or pass legislation affecting the political rights of its citizens except as limited by constitutional provisions, there is grave doubt as to its right to deprive the people residing within certain territorial limits of property or property rights which may have been acquired by them through corporate organization.[112] Like results, though in a varying degree, are affected through the amendment or repeal of the charter of a public corporation. Where such action deals with political rights or conditions, as already stated, it is within the power of the legislature or of the sovereign to deal arbitrarily and alter, amend or repeal at pleasure. The grant of charter rights usually, however, not only confers political and governmental powers, but in some degree or in some respect may operate, directly or indirectly, as the grant of a property, a vested or a contract right to third persons. In such cases the courts have held almost without dissent that where such rights are impaired or destroyed, the legislation in question is void as violating those provisions of the Federal and state constitutions protecting contract obligations and property or vested rights. As said in the Tennessee case:[113] "Neither the repeal of the charter of a municipal corporation nor a change of its name nor an increase or diminution of its territory or population nor a change in its mode of government nor all these combined will destroy the identity, continuity or succession of the corporation, if the people and territory reincorporated constitute an integral part of the corporation abolished."[114]

porated constituted an integral part of the corporation abolished. * * * The corporators and the territory are the essential constituents of the corporation and rights and liabilities naturally adhere to them."

[112] Terrett v. Taylor, 9 Cranch (U. S.) 43; Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 694; Smith v. Morse, 2 Cal. 524; Grogan v. City of San Francisco, 18 Cal. 590; Richland County v. Lawrence County, 12 Ill. 1; People v. Hurlbut, 24 Mich. 44; People v. Common Council of Detroit, 28 Mich. 228; City of New York v. Second Ave. R. Co., 32 N. Y. 261; People v. O'Brien, 111 N. Y. 1; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12; Dillon, Mun. Corp. (4th Ed.) § 68a.

[113] O'Connor v. City of Memphis, 74 Tenn. (6 Lea) 730.

[114] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Morgan v. City & Town of Beloit, 74 U. S. (7 Wall.) 613; Butz v. City of Muscatine, 75 U. S. (8 Wall.) 575; Curran v. Arkansas, 15 How. (U. S.) 312; Lara-

The power of taxation existing when bonds are issued by a municipal corporation as duly authorized, and which is the only resource for their payment, is considered such a contract obligation, and any law which withdraws or limits this taxing power and leaves no adequate means for payment is null and void as violating the principle stated above.[115] The repeal of a charter

mie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Broughton v. City of Pensacola, 93 U. S. 266; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514.

Port of Mobile v. Watson, 116 U. S. 289. "The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the states for the convenient administration of their affairs and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company and they issue their bonds in payment of the stock taken or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations and their obligations are secured by all the guarantees which protect the engagements of private individuals. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation which existed when the contract was made must be left unimpaired by the legislature or if they are changed a substantial equivalent must be provided."

U. S. v. Port of Mobile, 12 Fed. 768; Amy v. City of Selma, 77 Ala. 103; New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478; Coulter v. Robertson, 24 Miss. 278; Blake v. Portsmouth & C. R. Co., 39 N. H. 435; Broadfoot v. City of Fayetteville, 124 N. C. 478; People v. Morris, 13 Wend. (N. Y.) 325. See, also, note in 2 Mun. Corp. Cas. 540.

[115] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; City of Galena v. Amy, 72 U. S. (5 Wall.) 705; Board of Liquidation v. McComb, 92 U. S. 531; Edwards v. Kearzey, 96 U. S. 595.

Louisiana v. City of New Orleans, 102 U. S. 203. "The obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced; by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means, impairs the obligation. If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened; The Latin proverb Qui cito dat bis dat—He who gives quickly gives twice has its counterpart in a maxim equally sound, Qui serius solvit, minus solvit,—He who pays too late pays less. Any authorization of the postponement of payment or of means by which such postponement may be effected is in conflict with the constitutional inhibition."

Louisiana v. Pilsbury, 105 U. S. 278; Ralls County Court v. U. S., 105 U. S. 733; Louisiana v. City of New Orleans, 109 U. S. 285; Louisiana v. Police Jury of St. Martin's Parish,

and reincorporation, either under general laws or a new charter, does not destroy the rights of the corporation to collect taxes or debts due it arising under the provisions of the old organization,[116] and, as has been seen, it does not cancel old obligations.

§ 32. Corporate existence, and the doctrine of collateral attack.

A public corporation is created by direct act of the sovereign or indirectly through a delegated body, by the granting of a charter, which is its written authority to act as a governmental agent, and exercise and perform the appurtenant powers and duties. The corporation may be organized under laws subsequently declared unconstitutional or void, or the formal steps in the organization may be imperfectly or irregularly taken, the condition in either case raising a doubt as to the legal existence of the corporation, this doubt with an adverse decision upon the question being resolved into a certainty. The corporation meanwhile has performed its duties and exercised its powers, it has levied and collected taxes, constructed public improvements, incurred debts and liabilities, and entered into contract relations with third parties who have acted in good faith and upon the assumption that the corporation possessed the necessary powers. The legality of the existence of the corporation or its right to perform these duties and exercise these powers is called in question. What is the effect upon past acts and the relations which exist as their result? And, again, the proposition may present itself,—in what manner, by whom, and at what time can the question of legal right be raised? The rule of law invariably is that the state alone can question the right of the public corporation to exist and perform its duties and exercise its rights, and

111 U. S. 716; Seibert v. Lewis, 122 U. S. 284; Martin v. Somerville Water-Power Co., 3 Wall. Jr. 206, Fed. Cas. No. 9,165; Fazende v. City of Houston, 34 Fed. 95; Edwards v. Williamson, 70 Ala. 145; Amy v. City of Selma, 77 Ala. 103; State v. City of New Orleans, 37 La. Ann. 13. The principle also applies to the amendment of a state constitution. Munday v. Assessors of Rahway, 43 N. J. Law, 338; Broadfoot v. City of Fayetteville, 124 N. C. 478; Basset v. City of El Paso (Tex.) 30 S. W. 893; State v. Common Council of Madison, 15 Wis. 33; Terry v. Wisconsin M. & F. Ins. Co. Bank, 18 Wis. 87; Smith v. City of Appleton, 19 Wis. 468.

[116] Milster v. City of Spartanburg (S. C.) 46 S. E. 539; Bennison v. City of Galveston (Tex. Civ. App.) 78 S. W. 1089.

then in a proceeding brought for that purpose. And also that the question of legal corporate existence cannot be raised in a case or proceeding as collateral to the main issue or through collateral attack.[117] This doctrine is adopted to protect the rights of innocent parties[118] and to enable the corporation, however

[117] Ralls County v. Douglass, 105 U. S. 728; Shapleigh v. San Angelo, 167 U. S. 646; Austrian v. Guy, 21 Fed. 500; National L. Ins. Co. of Montpelier v. City of Huron, 62 Fed. 778; Harris v. Nesbit, 24 Ala. 398; Ex parte Moore, 62 Ala. 471; Town of Searcy v. Yarnell, 47 Ark. 269; State v. North, 42 Conn. 79; In re Allison, 13 Colo. 525; State v. Town of Winter Park, 25 Fla. 371; Kettering v. Jacksonville, 50 Ill. 39; Cleveland, C., C. & St. L. R. Co. v. Dunn, 61 Ill. App. 227; Town of Geneva v. Cole, 61 Ill. 397; Alderman v. School Directors, 91 Ill. 179; People v. Nelson, 133 Ill. 565, 27 N. E. 217; School Directors of Union School Dist. v. School Directors of New Union School Dist., 135 Ill. 464, 28 N. E. 49; Cicero v. Williamson, 91 Ind. 541; Huff v. City of Lafeyette, 108 Ind. 14. Contra, Forsythe v. City of Hammond, 142 Ind. 505; State v. Independent School Dist., 44 Iowa, 227; State v. Pawnee County Com'rs, 12 Kan. 426; People v. Maynard, 15 Mich. 463; Kayser v. Bremen, 16 Mo. 88; City of Trenton v. Devorss, 70 Mo. App. 8; St. Paul Gas Light Co. v. Village of Sandstone, 73 Minn. 225; Coler v. Dwight School Tp., 3 N. D. 249, with many authorities cited and collated; State v. Brown, 31 N. J. Law, 355; Borough of Glen Ridge v. Stout, 58 N. J. Law, 598, 33 Atl. 858; State v. Whitney, 41 Neb. 613; Coast Co. v. Borough of Spring Lake, 56 N. J. Eq. 615, 36 Atl. 21; State v. Central Pac. R., 21 Nev. 75, 25 Pac. 296; City of El Paso v. Ruckman, 92 Tex. 86, 46 S. W. 25; Foster v. Hare, 26 Tex. Civ. App. 177, 62 S. W. 541; Angel v. Town of Spring City (Tenn. Ch. App.) 53 S. W. 191, holds following the Tennessee cases contrary to the general doctrine: Pratt v. Lincoln County, 61 Wis. 62; Town of Spooner v. Town of Minong, 104 Wis. 425. See, also, Stuart v. School Dist. of Kalamazoo, 30 Mich. 69, where the court says: "If every municipality must be subject to be called into court at any time to defend its original organization and its franchises at the will of any dissatisfied citizen who may feel disposed to question them, and subject to dissolution, perhaps, or to be crippled in authority and powers if defects appear, however complete and formal may have been the recognition of its rights and privileges, on the part alike of the state and its citizens, it may very justly be said that few of our municipalities can be entirely certain of the ground they stand upon, and that any single person, however honestly inclined, if disposed to be litigious, or over-technical and precise, may have it in his power in many cases to cause infinite trouble, embarrassment, and mischief." See, also, many cases cited in McQuillin, Mun. Ord. p. 546, note 86.

[118] Ashley v. Presque Isle County Sup'rs, 60 Fed. 55.

Speer v. Kearney County Com'rs, 88 Fed. 749. In this case the Court said: "Moreover we are unable to

irregularly formed, to compel obedience and enforce its rights.[119] A public corporation exercises affirmatively certain functions, or it may enter into contract or other obligations. It is with

yield our assent to the broad proposition that there can be no de facto corporation under an unconstitutional law. Such a law passes the scrutiny and receives the approval of the attorney general of the lawyers who compose the judiciary committees of the state legislative bodies, of the legislature, and of the governor before it reaches the statute book. When it is spread upon that book it comes to the people of a state with the presumption of validity. Courts declare its invalidity with hesitation and after long deliberation and much consideration even when its violation of the organic law is clear and never when it is doubtful. Until the judiciary has declared it void, men act and contract, and they ought to act and contract, on the presumption that it is valid; and where, before such a declaration is made, their acts and contracts have affected public interests or private rights they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged * * * cannot be avoided, as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity, by any ex post facto declaration or decision that the law under which they acted was void."

State v. City of Des Moines, 96 Iowa, 521, 65 N. W. 818; People v. Maynard, 15 Mich. 463; State v. Rich, 20 Mo. 393; Town of Winneconne v. Village of Winneconne, 11 Wis. 10.

As to rights of bondholders see Ashley v. Presque Isle County Supr's, 60 Fed. 55; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587; Brown v. Bon Homme, 1 S. D. 216.

See Ruohs v. Athens, 91 Tenn. 20, to the contrary, but in accord with Tennessee cases on the doctrine of collateral attack.

[119] City of Carlisle v. Blamire, 8 East, 487.

In the levy of taxes. Presque Isle County Sup'rs v. Thompson, 61 Fed. 914; Dean v. Davis, 51 Cal. 406; Trumbo v. People, 75 Ill. 561; People v. Newberry's Trustees, 87 Ill. 41; School Dist. No. 49 of Pawnee County v. School Dist. No. 21, 32 Kan. 123; Kansas Town & Land Co. v. City of Kensington, 6 Kan. App. 247; Chicago, St. L. & N. O. R. Co. v. Town of Kentwood, 49 La. Ann. 931; Mills v. Tp. of Richland, 72 Mich. 100, 40 N. W. 183; Keweenaw Ass'n v. School Dist. of Hancock Tp., 98 Mich. 437; State v. Mineral Land Co., 84 Mo. App. 32; State v. Central Pac. R. Co., 9 Nev. 79; Riverton & P. Water Company v. Haig, 58 N. J. Law, 295; Rellstab v. Borough of Belmar, 58 N. J. Law, 489; Gardner v. Christian, 70 Hun, 547, 24 N. Y. Supp. 339; Troutman v. McClesky, 7 Tex. Civ. App. 561; McCrary v. City of Comanche (Tex. Civ. App.) 34 S. W. 679; Eustis v. City of Henrietta (Tex. Civ. App.) 37 S. W. 632; McMickle v. Hardin, 25 Tex. Civ. App. 222, 61 S. W. 322; Kuhn v. City of Port Townsend, 12 Wash. 605; Frace v. City of Tacoma, 16 Wash. 69; Hornbrook v. Town of Elm Grove, 40 W. Va. 543.

regret the statement is made that too often public corporations endeavor to avoid or defeat an honest debt or a legal obligation by the claim of no authority or power. In such cases the Federal courts have maintained vigorously the doctrine of collateral attack and have repeatedly held, that where there is a doubt as to the legality of the creation of the corporation which can only be raised by the state, if the state fails to act until after debts are created and liabilities incurred, those obligations are not impaired or destroyed by a subsequent dissolution of the corporation,[120] or the declaration by a judicial tribunal in a proceeding brought for that purpose that the corporation was originally without legal authority. This doctrine of collateral attacks applies also to official acts of officers of public corporations, and it is the rule that in disputes between private parties the validity of a public corporation acting under forms of law cannot be called in question where its corporate existence is unchallenged by the state.[121]

The collection of fines. Hamilton v. President & Trustees of Carthage, 24 Ill. 22; Atchison, T. & S. F. R. Co. v. Wilson, 33 Kan. 223; Baker County v. Benson, 40 Or. 207, 66 Pac. 815.

The prosecution of criminals. In re Short, 47 Kan. 250; followed in In re Rabbitt, 47 Kan. 382; In re Williams, 47 Kan. 303; People v. Smith, 131 Mich. 70, 90 N. W. 666; Inhabitants of Fredericktown v. Fox, 84 Mo. 59; State v. Fuller, 96 Mo. 165, 9 S. W. 583; City of Billings v. Dunnaway, 54 Mo. App. 1; City of Clarence v. Patrick, 54 Mo. App. 462; Town of Henderson v. Davis, 106 N. C. 88.

The construction of public improvements. Powell v. City of Greensburg, 150 Ind. 148. Or, the enforcement of ordinances and the administration of public affairs. Graham v. City of Greenville, 67 Tex. 62.

[120] Shapleigh v. City of San Angelo, 167 U. S. 646. "The state being the creator of municipal corporations is the proper party to impeach the validity of their creation. If the state acquiesces in the validity of a municipal corporation its corporate existence cannot be collaterally attacked."

Graham v. City of Greenville, 67 Tex. 62.

[121] Union Nat. Bank v. Matthews, 98 U. S. 621; Miller v. Perris Irr. Dist., 85 Fed. 693; Mullikin v. City of Bloomington, 72 Ind. 161; State v. Council, 106 Iowa, 731, 77 N. W. 474; Cleveland, C., C. & St. L. R. Co. v. Dunn, 63 Ill. App. 531; Mendenhall v. Burton, 42 Kan. 570, 22 Pac. 558; Kirkpatrick v. State, 5 Kan. 673; Village of Arapahoe v. Albee, 24 Neb. 242; Campbell v. Wainright, 50 N. J. Law, 555; State v. Fuller, 96 Mo. 165; Stuart v. School Dist. of Kalamazoo, 30 Mich. 69; Jaquith v. Hale, 31 Mich. 430; State v. Whitney, 41 Neb. 613, 59 N. W. 884; State v. Henderson, 145 Mo. 329, 46 S. W. 1076.

§ 33. The dissolution of the corporation and its effects.

Public corporations may be dissolved through an act of the legislature;[122] they may voluntarily, under general laws, surrender their charters;[123] again, under general laws, they may change their grade or class, effecting in this manner a dissolution of the old corporation;[124] or the corporation may be dissolved as the result of a judgment of ouster in proceedings brought to determine its rights to corporate existence.[125] The courts have held as negative propositions that a corporation will not be dissolved by its failure to elect officers,[126] for the misuser or nonuser of its charter rights,[127] or the misconduct of its officers.

The debts and legal obligations of a public corporation can-

[122] Town of Cicero v. City of Chicago, 182 Ill. 301; State v. Hamilton, 40 Kan. 323, 19 Pac. 723; Kansas Town & Land Co. v. City of Smith Center, 6 Kan. App. 252; Woods v. Henry, 55 Mo. 560; State v. Honerud, 66 Minn. 32; State v. Crow Wing County Com'rs, 66 Minn. 519; Town of Watervliet v. Town of Colonie, 27 App. Div. 394, 50 N. Y. Supp. 487; James County v. Hamilton County, 89 Tenn. 237, 14 S. W. 601.

[123] State v. Husband, 26 Ind. 308; Fowler v. Vandal, 84 Minn. 392; Blauvelt v. Village of Nyack, 9 Hun (N. Y.) 153; Com. v. Judges of Quarter Sessions, 8 Pa. 391.

[124] In re Extension of Boundaries of Denver, 18 Colo. 288, 32 Pac. 615; Wiedwald v. Dodson, 95 Cal. 450; Mintzer v. Schilling, 117 Cal. 361, 49 Pac. 209; Com. v. Rose, 20 Ky. L. R. 1220, 49 S. W. 29.

[125] Dodge v. People, 113 Ill. 491. In this case the court says: "It is proper to inquire what effect the judgment (of ouster) had upon the village itself. There is no room for doubt on this point. The authorities are clear that its immediate effect was to dissolve the corporation, whether it existed de jure or de facto,—or in other words its effect was to completely extinguish and annihilate the artificial municipal body which had theretofore existed by the name of the village of Fidelity, together with its rights, liberties and franchises. Or differently stated, its effect was the immediate death of the artificial being followed by all the consequences which the law annexes to such a death. As in the case of a natural person its death operated as an absolute revocation of all power and authority on the part of others to act in its name or on its behalf."

[126] Welch v. City of Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372; State v. Dunson, 71 Tex. 65, 9 S. W. 103; Buford v. State, 72 Tex. 182; State v. Hoff (Tex. Civ. App.) 29 S. W. 672.

[127] Welch v. City of Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372; Butler v. Walker, 98 Ala. 358, 13 So. 261; Swamp Land Dist. No. 150 v. Silver, 98 Cal. 51, 32 Pac. 866; People v. Bancroft, 2 Idaho, 1077, 29 Pac. 112; Cain v. Brown, 111 Mich. 657, 70 N. W. 337; Largen v. State, 76 Tex. 323.

not be impaired or destroyed by a change in the grade or class of a municipal organization, or through its dissolution.[128] The duty of their payment or performance devolves upon the territory succeeding to the old corporation. Property belonging to the corporation dissolved usually passes to and under the control of the new organization embracing the identical territory.

In Nevada it is held that where legislation looking to the disincorporation of a town provides for the filing of claims within a certain time, its constitutionality cannot be raised by one not having a claim.[129]

§ 34. Forfeiture of charter.

The charter of a private corporation in the proper action may be forfeited by judicial decree for the commission of acts by the corporation contrary to the provisions of general statutes or express provisions of its charter. The act of forfeiture is equivalent to the taking of corporate life, as without it, it cannot legally exist. Courts are slow to inflict a penalty which represents the extreme rigor of the law. As said in a New York case:[130] "Its infliction must rest upon grave cause and be warranted by material misconduct. * * * The state as prosecutor must show on the part of the corporation accused some sin against the law of its being which has produced or tends to produce injury to the public. The transgression must not be merely formal or incidental, but material and serious and such

[128] Shapleigh v. City of San Angelo, 167 U. S. 646; City of Uvalde v. Spier, 91 Fed. 594; Amy v. City of Selma, 77 Ala. 103; Vandriss v. Hill, 58 Kan. 611; Overseers of the Poor v. Sears, 39 Mass. (22 Pick.) 122; Ross v. Wimberly, 60 Miss. 345; Clarke v. Reeves County, 25 Tex. Civ. App. 463, 61 S. W. 981; Little v. Union Tp. Committee, 40 N. J. Law, 397; Shankland v. Phillips, 3 Tenn. Ch. 556. See, also, cases cited in notes to §§ 45, 46 and 96.

[129] In re Sticknoth's Estate, 7 Nev. 223.

State v. Beck, 25 Nev. 68. "Courts will not consider an objection made to the constitutionality of an act of the legislature by a party whose rights it does not affect and who has, therefore, no interest in defeating it. It is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection to the unconstitutionality of a legislative act can be presented and sustained (Cooley, Const. Lim. 196, 197)."

[130] People v. North River Sugar Refining Co., 121 N. Y. 582.

as to harm or menace the public welfare, for the state does not concern itself with the quarrels of private litigants; it furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may and often do exceed their authority where only private rights are affected. When these are adjusted all mischief ends and all harm is averted. But where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty." A public corporation, it will be remembered, is a governmental institution or agency and created for the sole purpose of carrying out some aim of government resulting in the advantage and benefit of society. Because of the material and the essential difference between a public and a private corporation, the courts generally hold in this country, at least, that the charter of a public corporation cannot be forfeited. The government of a particular agency of the sovereign may change its form, but under existing conditions and political theories, it is legally impossible that a particular district, however sparse or dense its population, can exist without some form of government.[131] In England the earlier cases held that the charter of a public corporation, like that of a private, could be forfeited by the sovereign in the proper proceedings.[132] The universal rule obtains that an incorporated town or city retains corporate capacity until its charter has been declared forfeited in a direct judicial proceeding looking to that end. The forfeiture of a charter cannot be declared in a collateral proceeding.[133]

II. Territorial Changes and Their Effect.

§ 35. Boundaries; their enlargement.

A public corporation is the organization of a certain geographical district under authority of law for the purpose, if a public

[131] Port of Mobile v. U. S., 116 U. S. 289; Harris v. Nesbit, 24 Ala. 398; State v. Stevens, 21 Kan. 210; Attorney General v. City of Salem, 103 Mass. 138; Attorney General v. City of Boston, 123 Mass. 460; Dillon, Mun. Corp. (4th Ed.) § 168.

[132] Rex v. Grosvenor, 7 Mod. 198; Smith's Case, 4 Mod. 55; Rex v. Saunders, 3 East, 119; Rex v. Inhabitants of Kent, 13 East, 220; Lyme Regis v. Henley, 2 Clark & F. 331; Attorney General v. Shrewsbury Corp., 6 Beav. 220.

[133] Harris v. Nesbit, 24 Ala. 398; Whalin v. City of Macomb, 76 Ill.

or quasi public corporation, of acting as a governmental agent,—carrying out exclusively some one or more of the functions of government; or, if a municipal corporation, of combining with the above additional powers or privileges and of legislating upon matters more particularly affecting the conditions and convenience of those residing within its limits. The corporation in both instances includes, within its jurisdiction and control, a certain geographical area. The fact that at the time of its organization it includes or is included within certain limits does not prevent the passage of future legislation enlarging boundaries or dividing territory, or preclude annexation or division under existing laws. To state the principle more concisely, a public corporation, of whatever class, may have its territorial limits under authority of law, arbitrarily or otherwise enlarged or reduced.

The paramount question, if action is taken of this character, is that of legislative authority,[134] and the extent and manner of

49; Hornbrook v. Town of Elm Grove, 40 W. Va. 543. See, also, cases cited § 32, note 46.

[134] U. S. v. City of Memphis, 97 U. S. 284; Paxson v. Holt, 40 Cal. 466; People v. City of Oakland, 92 Cal. 611; People v. City of Oakland, 123 Cal. 598; People v. Fleming, 10 Colo. 553, 16 Pac. 298; City of Jacksonville v. L'Engle, 20 Fla. 344; Saunders v. Provisional Municipality of Pensacola, 24 Fla. 226, 4 So. 801.

City of Brunswick v. Finney, 54 Ga. 317. The authority for annexation may be made subject to the condition that the people affected give their consent.

City of Burlington v. Leebrick, 48 Iowa, 252. The constitutional objection held not good that legislative powers are conferred upon the circuit court through Iowa Code, § 431, providing that cities may institute proceedings in the circuit court for the annexation of contiguous territory under certain conditions.

And the same is held in Kansas. Eskridge v. City of Emporia, 63 Kan. 368, 65 Pac. 694.

Defects in annexation proceedings held cured by subsequent legislation. Edmunds v. Gookins, 24 Ind. 169; Taylor v. City of Ft. Wayne, 47 Ind. 274.

The territory annexed should be platted. Paul v. Town of Walkerton, 120 Ind. 565, 50 N. E. 725; Prescott v. City of Chicago, 60 Ill. 121.

Village of Hyde Park v. City of Chicago, 124 Ill. 156, 16 N. E. 222. Where an act giving the power to extend the limits of an incorporated city so as to include an adjoining incorporated town is held unconstitutional, an election held pursuant to such act will not operate as a consolidation of the two towns.

Town of Cicero v. City of Chicago, 182 Ill. 301; People v. Binns, 192 Ill. 68; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; Lewis v. Town of Brandenburg, 20 Ky. L. R. 1011, 47 S. W. 862, 48 S. W. 978;

derive from the imposition of its new form of government;[139] and whether or not, as has already been suggested, its value is enhanced to such a degree by the existence of a center of population near by that it should justly share its proportion of the burdens of such municipality.[140]

In Kentucky and Iowa it is held independent of statute that while the power of the corporation to extend its boundaries will not be interfered with or limited by the fact that the rate of taxation inside the city limits is higher than that in the territory annexed, yet in the exercise of such power it is required that the city must establish a special rate of taxation for the territory so annexed in order to avoid any unjust increase of the burden of taxation disproportionate to the benefits received.[141]

sentative districts, such alteration being forbidden by the constitution.

Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; City of St. Louis v. Allen, 13 Mo. 400.

People v. Prillen, 73 App. Div. 207, 76 N. Y. Supp. 821. N. Y. Consolidation Laws of 1882, chap. 410, construed as to authority for licensing engineers. City of Omaha v. City of South Omaha, 31 Neb. 378, 47 N. W. 1113; State v. Van Camp, 36 Neb. 9, 91, 54 N. W. 113; Blanchard v. Bissell, 11 Ohio St. 96; Appeal of Brinton, 142 Pa. 511; Union County v. Knox County, 90 Tenn. 541; State v. City of Waxahachie, 81 Tex. 626. See, also, 33 Am. & Eng. Corp. Cas.

[139] Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725.

Lake Erie & W. R. Co. v. City of Alexandria, 153 Ind. 521. In this case the reasons given, in affirming an order annexing territory, set out quite clearly necessary conditions coming within the rules suggested in the text. It was alleged in the petition that certain territory required better police surveillance than could be given without municipal control, that property and residents within that territory enjoyed police protection without the payment of taxes therefor, and further, that the territory needed water, sewage and improved street facilities, which could only be secured through municipal organization.

Town of Latonia v. Hopkins, 104 Ky. 419, 47 S. W. 248; Specht v. City of Louisville, 22 Ky. L. R. 699, 58 S. W. 607; Copeland v. City of St. Joseph, 126 Mo. 417; Parker v. Zeisler, 73 Mo. App. 537; Kansas City v. Stegmiller, 151 Mo. 189; Village of Hartington v. Luge, 33 Neb. 623, 50 N. W. 957; Village of Syracuse v. Mapes, 55 Neb. 738, 76 N. W. 458; Jones v. City of Memphis, 101 Tenn. 188, 47 S. W. 138.

[140] Village of Syracuse v. Mapes, 55 Neb. 738, 76 N. W. 458.

City of East Dallas v. State, 73 Tex. 370. Where the court referred to "A tendency on the part of thriving and ambitious cities to extend the limits of the municipality beyond the urban population and to subject to taxation persons and property who neither need nor receive any protection from the city government."

[141] Maltus v. Shields, 59 Ky. (2

"That injustice may be and has sometimes been done by the annexation of territory to a town which has contracted an improvident debt is no doubt true; and sometimes, and perhaps more frequently, the owners of contiguous territory have had the benefit, by reflected value and convenience, of expenditures for which they have not contributed anything. The question is one beyond the reach of practical consideration, in the absence of any statute; and it would require a very artificial and unsound mode of reasoning to hold that territory could not be annexed to a town which owed debts until the owners of such territory were paid a compensation in money for a proportional part of such debts, on the ground that the property annexed was condemned for public use."[142] Territory may be enlarged by the annexation of contiguous land notwithstanding the remonstrances of the people residing within such territory unless the constitution or general statutes of the state require that the consent of all the inhabitants shall be first obtained. This consent is frequently required as a condition precedent to annexation.[143] Another question sometimes considered by the courts is its availability for certain uses; is it fit for platting or other urban purposes, or is a strictly rural use the only one to which it can be put?[144] Another limitation upon the power to annex

Metc.) 553; Louisville Bridge Co. v. City of Louisville, 81 Ky. 189; Deiman v. City of Ft. Madison, 30 Iowa, 542; Butler v. City of Muscatine, 11 Iowa, 433.

[142] Powers v. Wood County Com'rs, 8 Ohio St. 286.

[143] Village of Hartington v. Luge, 33 Neb. 623, 50 N. W. 957; City of Topeka v. Gillett, 32 Kan. 431; Opinion of Justices, 60 Mass. (6 Cush.) 580; Stone v. City of Charlestown, 114 Mass. 214; Daly v. Morgan, 69 Md. 460; City of St. Louis v. Russell, 9 Mo. 507; City of East Dallas v. State, 73 Tex. 371.

[144] Clark v. Kansas City, 176 U. S. 114; Vestal v. City of Little Rock, 54 Ark. 321, 15 S. W. 891, 16 S. W. 291; City of Eureka Springs v. Woodruff, 55 Ark. 616; City of Evansville v. Page, 23 Ind. 525; Chandler v. City of Kokomo, 137 Ind. 295, 36 N. E. 847; Pittsburgh, C., C. & St. L. R. Co. v. City of Indianapolis, 147 Ind. 292, 46 N. E. 641; Glover v. City of Terre Haute, 129 Ind. 593; Forsythe v. City of Hammond, 142 Ind. 505; Lake Erie & W. R. Co. v. City of Alexandria, 153 Ind. 521; Glass v. City of Cedar Rapids, 68 Iowa, 207; City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616; Union Pac. R. Co. v. Kansas City, 42 Kan. 497, 22 Pac. 633; Tilford v. City of Olathe, 44 Kan. 721; following City of Emporia v. Smith, 42 Kan. 433, 22 Pac. 616; Eskridge v. City of Emporia, 63 Kan. 368, 65 Pac. 694; Yancey v. Town of Fairview, 23 Ky. L. R. 2087, 66 S. W. 636; Copeland v. City of St. Joseph,

may lie in the fact that the territory sought to be included forms in itself an organization of a municipal or public quasi corporation nature.[145]

Many of the cases cited, following a statutory provision, hold that annexation of lands not ordinarily coming within the rule may be effected where the owners of such lands petition or vote for annexation. This is especially true in cases where as a consequence municipal taxes may be or are imposed on lands strictly rural in character and therefore not capable of receiving the benefits or advantages usually derived from municipal organization.[146]

§ 37. The petition for annexation.

It is difficult to state a general rule or principle of law which shall govern the formulating of a petition having for its purpose the annexation of territory to an existing public corporation. This difficulty arises from the fact that proceedings looking to this end are usually statutory in their character. It might be said that in the construction of such provisions that rule should be given which applies to all rights created by statute, namely, the rule of strict construction. The petition is usually held jurisdictional, and noncompliance with the statutes in form and averments is generally held fatal.[147] If there are statutory pro-

126 Mo. 417; State v. Dimond, 44 Neb. 154; City of Wahoo v. Tharp, 45 Neb. 563; Chicago, B. & Q. R. Co. v. Nebraska City, 53 Neb. 453, 73 N. W. 952.

[145] McAskie's Appeal, 154 Pa. 24.

[146] People v. Bennett, 29 Mich. 451; In re Borough of Camp Hill, 142 Pa. 511, 21 Atl. 978; In re Borough of Little Meadows, 28 Pa. 256; In re Borough of Blooming Valley, 56 Pa. 66; Kelly v. City of Pittsburgh, 85 Pa. 170; Hewitt's Appeal, 88 Pa. 55; City of East Dallas v. State, 73 Tex. 371; State v. Town of Baird, 79 Tex. 63. See, also, cases cited in preceding note.

As to the effect upon a homestead through annexation to a municipality see Finley v. Dietrick, 12 Iowa, 516; Traux v. Pool, 46 Iowa, 256.

[147] People v. City of Oakland, 123 Cal. 598; Forsythe v. City of Hammond, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950; Elston v. Trustees of Crawfordsville, 20 Ind. 272; In re Chester Tp., 174 Pa. 177; Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725; Layton v. City of Monroe, 50 La. Ann. 121; State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631; Graham v. City of Greenville, 67 Tex. 62; Mason v. City of Loudon, 67 Tenn. (8 Baxt.) 94; Armstrong v. City of Topeka, 36 Kan. 432, 13 Pac. 843. See, also, notes in 33 Am. & Eng. Corp. Cas.

visions permitting an amendment of such petition by a court having jurisdiction, an order of this court must be obtained before the amendment will be valid, and then only upon terms permitting those who may object to be heard.[148]

The determination by an authorized official body that the petition contains the necessary legal averments and is signed by the required number of properly qualified voters, is usually held by the courts to be conclusive in the absence of fraud, and such is ordinarily the presumption of law.[149] It thereupon becomes the duty of such body, when the annexation of territory is dependent upon the consent of the people, to order an election for such purpose.[150]

In dealing with the presumption of law in such cases, the court in the Crow Wing County case cited said: "Respondents further contend that the finding of the commission followed as it is by the proclamation of the governor is conclusive, and that the courts cannot in any manner review such finding. Undoubtedly every presumption is in favor of such finding and proclamation; and until the relator is able to prove that there were neither facts nor proper evidence of facts to support such finding it must stand. But if it sufficiently appears that the finding is wholly unsupported either by the actual existing facts or the proper evidence thereof, the relator should have judgment. We are also of the opinion that false, ex parte affidavits as to the number of voters residing in the territory in question, or as to any other fact, are not competent and sufficient evidence to sustain such findings, and neither is the false report of some private citizen sent by the commission to ascertain the facts. As the statute does not provide for any hearing on notice before the commission but leaves the latter to ascertain in its own way whether

[148] Vogel v. City of Little Rock, 55 Ark. 609; Woodruff v. City of Eureka Springs, 55 Ark. 616; Shugars v. Williams, 50 Ohio St. 297, 34 N. E. 248. See, also, notes 33 Am. & Eng. Corp. Cas.

[149] People v. City of Los Angeles, 133 Cal. 338, 65 Pac. 749; Windfall Mfg. Co. v. Emery, 142 Ind. 456; People v. City of Peoria, 166 Ill. 517; Town of Williamstown v. Matthews, 19 Ky. L. R. 1766, 44 S. W. 387; State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631. This presumption may be rebutted by competent evidence. Hunter v. Senn, 61 S. C. 44.

[150] Roberts v. People, 93 Ill. App. 645; Young v. Carey, 184 Ill. 613; Shank v. Town of Ravenswood, 43 W. Va. 242, 27 S. E. 223.

the petitions are conformable to law, the relator must show not only that there was no competent evidence before the commission to sustain the finding, but also that the actual facts do not sustain such finding.'"[151]

Where territory to be annexed must be contiguous or adjacent, it is necessary to recite in the petition that land about to be annexed is of such character.[152] It is usually necessary to include in the petition averments to the effect that the territory sought to be annexed will, because of its character or location, be benefited by the annexation.[153]

§ 38. Notice necessary.

The usual rules that govern the giving of notice obtain here as to those whose rights may be affected by the annexation of territory, and it can be said that such proceedings will not be held legal and binding upon those not receiving notice of their pendency in the manner required by law, usually by publication, posting or personal service.[154]

§ 39. Objections to annexation.

Objections to the annexation of territory may be filed at the proper time by those whose rights are injuriously affected. These objections may go either to the jurisdiction of the tribunal then passing upon the question, or to the merits of the proceeding. In order that territory can be annexed, certain conditions and facts must exist; some of these conditions created by law, others arising from the application of fundamental principles.[155] The

[151] State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631.

[152] Chandler v. City of Kokomo, 137 Ind. 295, 36 N. E. 847; State v. Town of Westport, 116 Mo. 582; In re Heidler, 122 Pa. 653.

[153] Village of Hardington v. Luge, 33 Neb. 623.

[154] Gunter v. City of Fayetteville, 56 Ark. 202; Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031; City of Bloomington v. Dunn, 27 Ind. App. 81, 60 N. E. 958; State v. Town of Westport, 116 Mo. 582, 22 S. W. 888; Pelton v. Ottawa County Sup'rs, 52 Mich. 517; Gottschalk v. Becher, 32 Neb. 653; McFate's Appeal, 105 Pa. 323; In re Borough of Camp Hill, 142 Pa. 511.

[155] Windfall Mfg. Co. v. Emery, 142 Ind. 456; Hiatt v. Town of Darlington, 152 Ind. 570; Town of Latonia v. Hopkins, 20 Ky. L. R. 620, 47 S. W. 248; City of Lebanon v. Creel, 22 Ky. L. R. 865, 59 S. W. 16; City of Louisville v. Town of Crescent Hill, 21 Ky. L. R. 755, 52 S. W.

principle of estoppel as well as laches applies to objections or attacks made upon the validity of annexation proceedings.[156]

§ 40. Official declaration.

A declaration or order by the proper authorities may be required by statute before territory sought to be annexed becomes a part of the corporation seeking such annexation or falls within its jurisdiction for the purpose of levying municipal taxes or exercising municipal control.[157]

The right of appeal. In case of an adverse decision, property owners should have the privilege and right of appeal, and this is especially true where the tribunal passing upon the matter is of a ministerial or quasi judicial character or an inferior judicial body. If this rule did not exist, the confiscation of property might be arbitrarily and effectually accomplished without an opportunity for the correction of the wrong.[158] The appeal is usually a trial de novo upon the questions which can be and are raised. As already suggested the findings or conclusion of the inferior body, in certain respects, may be conclusive, except in cases of fraud. One's right to appeal cannot be questioned or denied on the ground that his interest may be trifling.

In an Iowa case the court said: "The assessed valuation of the land is $80 and the taxes thereon amount to $1.31. This is thought to be too trifling to permit an action. The law provides

1054; Summers v. Town of Elsmere, 21 Ky. L. R. 1525, 55 S. W. 682; In re Robinson's First Addition to City of Hutchinson, 62 Kan. 426, 63 Pac. 426; Felix v. Wagner, 39 La. Ann. 391; City of Pittsburg's Appeal, 79 Pa. 317; In re Incorporation of Borough of Edgewood, 130 Pa. 348, 18 Atl. 646; In re Borough of Warren, 168 Pa. 441.

[156] Black v. Town of Brinkley, 54 Ark. 372, 15 S. W. 1030. A delay of eight months regarded as laches.

State v. City of Des Moines, 69 Iowa, 521, 65 N. W. 818. The principle of estoppel applies even where the original authority was unconstitutional.

Cobb v. Kingman, 15 Mass. 197. In this case there had been an acquiescence for eighty years in existing conditions.

Gottschalk v. Becher, 32 Neb. 653; In re Borough of Camp Hill, 142 Pa. 511, 21 Atl. 978; Sherry v. Gilmore, 58 Wis. 324.

[157] Murray v. City of Virginia, 91 Ill. 558.

[158] Phillips v. Corbin, 8 Colo. App. 346; Wilcox v. City of Tipton, 143 Ind. 241; Forsythe v. City of Hammond, 142 Ind. 505; Paul v. Town of Walkerton, 150 Ind. 565, 50 N. E. 725; Lewis v. Town of Brandenburg, 20 Ky. L. R. 1011, 47 S. W. 862, 48 S. W. 978.

that any citizen having an interest in the question may prosecute the action to final judgment. The law was complied with * * * and this is conclusive upon us."[159] However, the statutes in some cases limit such right of appeal to citizens and freeholders of the territory sought to be included.[160]

§ 41. The effect of annexation upon those concerned.

Upon the annexation of territory to a public corporation already organized, existing rights either of the corporation itself, of those residing within its limits, or of those who have had dealings with the corporation, may be affected by such action.[161] There may be suits pending by or against the corporation, and it is held that such annexation does not or cannot affect or change the rights or status of the parties.[162] The territory annexed may have been a public quasi or a municipal corporation with obligations, liabilities or contract rights existing in favor of private parties. The rule of law is uniform that no organized territory can avoid or defeat such rights and obligations by a change in its form of government, or even through its dissolution. Even the lgislature cannot authorize or permit the destruction of contract rights or of legal obligations through such proceedings by dishonest public corporations.[163] This subject will be considered at greater length in succeeding sections.

It seems to be also the general rule that in cases of annexation

[159] State v. City of Des Moines, 96 Iowa, 521, 65 N. W. 818.

[160] Pittsburgh, C., C. & St. L. R. Co. v. City of Indianapolis, 147 Ind. 292, 46 N. E. 641.

[161] People v. City of Oakland, 123 Cal. 598. Held here that the annexation of new territory would not be considered an amendment to a city's charter.

Edmunds v. Gookins, 20 Ind. 477; Harrison v. People, 97 Ill. App. 421; City of East St. Louis v. Rhein, 139 Ill. 116, 28 N. E. 1089; Morris County Com'rs v. Hinchman, 29 Kan. 90; Pence v. City of Frankfort, 101 Ky. 534, 41 S. W. 1011; Dees v. City of Lake Charles, 50 La. Ann. 356, 23 So. 382; Inhabitants of Wilton v. Inhabitants of New Vineyard, 43 Me. 315; Inhabitants of Castine v. Inhabitants of Winterport, 56 Me. 319; Miller v. Greenwalt, 64 N. J. Law, 197, 44 Atl. 880; Miller v. Greenwalt, 64 N. J. Law, 722, 46 Atl. 1100; Wright v. City of Mt. Vernon, 44 App. Div. 574, 60 N. Y. Supp. 1017.

[162] People v. City & County of San Francisco Sup'rs, 21 Cal. 668.

[163] D'Esterre v. City of New York (C. C. A.) 104 Fed. 605; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; Kearny County Com'rs v. Vandriss (C. C. A.) 115 Fed. 866; Henderson v. City of New York, 65 App. Div. 180, 72 N. Y. Supp. 609.

of organized territory, its powers cannot be diminished through the fact that in some respects the powers of the municipality to which it is annexed may be less, though this may be regulated by statutory provisions.[164]

The consolidation of territory into municipal organizations usually does not affect the lines of highway, parish, school, judicial or legislative districts embraced within such territory, but these continue the same as before the consolidation or annexation.[165]

The control of public property passes upon the consolidation of municipalities to the consolidated organization. It does not remain, as a rule, with the corporations consolidating. These, for purposes of regulation and ownership, pass out of existence.[166]

So long as the corporation retains the same identity, its claim and title to property remain unaffected.[167]

§ 42. Division of public corporations and the authority.

A municipal corporation proper partakes both of the nature of a public and private corporation. It is public in that it is a governmental agent performing public duties as directed by the legislature, receiving and holding its charter and powers at the will of the legislature; a private corporation, but differing from others, in that it is one organized for the better comfort, advantage and convenience of those residing within its limits. The wants of centers of population are many and complex compared

[164] City of Chicago v. Weber, 94 Ill. App. 561; People v. Harrison, 191 Ill. 257; People v. Roosevelt, 24 App. Div. 17, 48 N. Y. Supp. 1043; Glentz v. State, 38 Wis. 549; Bronx Gas & Elec. Co. v. City of New York, 17 Misc. 433, 41 N. Y. Supp. 358.

[165] Kentucky Wagon Mfg. Co. v. City of Louisville, 20 Ky. L. R. 408, 46 S. W. 499; Harrisson v. Hernsheim, 28 La. Ann. 881. The jurisdiction of state courts is never affected by changes in the boundaries of municipal corporations.

Dillingham v. Snow, 5 Mass. 547; Overseers of Poor v. Sears, 39 Mass. (22 Pick.) 122. See cases cited § 85.

[166] Wright v. City of Mt. Vernon, 44 App. Div. 574, 60 N. Y. Supp. 1017; Inhabitants of Bloomfield v. Borough of Glen Ridge, 54 N. J. Eq. 276, 33 Atl. 925; Wabash R. Co. v. City of Defiance, 52 Ohio St. 262, 40 N. E. 89.

[167] Heizer v. Yohn, 37 Ind. 415; Springwells Tp. v. Wayne County Treasurer, 58 Mich. 240; Norris v. Town of Smithville, 31 Tenn. (1 Swan) 164; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93.

with the needs of country sparsely settled. Cities, towns and villages must have water and sewerage facilities to preserve the health of their inhabitants, fire and police departments to protect the property and lives of those residing or coming within their borders, and in addition to these elementary desires, facilities for rapid transportation from one part of the territory to another, and others ordinarily termed public utilities, the character and control of which are questions of practical economics and politics rather than of law.

From the ideas suggested in the preceding paragraph it will be seen that a necessity may exist for division of organization. Territory becomes more densely populated, and, in order that this center of population shall be better governed and property better protected, there arises a demand for a change in the grade of governmental organization or for a concentration of government.

A public corporation being an artificial person exists wholly at the pleasure of the sovereign. This principle applies to all of its rights, powers and liabilities, its boundaries, its revenues, its mode of organization, and its municipal life. In order therefore that territory may be divided, as in the case of the annexation or consolidation of adjoining districts, there must exist the legal authority for such division; and we may find this authority either in the general statutes of a state or in a special act passed on a particular occasion to meet a peculiar need.[168]

It is within the discretion of the legislature, limited only by constitutional provisions, to provide the mode of division, either by means of an election[169] held in the manner and at the time

[168] See chap. III on legislative control, post.

[169] Van Dusen v. Fridley, 6 Dak. 322; People v. George, 2 Idaho, 813, 26 Pac. 983; People v. Reynolds, 10 Ill. 1; Monk v. Town of George, 86 Iowa, 315.

State v. Mantor, 14 Minn. 437 (Gil. 327). Proceedings of county commissioners held void as unauthorized by law.

State v. Nelson, 34 Neb. 162, 51 N. W. 648; State v. Dimond, 44 Neb. 154; State v. Clark, 59 Neb. 702, 82 N. W. 8; citing 17 Neb. 188; 22 Neb. 158; 26 Neb. 521; 29 Neb. 460; 43 Neb. 635; 50 Neb. 130, 620; and 51 Neb. 801; State v. Armstrong, 30 Neb. 493; State v. Roper, 47 Neb. 417; In re Mathews, 59 App. Div. 159, 69 N. Y. Supp. 203; People v. Morrell, 21 Wend. (N. Y.) 563; Sansom v. Mercer, 68 Tex. 488, 5 S. W. 62; Freemont County Com'rs v. Perkins, 5 Wyo. 166, 38 Pac. 915. See, also, cases cited, § 85.

provided, and upon the consent at this election of a certain percentage of the duly qualified voters of the district affected,[170] or it may provide arbitrarily and directly for the division of the territory.[171] In states having constitutional provisions prohibiting special legislation, such acts must be of a general nature and have a uniform operation throughout the state.

Division of territory upon the principles suggested can be applied not only to the subdivision of the larger political organizations, but also to the division and rearrangement of what may be termed the ward lines of an existing municipality. In the latter case the rearrangement of such lines is effected through the city council, the local legislative body of the municipal corporation possessing the legal authority.[172]

One of the fundamental differences between a municipal corporation proper and a public or public quasi corporation is the difference in power as to the initiation of action legislative in its character, looking to the betterment and convenience of the people within its limits. The city council or legislative body, by whatever name it may be known, has this power of local

[170] McKena v. Mount Vernon, 51 Iowa, 306; State v. Cheyenne County Com'rs, 24 Neb. 40, 38 N. W. 40; State v. Armstrong, 30 Neb. 493.

[171] People v. Martin, 178 Ill. 611.

Seibert v. Swayne, 97 Ill. App. 85. A general law does not authorize a proceeding for the disconnection of territory from a town incorporated by a special act.

State v. Kinsella, 14 Minn. 524 (Gil. 395). Provisions for dividing township cannot be included in an act entitled "An act to incorporate the village of F."

State v. Ruhe, 24 Nev. 251, 52 Pac. 274; People v. Hayt, 7 Hun (N. Y.) 39.

[172] Cleveland, C., C. & St. L. R. Co. v. Dunn, 61 Ill. App. 227; People v. City of Danville, 147 Ill. 127; Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; Inhabitants of Tisbury v. Inhabitants of West Tisbury, 171 Mass. 201; State v. Stewart, 52 Neb. 243; Morton v. Carlin, 51 Neb. 202; but county commissioners have no power to change ward lines of city; State v. City of Newark, 53 N. J. Law, 4, 20 Atl. 886; McLaughlin v. City of Newark, 57 N. J. Law, 298, 30 Atl. 543; Smith v. Howell, 60 N. J. Law, 384.

In Gilhooly v. City of Elizabeth and Hopper v. City of Paterson, 66 N. J. Law, 484, 49 Atl. 1106, it is held that a commission appointed by the government to district or redistrict wards in cities is unconstitutional as a regulation of municipal affairs by commission.

State v. City of Bayonne, 54 N. J. Law, 125, 22 Atl. 1006; McCulley v. City of Elizabeth, 66 N. J. Law, 555, 49 Atl. 686; Griffin v. Wanser, 57 N. J. Law, 535, 31 Atl. 222; State v. Pugh, 43 Ohio St. 98. See, also, cases collected in 33 Am. & Eng. Corp. Cas.

initiation to a large extent, and the objection raised at times does not hold that powers exercised cannot be legally exercised because they are possessed originally by the legislative body of the sovereign as delegated powers, and cannot therefore in turn be delegated in their performance to others.

Legal authority may also exist for the division of districts organized not only for municipal purposes, as commonly understood, but also for judicial or legislative.[173]

§ 43. Character of the district divided or disconnected.

Granting the existence of legal authority, the question may arise as to the character of the territory or districts to be divided, and if they possess such characteristics that under the authority granted the division can be effected. Territory may be disconnected from an existing municipality when it fails to retain or does not possess the characteristics which would enable it in the first instance to be annexed to an adjoining municipal organization.[174]

The existence of a deep wooded ravine is not such a natural division of territory as requires separate corporate existence,[175] and prohibitions against the division or disconnection of territory may apply to the area[176] or population of a certain district.[177] And it has also been held that the owner of agricultural lands included within the boundaries of a village is not precluded from maintaining a suit to have such lands detached.[178]

[173] Howard v. McDiarmid, 26 Ark. 100; Sabin v. Curtis, 3 Idaho, 662, 32 Pac. 1130; Alfred v. State, 37 Miss. 296; In re McGinness' Estate, 13 Misc. 714, 35 N. Y. Supp. 820; Baker County v. Benson, 40 Or. 207, 66 Pac. 815; Galley v. Guichard, 27 La. Ann. 396; State v. Williams, 29 La. Ann. 779; Lafayette F. Ins. Co. v. Remmers, 29 La. Ann. 419; State v. Blasdel, 6 Nev. 40; In re Judges' Contested Election, 109 Pa. 337.

[174] Rice v. Colorado Smelting Co., 28 Colo. 519, 66 Pac. 894; Gilbert v. Morgan, 98 Ill. App. 281; City of Geneva v. People, 98 Ill. App. 315. See, also, 33 Am. & Eng. Corp. Cas.

[175] In re Borough of Edgewood, 130 Pa. 348, 18 Atl. 646.

[176] State v. Armstrong, 30 Neb. 493, 46 N. W. 618; State v. Merriman, 6 Wis. 14; State v. Elwood, 11 Wis. 17.

[177] City of Hastings v. Hansen, 44 Neb. 704, 63 N. W. 34.

[178] Village of Osmond v. Smathers, 62 Neb. 509, 87 N. W. 310; Village of Osmond v. Matteson, 62 Neb. 512, 87 N. W. 311.

§ 44. Mode of division, with official declarations.

The division of territory may be effected either on petition signed by those duly qualified by law, or on an election called and held in the statutory manner. The result to be judicially declared by a judicial or ministerial body or a board of county commissioners,[179] or a legislative body, viz., the city council of an organized municipality.[180]

In the Iowa case cited, the court held an ordinance fixing the boundaries invalid because not adopted by a majority of the whole number of the council necessary under the Iowa code. The necessity exists in all cases for an official declaration and determination of the result, and it is usually held that where the facts as presented show authority for a division or detachment of territory, such board or body have no discretionary powers; neither can they act judicially upon matters not appearing upon the face of the returns.[181]

Upon a hearing for the consideration of a petition for the disconnection or division of territory, or the determination of the result of an election held to accomplish the same purpose, unless such is had before a court of superior jurisdiction, the proceed-

[179] People v. Binns, 192 Ill. 68. As to appointment of commissioners to divide a town site in pursuance of 14 U. S. St. 541, see Allen v. Houston, 21 Kan. 194. People v. Carpenter, 24 N. Y. 86; Griffin v. Wanser, 57 N. J. Law, 535; In re Exeter Borough, 8 Kulp (Pa.) 115; In re Wyalusing Tp., 2 Serg. & R. (Pa.) 402; In re Summit Borough, 114 Pa. 362; State v. Rigsby, 17 Tex. Civ. App. 171, 43 S. W. 271; In re Harrison Tp., 5 Pa. 447.

[180] Cascaden v. City of Waterloo, 106 Iowa, 673, 77 N. W. 333; McCulley v. City of Elizabeth, 66 N. J. Law, 555, 49 Atl. 686; State v. Darrow, 65 Minn. 419, 67 N. W. 1012.

[181] City of Geneva v. People, 98 Ill. App. 315; Village of New Holland v. Holland, 99 Ill. App. 251; Henry v. Taylor, 57 Iowa, 72. But see contra, Monk v. Town of George, 86 Iowa, 315, 53 N. W. 240, where passage of ordinance disconnecting territory was sought to be compelled by mandamus.

Kansas Town Co. v. McLean, 7 Kan. App. 101; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328; Inhabitants of Orvil v. Borough of Woodcliff, 61 N. J. Law, 107; Brown v. Fowzer, 114 Pa. 446; Case of Green Township, 9 Watts & S. (Pa.) 22; In re Limestone Township, 11 Pa. 270; In re Plum Township, 83 Pa. 73; but In re Gettysburg, 90 Pa. 355, and In re Fifteenth Ward, 11 Phila. (Pa.) 406, hold that it is proper practice in the petition to ask for a division, leaving the details as to the number of wards and the boundaries thereof to the judgment of the commissioners.

ings are usually of an informal nature,[182] and the rules of evidence do not strictly apply to testimony introduced, though rules of law as to the waiver of rights by appearance or trial usually obtain.[183] It may also be necessary to give a notice in writing, and this when required is jurisdictional as to persons or property affected.[184]

§ 45. Effects of annexation or division upon public property and liabilities.

A public corporation, during its existence, acquires property and usually contracts liabilities. This property is partially or wholly paid for through the levy of taxes upon taxable interests within its jurisdiction. In the annexation of territory, the effects of such action are comparatively few and unimportant. When territory is divided, however, other and more serious questions may arise: The obligations or liabilities before division; how apportioned, and if wholly assumed by part of the territory thus divided, by what part; and, on the other hand, what part of the district thus divided should retain the property. On these questions many cases will be found fixing or attempting to fix a rule as to the division of both liabilities and property, which shall be just and equitable considered from the standpoint of the corporation itself and private individuals with contract rights capable of enforcement or creditors of the corporation.[185]

[182] In re Borough of Lansford, 141 Pa. 134, 21 Atl. 503.

[183] Luick v. Town of Belmond, 109 Iowa, 361.

[184] Pelton v. Ottawa County Sup'rs, 52 Mich. 517.

[185] Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; Comanche County Com'rs v. Lewis, 133 U. S. 205; Pepin Tp. v. Sage, 129 Fed. 657; Perry County v. Conway County, 52 Ark. 432; Washington County v. Weld County, 12 Colo. 154; True v. Davis, 133 Ill. 532; Towle v. Brown, 110 Ind. 68; City of Wellington v. Wellington Tp., 46 Kan. 221; Mount Hope Cemetery v. City of Boston, 158 Mass. 512; City of Winona v. School Dist. No. 82, 40 Minn. 19; Clother v. Maher, 15 Neb. 2; School Dist. No. 3 v. Greenfield, 64 N. H. 86; People v. Ulster County Sup'rs, 94 N. Y. 267; Dare County Com'rs v. Currituck County Com'rs, 95 N. C. 192; Morris v. State, 62 Tex. 743; De Mattos v. City of New Whatcom, 4 Wash. 130; Board of Education of Barker Dist. v. Board of Education of Valley Dist., 30 W. Va. 430; Richland County v. Village of Richland Center, 59 Wis. 599; Knight v. Town of Ashland, 61 Wis. 242; Schriber v. Langlade, 66 Wis. 629;

§ 46. Division or adjustment of debts and liabilities.

Considering first the division or readjustment of indebtedness or liabilities. Sometimes, under laws authorizing division of territory, the liabilities of different portions divided or annexed remain the sole obligation of the original debtor, and taxes are levied by that corporation upon the property within its district to apply on their reduction or payment. The indebtedness generally follows the name;[186] or the indebtedness is assumed proportionately by the reorganized corporations, and taxes to reduce or pay the same are assessed and levied upon all of the property within their limits.[187] Where a new corporation is

Forest County v. Langlade County, 76 Wis. 610.

[186] Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Carter County v. Sinton 120 U. S. 517; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; Kearny County Com'rs v. Vandriss (C. C. A.) 115 Fed. 866; County of Tulare v. Kings County, 117 Cal. 195, 49 Pac. 8; Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788; In re Establishment of New Counties, 9 Colo. 639; Pierson Tp. v. Reynolds Tp., 49 Mich. 224; Rumsey v. Town of Sauk Centre, 59 Minn. 316, 61 N. W. 330; Town of Humboldt v. City of Barnesville, 83 Minn. 219, 86 N. W. 87; Hughes v. School Dist. No. 29, 72 Mo. 643; Huffmire v. City of Brooklyn, 162 N. Y. 584; Watson v. Pamlico County Com'rs, 82 N. C. 17; Vance County Com'rs v. Granville County Com'rs, 107 N. C. 291; Allegheny City v. Blair, 74 Pa. 225; Wade v. Borough of Oakmont, 165 Pa. 479; Town of Spooner v. Town of Minong, 104 Wis. 425; Brewis v. City & Village of Duluth, 3 McCrary, 219, 9 Fed. 747. See, also, cases collected 11 Am. & Eng. Corp. Cas.

[187] D'Esterre v. City of New York, 104 Fed. 605; Cash v. Town of Douglasville, 94 Ga. 557; School Directors v. Miller, 49 Ill. 494; Dubuque County v. Clayton County, 3 G. Greene (Iowa) 604; Lake Charles Ice, Light & Waterworks Co. v. City of Lake Charles, 106 La. 65; Dyar v. Village of Farmington, 70 Me. 515; Hampshire County v. Franklin County, 16 Mass. 76; Clay County v. Chickasaw County, 76 Miss. 418, 24 So. 975; People v. Ryan, 19 Mich. 203; Holliday v. Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Bronx Gas & Elec. Co. v. City of New York, 17 Misc. 433, 41 N. Y. Supp. 358; In re Vacheron, 51 App. Div. 182, 64 N. Y. Supp. 503; City of Dallas v. Beeman, 23 Tex. Civ. App. 315; Higginbotham v. Com., 25 Grat. (Va.) 627; Laramie County Com'rs v. Albany County Com'rs, 1 Wyo. 137; Dousman v. President of Milwaukee Town, 1 Pin. (Wis.) 81.

Pence v. City of Frankfort, 19 Ky. L. R. 721, 41 S. W. 1011. In this case the objection that the annexed territory had no voice in the original incurring of an indebtedness was not held good, for, as the court said, they enjoyed in common with others the public improvements to construct which the debt was contracted.

organized from territory formerly comprised within others, a law providing for the assumption of all indebtedness by the new and that all existing rights of action by or against either may be maintained by or against the new corporation,[188] it has been held, does not create a new debt or renew by implication the time of payment so as to affect the running of the statute of limitations against the old,[189] and it has also been held that where a part of a public corporation is separated from it, it is not necessary to provide for a readjustment of the debts or a division of the property in order that the law should be valid.[190] No question can arise, it has been held in California, as to the adjustment of the principal of the debt claimed, but only the interest or a portion thereof.[191]

A public corporation may change its character under lawful authority, passing from a public quasi corporation to a municipal corporation of the highest grade or degree of organization, embracing, however, the same territory. The rule is clearly established that such change does not work a forfeiture of any rights existing as against the old corporation, or defeat any of its liabilities, but that, so far as its obligations and liabilities are concerned, the new corporation is liable for the debts of the old. The transition does not work the dissolution of the civil life of the corporation so as to extinguish its indebtedness. The obligations remain the same and are not impaired or destroyed.[192]

[188] Huffmire v. City of Brooklyn, 162 N. Y. 584.

[189] Robertson v. Blaine County, 85 Fed. 735; Gibbs v. Gibbs, 6 Colo. App. 368; Weiser v. McDowell, 93 Iowa, 772; McCrady v. Jones, 44 S. C. 406; Mills County v. Lampasas County (Tex. Civ. App.) 40 S. W. 552; Town of Spooner v. Town of Minong, 104 Wis. 425.

[190] Perry County v. Conway County, 52 Ark. 430; Garland County v. Hot Spring County, 68 Ark. 83; Stuart v. Kirley, 12 S. D. 245, 81 N. W. 147.

[191] Beals v. Amador County Sup'rs, 28 Cal. 449.

[192] Port of Mobile v. Watson, 116 U. S. 289; Laird v. City of De Soto, 22 Fed. 421; Hill v. City of Kahoka, 35 Fed. 32; Pacific Imp. Co. v. City of Clarksdale, 74 Fed. 528.

Pepin Tp. v. Sage (C. C. A.) 129 Fed. 657. "We are of opinion that the territory of the village, upon its dissolution, fell within the township and city, and made them the successors of the village. But it is urged upon us that this results in transferring the debts of one community to other communities which had no voice in the creation of the debts or in their transfer. In one sense, that is true, but the result of a ruling to the contrary would be distressing to contemplate. It would amount to a declaration that the state extinguished one of its

And logically following this rule it is also held that the powers of the new corporation to levy taxes for the payment of such obligations remain the same. They are not or cannot be lessened so as to defeat the rights of creditors of the old corporation.

The act of division and reapportionment of the debts, even upon a failure of the legislature to include a scheme or plan for

municipalities under circumstances which make proceedings for the collection and payment of the municipal debts impossible. A result which imputes to a state such an indifference to the claims of justice and to the lawful engagements of the municipalities under its control is not permissible where another is possible under the law. The circumstances of this case do not permit such an imputation."

Bates v. Gregory, 89 Cal. 396; Gilpin v. City of Ansonia, 68 Conn. 72; Inhabitants of Bloomfield v. Borough of Glen Ridge, 54 N. J. Eq. 276; City of Olney v. Harvey, 50 Ill. 453; Rogers v. People, 68 Ill. 154; Garfield Tp. v. Dodsworth, 9 Kan. App. 752, 58 Pac. 565; Garfield Tp. v. Hoskinson, 8 Kan. App. 862, 62 Pac. 166; City of Maysville v. Shultz, 33 Ky. (3 Dana) 10; Higginson v. Turner, 171 Mass. 586, 51 N. E. 172; Inhabitants of Mt. Desert v. Inhabitants of Tremont, 72 Me. 348; Phinney v. Phinney, 81 Me. 464; Lee v. City of Thief River Falls, 82 Minn. 88, 84 N. W. 654; City of Jefferson v. Edwards, 37 Mo. App. 617; Broadfoot v. City of Fayetteville, 124 N. C. 478, 32 S. E. 804; Scaine v. Inhabitants of Belleville, 39 N. J. Law, 526; City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190. But in Guthrie Nat. Bank v. McElhinney, 5 Okl. 107, 47 Pac. 1062, an indebtedness incurred by the people of certain towns prior to the consolidation of those towns into the village of Guthrie was held an indebtedness of the individuals incurring it and not of the towns, and the legislature had no power to require its payment after consolidation. The same is held in City of Guthrie v. T. W. Harvey Lumber Co., 9 Okl. 464, where the court decided that the provisional governments of towns organized prior to act of congress of May 2, 1890, were but voluntary associations of the people without any legal authority to contract debts that should afterward constitute legal obligations against the municipalities embracing the same territory.

City of Philadelphia v. Com., 52 Pa. 451.

White v. City of Quanah (Tex. Civ. App.) 27 S. W. 839. A vesting of the property in the new corporation and the imposition of the debts and obligations of the old one upon the new is dependent on the vote of the taxpayers.

Ranken v. McCallum, 25 Tex. Civ. App. 83, 60 S. W. 975; Baxter v. State, 9 Wis. 38; Schriber v. Town of Langlade, 66 Wis. 616.

In re Fremont & Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073. In this case it is held that a judgment against one of the parent counties must be counted as a "debt."

Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320. See, also, §§ 29, 31, and 33.

the reapportionment and readjustment of the debts and property of the territory affected is considered legislative in its character, political action on the part of the sovereign not to be interfered with or changed by the judicial branch.[193]

Some of the attempts to formulate a rule applying to the adjustment or reapportionment of debts or property in the case of division of territory have been referred to in the foregoing paragraphs. A favorite expression of the law makers in announcing such a rule is the use of the word "ratable" or "proportionate."[194] The debts and property must be adjusted in a "ratable" or "proportionate" manner, the words applying either to the population[195] or the comparative assessed valuation of taxable property of the different portions.[196]

Usually it is held that where a dispute arises as to what is a proportionate or ratable division, it is not necessary to make the taxpayers, either of the old or of the new organizations, parties to a suit brought to determine such dispute.[197] In some cases law makers attempt to arbitrarily decide what is either a ratable or a just and equitable division of the debts and property of the territory divided or consolidated[198] without any reference of these questions to local authorities for their determination.[199]

[193] Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

[194] In re Sugar Notch Borough, 192 Pa. 349; Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536; Blount County v. Loudon County, 67 Tenn. (8 Baxt.) 74; In re Fremont & Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073; De Mattos v. City of New Whatcom, 4 Wash. 127, 29 Pac. 933.

[195] Richardson v. Boske, 111 Ky. 893, 64 S. W. 919; Trinity County v. Polk County, 58 Tex. 321; Iowa County v. Green County, 1 Pin. (Wis.) 518.

[196] Canova v. State, 18 Fla. 512; Montgomery County v. Menefee County Ct., 93 Ky. 33; Inhabitants of Brewster v. Inhabitants of Harwich, 4 Mass. 278; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328; Chickasaw County Sup'rs v. Clay County Sup'rs, 62 Miss. 325; Harrison Tp. v. Schoolcraft County Sup'rs, 117 Mich. 215; Leflore County v. Carroll County Sup'rs, 61 Miss. 220; Queens County v. City of New York, 48 App. Div. 337, 62 N. Y. Supp. 1047; Mills County v. Brown County, 87 Tex. 475; Goodhue v. Town of Beloit, 21 Wis. 636; Gilkey v. Town of How, 105 Wis. 41.

[197] County of Tulare v. Kings County, 117 Cal. 195; County of Colusa v. Glenn County, 117 Cal. 434; Holliday v. Sweet Grass County, 19 Mont. 364; Brown County v. Rock County, 51 Neb. 277; Sierra County Com'rs v. Dona Ana County Com'rs, 5 Gild. (N. M.) 190; Presidio County v. Jeff Davis County.

In Minnesota it is held that an organized county has no power to create an indebtedness against an unorganized county attached to it for judicial purpose, which will become a valid debt of such unorganized county on its subsequent organization.[200]

§ 47. The legal authority; where existing.

The legislature having arbitrary power, as has been said, over the organization of all public corporations, to create or dissolve them, increase or diminish their boundaries, legislate as to their debts or liabilities and property, except so far as the rights of third parties may be affected, it follows that upon the division or annexation of territory it has the right and the power to determine and apportion, in a fitting manner, the obligations and the property of those corporations. It is for the legislature to determine to what extent the property or the inhabitants of the detached portion shall bear the burdens of the organizations to which they formerly belonged.[201] The courts, even under constitutional provisions to the effect that every organization created

13 Tex. Civ. App. 115; Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536; Town of Ackley v. Town of Vilas, 79 Wis. 157, 48 N. W. 257.

198 Ontonagon County Sup'rs v. Gogebic County Sup'rs, 74 Mich. 721, 42 N. W. 170; State v. Demann, 83 Minn. 331, 86 N. W. 352; Town of South Portland v. Town of Cape Elizabeth, 92 Me. 328; Neilson v. City of Newark, 49 N. J. Law, 246, 8 Atl. 292; Vanderbeck v. Inhabitants of Englewood, 39 N. J. Law, 345.

Plunkett's Creek Tp. v. Crawford, 27 Pa. 107. A judgment against a town subsequently divided can be revived against each fraction thereof with a right of contribution to that portion first paying the indebtedness.

In Borough of North Lebanon v. Arnold, 47 Pa. 488, it is held that there is no personal liability in case of division, resting upon the inhabitants of territory rearranged.

In re Sharon Hill Borough, 140 Pa. 250; Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113; Town of Plainfield v. Village of Plainfield, 67 Wis. 526; In re Fremont & Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073.

199 In re House Bill No. 231, 9 Colo. 624; Orange County v. Los Angeles County, 114 Cal. 390; San Diego County v. Riverside County, 125 Cal. 495; Clay County v. Chickasaw County, 76 Miss. 418; Perkins County v. Keith County, 58 Neb. 323; Jeff Davis County v. City Nat. Bank, 22 Tex. Civ. App. 157.

200 First Nat. Bank of Detroit v. Beltrami County Com'rs, 77 Minn. 43, 79 N. W. 591.

201 State v. Browne, 56 Minn. 269, 57 N. W. 659; Town of Rutland v. Town of West Rutland, 68 Vt. 155, 34 Atl. 422; Town of Ackley v. Town of Vilas, 79 Wis. 157, 48 N. W. 257. See, also, cases cited under preceding section.

out of another shall be liable for a just proportion of existing debts, do not have the power to determine such proportion. It is held that this is a legislative question. It is for the legislature to either itself determine what this proportion shall be or to establish a rule or basis for the division,[202] and where an act of division imposes what seems to be a disproportionate part of the liabilities or burdens, the courts have no power to inquire and adjust the obligations upon a different basis.[203]

§ 48. Agency of apportionment.

As already suggested, the basis of division or apportionment of debts and property of a portion of the territory divided or annexed may be fixed by the legislature in the authority given for such action, or it may provide for the appointment of a board, or place upon some existing official body the burden and duty of determining this question. In some instances it is left to an existing judicial body;[204] in others the apportionment is determined by a board ministerial or executive in its character.[205] It is usually held that a duty thus devolving upon these officers or

[202] Orange County v. Los Angeles County, 114 Cal. 390; County of Tulare v. Kings County, 117 Cal. 195, 49 Pac. 8; Town of Granby v. Thurston, 23 Conn. 416; Queens County v. City of New York, 48 App. Div. 337, 62 N. Y. Supp. 1047; Sedgwick County Com'rs v. Bunker, 16 Kan. 498; Sharp's Ex'r v. Dunavan, 56 Ky. (17 B. Mon.) 223; Stone v. City of Charlestown, 114 Mass. 214; Morrow County v. Hendryx, 14 Or. 397.

[203] State v. City of Mobile, 24 Ala. 701; Smith v. Village of Adrian, 1 Mich. 495; City of Baltimore v. State, 15 Md. 376; Sill v. Village of Corning, 15 N. Y. 297; People v. Draper, 15 N. Y. 532; Lowe v. Hardy, 7 Utah, 368, 26 Pac. 982; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

[204] Fairfield v. Rural Independent School Dists., 111 Fed. 108; Bingham County v. Bannock County, 5 Idaho, 627, 51 Pac. 769; Town of Jamaica v. Town of Vance, 96 Ill. App. 598; In re Lent, 16 Misc. 606, 40 N. Y. Supp. 570; Forest County v. Langlade County, 76 Wis. 605.

[205] Los Angeles County v. Orange County, 97 Cal. 329, 32 Pac. 316; Elmore, Logan & Bingham Counties v. Alturas County, 4 Idaho, 145, 37 Pac. 349; District Tp. of Viola v. District Tp. of Audubon, 45 Iowa, 104; Independent Dist. of Corwith v. District Tp. of Lu Verne, 107 Iowa, 73, 77 N. W. 525; Goulding v. Inhabitants of Peabody, 170 Mass. 483; Marathon Tp. v. Oregon Tp., 8 Mich. 372; School Dists. No. 17 & 24, Kearney County v. School Dists. No. 2 & 18, 17 Neb. 177; Borough of Carlstadt v. Township Committee of Bergen, 60 N. J. Law, 360, 37 Atl. 612; State v. McMillan, 52 S. C. 60, 29 S. E. 540.

bodies is a continuing one, and their refusal to perform such duty does not defeat or impair the rights of parties intended by the legislature to be established in this way.[206] Neither will mandamus lie to compel the performance of such duty by them.[207] But after such agency performs its duties, its authority may be exhausted.[208] The authority of boards whose duty it is to ascertain the amount of the debt at a certain time, and apportion it, is limited to what might be termed purely clerical duties. They have no power or authority to pass upon and determine the validity of indebtedness,[209] and in the absence of fraud or mistake their action is final and will not be disturbed,[210] though questions of law may be passed upon after appeal to the courts.[211]

§ 49. Character or form of indebtedness.

The indebtedness or obligations of territory divided often assumes a different legal character or form. It may consist of an issue of valid outstanding negotiable bonds;[212] or what can

[206] Elmore, Logan & Bingham Counties v. Alturas County, 4 Idaho, 145, 37 Pac. 349; People v. Town of Oran, 121 Ill. 650, 13 N. E. 726; District Tp. of Franklin v. Wiggins, 110 Iowa, 702, 80 N. W. 432; School Dist. No. 46 of Douglas County v. School Dist. No. 53, 49 Neb. 33.

[207] Town of Enterprise v. State, 29 Fla. 128; McCormick v. People, 139 Ill. 499; State v. Kolsem, 130 Ind. 434; In re Haynes, 54 N. J. Law, 6; Lewis v. Moore, 54 N. J. Law, 121; Township Committee of Lakewood v. Township Committee of Brick, 55 N. J. Law, 275, 26 Atl. 91; People v. Ulster County Sup'rs, 94 N. Y. 263; Vance County Com'rs v. Granville County Com'rs, 107 N. C. 291.

[208] Riverside County v. San Bernardino County, 134 Cal. 517, 66 Pac. 788.

[209] Blaine County v. Smith, 5 Idaho, 255, 48 Pac. 286; Blaine County v. Lincoln County, 6 Idaho, 57, 52 Pac. 165; State v. McNutt, 87 Wis. 277, 58 N. W. 389; In re Fremont & Big Horn Counties, 8 Wyo. 1, 54 Pac. 1073.

[210] Canyon County v. Ada County, 5 Idaho, 686, 51 Pac. 748; Blaine County v. Lincoln County, 6 Idaho, 57, 52 Pac. 165; Vose v. Inhabitants of Frankfort, 64 Me. 229; Borough of Dunmore's Appeal, 52 Pa. 374; In re School Directors of Aliquippa, 172 Pa. 81; Town of Rutland v. Town of West Rutland, 68 Vt. 155, 34 Atl. 422.

[211] Inhabitants of Tisbury v. Inhabitants of West Tisbury, 171 Mass. 201, 50 N. E. 522.

[212] Hackett v. City of Ottawa, 99 U. S. 86; Scipio v. Wright, 101 U. S. 665; Ottawa v. First Nat. Bank, 105 U. S. 342; Carter County v. Sinton, 120 U. S. 517; Comanche County v. Lewis, 133 U. S. 201; Harper County Com'rs v. Rose, 140 U. S. 75; Barnett v. City of Denison, 145 U. S. 135; Morgan v. Town of Waldwick, 17 Fed. 286; Hill v. City of Kahoka, 35 Fed. 32; Ashley v.

be termed, for want of a better phrase, "floating indebtedness";[213] or again the obligation may exist as the result of a contract, claim or subscription payable at some future time,[214] or a liability existing as the result of a tort.[215] The cases cited in the notes under these various propositions suggest the different rulings made, but the basic principles of division remain as given in the preceding sections.

In apportioning the floating indebtedness to be paid by respective portions of detached territory, questions may arise as to what constitutes floating indebtedness. Accrued interest upon indebtedness, it is generally held, should be divided or appor-

Presque Isle County Sup'rs, 60 Fed. 62; Pacific Imp. Co. v. City of Clarksdale, 74 Fed. 528; Taylor v. School Dist. of Garfield, 97 Fed. 753; D'Esterre v. City of New York, 104 Fed. 605; Garland County v. Hot Spring County, 68 Ark. 83; Coconino County v. Yavapai County (Ariz.) 52 Pac. 1127; Johnson v. City of San Diego, 109 Cal. 468; County of Tulare v. Kings County, 117 Cal. 195, 49 Pac. 8; State v. Suwannee County Com'rs, 21 Fla. 1; Marion County Com'rs v. Harvey County Com'rs, 26 Kan. 181; State v. Kiowa County Com'rs, 41 Kan. 630; Craft v. Lofinck, 34 Kan. 365; Vandriss v. Hill, 58 Kan. 611; Hodgeman County Com'rs v. Garfield County Com'rs, 42 Kan. 409, 22 Pac. 430; Montgomery County v. Menefee County Ct., 93 Ky. 33, 18 S. W. 1021; Rumsey v. Town of Sauk Centre, 59 Minn. 316, 61 N. W. 330; Canosia Tp. v. Grand Lake Tp., 80 Minn. 357, 83 N. W. 346; Holliday v. Sweet Grass County, 19 Mont. 364, 48 Pac. 553; Ter. v. Cascade County Com'rs, 8 Mont. 396, 20 Pac. 809; Clother v. Maher, 15 Neb. 1; Sierra County Com'rs v. Dona Ana County Com'rs, 5 Gild. (N. M.) 190, 21 Pac. 83; People v. Coler, 26 Misc. 327, 56 N. Y. Supp. 1072; Jeff Davis County v. City Nat. Bank, 22 Tex. Civ. App. 157, citing Presidio County v. City Nat. Bank, 20 Tex. Civ. App. 511, 44 S. W. 1069.

[213] Colusa County v. Glenn County, 117 Cal. 434, 49 Pac. 457; In re House Bill No. 122, 9 Colo. 639; Town of Cicero v. Hill, 193 Ill. 226; Knoxville Nat. Bank v. Independent Dist. of Washington, 40 Iowa, 612; Bradish v. Lucken, 38 Minn. 230, 36 N. W. 454; Holliday v. Sweet Grass County, 19 Mont. 364, 48 P. 553; Inhabitants of Lodi v. Hackensack Imp. Commission, 60 N. J. Eq. 229, 46 Atl. 782; Lawrence County v. Meade County, 6 S. D. 528, 62 N. W. 131; Knight v. Town of Ashland, 65 Wis. 166.

[214] Hempstead County v. Howard County, 51 Ark. 344. See Garland County v. Hot Spring County, 68 Ark. 83, as to costs in mandamus proceeding. Nez Perce County v. Latah County, 3 Idaho, 413; Hensley Tp. v. People, 84 Ill. 544; Queens County v. City of New York, 48 App. Div. 337, 62 N. Y. Supp. 1047; Grant County v. Lake County, 17 Or. 453; Potter v. Black, 15 Wash. 186, 45 Pac. 787.

[215] Barber v. City of East Dallas, 83 Tex. 147, 18 S. W. 438.

tioned on the same basis as the principal,[216] though some cases hold to the contrary.[217]

Cash in the treasury of an organization, portions of which have been detached, or credits resulting from taxation or some claim, should not be deducted before determining the amount of the indebtedness to be apportioned.[218] The rule seems to be that the principal of the indebtedness should be adjusted and credit items treated as property to be divided in the same proportion, leaving it to the different organizations to apply these credits as they may elect, either upon the debt assigned to them or in the payment of current expenses. It is further held that an obligation, in order to be considered a "debt," need not be due and payable at the time of the division. The existence of an obligation is the determining question, not its due date.

In a Maine case it was held that where the statute dividing the town provided for the assumption of certain indebtedness, a subsequent statute exonerating the new town from this liability was unconstitutional, as it impaired the obligation of the contract created by the original act.[219]

§ 50. Division of assets.

Equally important with the adjustment and apportionment of the debts and liabilities of territory divided or rearranged is the division of assets belonging to the old or the different organizations. They are usually acquired through the expenditure of moneys raised by the levy of taxes upon property within its jurisdiction. These moneys may be expended in the construction of public buildings located within a certain portion of the organization. Territory forming an old corporation has been subject to the levy of taxes for the erection of these buildings,[220]

[216] Hempstead County v. Howard County, 51 Ark. 344.

[217] Garland County v. Hot Spring County, 68 Ark. 83.

[218] Cheyenne County Com'rs v. Bent County Com'rs, 15 Colo. 320; Forest County v. Langlade County, 91 Wis. 543, 63 N. W. 760, 65 N. W. 182.

[219] Bowdoinham v. Richmond, 6 Me. (6 Greenl.) 112.

[220] School Dist. No. 2, Ford County, v. School Dist. No. 4, 16 Ill. App. 651; Heizer v. Yohn, 37 Ind. 415; District Tp. of Williams v. District Tp. of Jackson, 36 Iowa, 216; Way v. Fox, 109 Iowa, 340; Board of Education of Topeka v. State, 64 Kan. 6, 67 Pac. 559; Trustees of Public Schools v. Yazoo City Library Ass'n (Miss.) 12 So. 30; Inhabitants of First Parish in Medford v. Pratt, 21

and in the process of division part is deprived of the use of this property. Here, as in all cases affecting the organization, powers, obligations and property of public corporations, the authority exists, without question, in the legislature to provide an equitable adjustment.[221] Public property may consist not only of buildings erected for public use, but moneys,[222] taxes in process of collection,[223] credits,[224] real estate, other than buildings,[225] claims,

Mass. (4 Pick.) 221; State v. School Dist. No. 21, 6 N. D. 488, 71 N. W. 772; Mills County v. Brown County, 87 Tex. 475; State v. Frost, 103 Tenn. 685.

[221] State v. Votaw, 8 Blackf. (Ind.) 2. Cases collected in 11 Am. & Eng. Corp. Cas.

[222] Evins v. Batchelor, 61 Ark. 521; County of Kings v. County of Tulare, 119 Cal. 509; Washington County v. Weld County, 12 Colo. 152; Cooke v. School Dist. No. 12 of Logan County, 12 Colo. 453; Town of Jamaica v. Town of Vance, 96 Ill. App. 598; Johnson v. Smith, 64 Ind. 275; Towle v. Brown, 110 Ind. 599, 10 N. E. 628; District Tp. of Jasper v. District Tp. of Sheridan, 47 Iowa, 183.

Crawford County Com'rs v. Marion County Com'rs, 16 Ohio, 466. When county lines are changed the county acquiring additional territory is not entitled to demand from the county losing this territory any portion of the funds in the treasury.

Inhabitants of Harrison v. Inhabitants of Bridgeton, 16 Mass. 16; People v. Hodge, 4 Neb. 265; Land, Log & Lumber Co. v. Oneida County, 83 Wis. 649.

[223] School Dist. No. 15 v. School Dist. of Waldron, 63 Ark. 433; County of Colusa v. County of Glenn, 124 Cal. 498; San Diego County v. Riverside County (Cal.) 55 Pac. 7; Morgan County Com'rs v. Hendricks County Com'rs, 32 Ind. 234; Cheatham County v. Dickson County (Tenn. Ch. App.) 39 S. W. 734; Reeves County v. Pecos County, 69 Tex. 177, 7 S. W. 54; Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536.

[224] School Directors of Pelican County v. School Directors of Rock Falls, 81 Wis. 428. The word "credits" as used in the phrase "just share of credits" held not to include "school sites, school houses, furniture, and fixtures, the value thereof, or any tangible property whatever."

[225] Justices of Marshall County Ct. v. Justices of Calloway County Ct., 65 Ky. (2 Bush) 93; West Carroll Parish v. Gaddis, 34 La. Ann. 928; People v. Ryan, 19 Mich. 203; Clement v. Everest, 29 Mich. 19. The last two cases also consider the question of apportionment of debts. Buena Vista Board of Health v. City of East Saginaw, 45 Mich. 257; Simmons v. Inhabitants of Nahant, 85 Mass. (3 Allen) 316; Lakin v. Ames, 64 Mass. (10 Cush.) 198; Inhabitants of Wrentham v. Inhabitants of Norfolk, 114 Mass. 555; Richardson v. Brown, 6 Me. (6 Greenl.) 355; Inhabitants of Poland v. Strout, 19 Me. 121; Craven County Com'rs v. Pamlico County Com'rs, 73 N. C. 298.

Greenville v. Mason, 53 N. H. 515. This case in common with many others holds that no property, real or personal, of the original town,

miscellaneous personal property,[226] or public improvements.[227] The rules adopted by the legislature and the courts for the division of this property are much the same as those applied in the adjustment or apportionment of the debt.[228] If the debt has been contracted solely in the erection of public buildings or the acquirement of other property, it is "just and equitable" that the locality retaining this property should assume all the debt.[229] If, on the other hand, property is divided among the different portions of territory, it is "just and equitable" that these should be charged with a proportionate amount of the liabilities contracted

falls to the new corporation unless located within its boundaries, except as expressly provided in the act of division.

Brown County v. Rock County, 51 Neb. 277, 70 N. W. 943; Sanbornton v. Tilton, 55 N. H. 603; Seabrook v. Fowler, 67 N. H. 428, 30 Atl. 414; Town of North-Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Craven County Com'rs v. Pamlico County Com'rs, 73 N. C. 298; Appeal of School Dist. of Aleppo, 96 Pa. 76; Kuhn v. Board of Education, 4 W. Va. 499, discussing the effect of division on title to property and liability for debts; Town of Milwaukee v. City of Milwaukee, 12 Wis. 102; State v. Rice, 35 Wis. 178.

[226] Presque Isle County Sup'rs v. Thompson, 10 C. C. A. 154, 61 Fed. 914; Independent School Dist. of Georgia v. Independent School Dist. of Victory, 41 Iowa, 321; Goulding v. Inhabitants of Peabody, 170 Mass. 483, 49 N. E. 752; State v. Bunker, 59 Me. 366; School Dist. No. 20 in Chester v. Pierce, 69 Vt. 317, 31 Atl. 783; School Directors of Ashland v. City of Ashland, 87 Wis. 533; Hall v. Baker, 74 Wis. 118.

In re Fremont County, 8 Wyo. 1, 54 Pac. 1073. Delinquent taxes should be computed as an asset at their value only and not at the aggregate amount on the rolls; neither should taxes levied for special purposes be considered.

[227] Almand v. Atlanta Consol. St. R. Co., 108 Ga. 417.

[228] State v. Harshaw, 73 Wis. 211; State v. Weingarten, 92 Wis. 599; State v. Taylor, 94 Wis. 267, 68 N. W. 953; State v. Maik, 113 Wis. 239, 89 N. W. 183. See, also, § 46.

[229] Gilliam County v. Wasco County, 14 Or. 525; Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Eagle v. Beard, 33 Ark. 497; People v. School Trustees, 86 Ill. 613; Reckert v. City of Peru, 60 Ind. 473; Board of Education of Topeka v. State, 64 Kan. 6, 67 Pac. 559; Inhabitants of Windham v. Inhabitants of Portland, 4 Mass. 384; Richards v. Dagget, 4 Mass. 539; Minot v. Curtis, 7 Mass. 441; Inhabitants of Hampshire County v. Inhabitants of Franklin County, 16 Mass. 76; Inhabitants of North Yarmouth v. Skillings, 45 Me. 133; Inhabitants of Frankfort v. Inhabitants of Winterport, 54 Me. 250; McCully v. Board of Education of Ridgefield Tp., 63 N. J. Law, 18, 42 Atl. 776; City of Brownwood v. Noel (Tex. Civ. App.) 44 S. W. 1014.

for its acquisition.[230] The principles touching the division of liabilities in case of their contraction for current expenses, or where the result is not in existence at the time of the division, have already been discussed.

§ 51. Agency for division of assets.

Property may be divided, as in the case of apportionment of debts or liabilities, by the legislature in the act authorizing the division,[231] or it may be left to a local commission, who proceed in the same manner, whose duties are substantially the same, and whose official and legal character is in all respects similar to like bodies appointed for the adjustment of debts or liabilities. It seems, however, to be the rule that the authority should designate the agency by, and the manner in which, the property is to be apportioned;[232] though in Tennessee it is held that in the absence of legislative provision the portions of divided territory will hold in severalty for public purposes the public property which falls within their limits.[233]

The power to levy taxes, granted in varying degrees to different portions of divided territory, upon division, seems to remain, as to any particular purpose, not less than as originally existing.[234] And in apportionment of taxes levied and collected by the state authorities prior to the division of territory, the cases seem to hold that the officers of the state should separate the equalized valuation, if that is the basis for apportioning the debts and liabilities, and assign the taxes to the different portions of the

[230] Inhabitants of Orvil v. Borough of Woodcliff, 64 N. J. Law, 286, 45 Atl. 686.

[231] Town of Jamaica v. Town of Vance, 96 Ill. App. 598; State v. Votaw, 8 Blackf. (Ind.) 2; Love v. Schenck, 34 N. C. (12 Ired.) 304; Putnam County Com'rs v. Auditor of Allen County, 1 Ohio St. 323; Greenville v. Mason, 53 N. H. 515; Baker County v. Benson, 40 Or. 207, 66 Pac. 815; Land, Log & Lumber Co. v. Oneida County, 83 Wis. 649. See sec. 46.

[232] Gregg v. French, 67 Minn. 402, 69 N. W. 1102.

[233] Prescott v. Town of Lennox, 100 Tenn. 591.

[234] Board of Councilmen of Frankfort v. Mason & Foard Counties, 18 Ky. L. R. 543, 37 S. W. 290.

Richards v. Dagget, 4 Mass. 534. A vote to raise money for the purpose of constructing a new school is annulled by the division of the territory thus voting, and the assessment cannot be legally made.

But see contra, People v. Chicago & A. R. Co., 172 Ill. 71, and Fender v. Neosho Falls Tp., 22 Kan. 305.

divided territory in proportion to the valuation of the property therein.[235]

Officers of the new organization, whose legal duty it is to collect taxes, have no power to collect those previously levied by the old corporation.[236]

III. Corporate Name and Boundaries.

§ 52. Existence of a public corporation.

The precise time when the steps necessary to the legal existence of a public corporation have been completed may be important in determining rights of third parties against the territory included within its limits or its own rights and powers. The necessity for a valid organization also exists that a corporation may legally perform its governmental duties and exercise its powers.[237] A futile attempt to organize a corporation of a lower, it has been held, does not prevent the organization of one of a higher, grade.[238] The rule also seems to be that a town incorporated under an act held unconstitutional, thereafter has no legal existence, and a judgment against it is a mere nullity,[239] though it will be considered a de facto town from the time of its attempted organization until the law is declared unconstitutional, and the acts of its officers, the acts of de facto officers, binding between third parties dealing with them as public officials,[240] and also for the purpose of enforcing liabilities against the corporation contracted during its existence as a de facto organization.[241] If the authority for the organization of a public corporation provides for the election or appointment of certain officials before it can legally exist, the requirements of the law in this respect must be followed,[242] though some cases hold a failure in this respect will not

[235] Auditor General v. Menominee County Sup'rs, 89 Mich. 552.

[236] State v. Clevenger, 27 Neb. 422, 43 N. W. 243.

[237] People v. Morrow, 181 Ill. 315; State v. Arnold, 38 Ind. 41; City of Guthrie v. Wylie, 6 Okl. 61; City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190; Gilkey v. Town of How, 105 Wis. 41.

[238] Butler v. Walker, 98 Ala. 358, 13 So. 261; State v. Tucker, 48 Mo. App. 531; Watson v. Corey, 6 Utah, 150.

[239] Colton v. Rossi, 9 Cal. 595.

[240] Riley v. Garfield Tp., 58 Kan. 299, 49 Pac. 85; Town of Winneconne v. Village of Winneconne, 111 Wis. 13, 86 N. W. 590.

[241] White v. City of Quanah (Tex. Civ. App.) 27 S. W. 839.

[242] Keating v. Marble, 39 Kan.

invalidate the organization.[243] The words "be, and the same hereby is incorporated," do not alone indicate an intention on the part of the legislature that the corporation should take immediate effect as against a general law that public acts shall not take effect until thirty days after the session of the legislature, unless otherwise provided.[244] Corporate existence will not be presumed from the registration of a municipal charter, when, under the code, it is necessary that the charter shall be certified before it is registered.[245]

§ 53. Name of the corporation.

The existence of a public corporation presupposes a legal name, acquired in the proceedings incorporating it or by custom,[246] under which it exercises its powers, performs its duties, and which it uses in assuming liabilities and contracting obligations.

The rule as to the use of the name by the corporation is substantially that relating to private individuals. A mere misnomer will not invalidate proceedings nor defeat rights. The essential thing is identity,[247] and if the name used in either a contract or a devise or grant to the corporation sufficiently describes and identifies it, it will be sufficient, although it may not be the precise and technical name.[248] The use of the correct legal name in

370, 18 Pac. 189; Behr v. Willard, 11 Neb. 601; Campbell v. Wainright, 50 N. J. Law, 555, 14 Atl. 603; Gilkey v. Town of How, 105 Wis. 41.

[243] Rousey v. Wood, 63 Mo. App. 460.

[244] Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 58; Cooper v. Curtis, 30 Me. 488.

[245] State v. Frost, 103 Tenn. 685.

[246] See Knight v. Mayor, etc., of Wells, 1 Ld. Raym. 80; City of Gainesville v. Caldwell, 81 Ga. 76; Johnson v. Common Council of Indianapolis, 16 Ind. 227; Neely v. Yorkville, 10 S. C. (10 Rich.) 141; Richards v. Town of Clarksburg, 30 W. Va. 491.

[247] University of Oxford's Case, 10 Coke, 53b, 57b; Foster v. Walter, 1 Cro. Eliz. 106; Attorney General v. Town of Rye, 7 Taunt. 546; Clement v. City of Lathrop, 18 Fed. 885; People v. Potter, 35 Cal. 110; People v. Pike, 197 Ill. 449; State v. Woodbury, 76 Me. 457; People v. Runkle, 9 Johns. (N. Y.) 147; State v. Hollis, 59 N. H. 390; Berks & D. Turnpike Road v. Myers, 6 Serg. & R. (Pa.) 12; 2 Kent, Comm. 292; Dillon, Mun. Corp. (4th Ed.) § 180. But see Sweetwater County Com'rs v. Young, 3 Wyo. 684, 29 Pac. 1002, and Boon v. Town of Jackson, 98 Ga. 490.

[248] Case of Mayor, etc., of Lynne Regis, 10 Coke, 120; Dr. Ayray's Case, 11 Coke, 18b; Rex v. Inhabitants of Haughley, 4 Barn. & Adol. 650; Croydon Hospital v. Farley, 6 Taunt. 467; University of Oxford's Case, 10 Coke, 53b, 57b; Inhabitants

actions is more strictly insisted upon.[249] The legislature may, at its pleasure, subject to statutory or constitutional restrictions, change the name of a public corporation, but its identity for the purpose of enforcing obligations will not, by such action, be destroyed.[250] The change of name may be effected by an alteration in the grade of organization or by special act. In Kansas it is held that such change carries with it a change of the legal title from "the inhabitants, etc.," to "the city, etc."[251] The new name sought must not be misleading.

§ 54. The seal and its use.

The law regarding the use of a seal by a corporation, either public or private, has changed materially in recent years, the reasons evidently being the same leading to a change in the law as to the use of a seal by natural persons. Formerly the corporation "spoke" through its seal. A contract or other instrument to be valid must have had the corporate seal affixed and have been attested by the proper officer. The rule now is that the use of the seal is not necessary to bind a corporation except in those cases where this is directed in express terms by the statutes.[252]

The rule, however, that an instrument under seal embodies a

of First Parish in Sutton v. Cole, 20 Mass. (3 Pick.) 232; New York Inst. for Blind v. How's Ex'rs, 10 N. Y. (6 Seld.) 84; Chapin v. School Dist. No. 2 in Winchester, 35 N. H. 445.

[249] City of Ft. Wayne v. Jackson, 7 Blackf. (Ind.) 36; Village of Romeo v. Chapman, 2 Mich. 179; St. Louis County Court v. Griswold, 58 Mo. 175; Carder v. Fayette County Com'rs, 16 Ohio St. 353; Clarke v. Potter County, 1 Pa. 163; Berks & D. Turnpike Road v. Myers, 6 Serg. & R. (Pa.) 12.

[250] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Town of Mt. Pleasant v. Beckwith, 100 U. S. 524. See, also, authorities cited under §§ 45 and 46.

[251] West v. City of Columbus, 20 Kan. 633.

[252] Bernardin v. North Dufferin Municipality, 19 Can. Sup. Ct. 581; Smeltzer v. White, 92 U. S. 390; Gordon v. City of San Diego (Cal.) 32 Pac. 885; Ring v. Johnson County, 6 Iowa, 265; Prescott v. Gonser, 34 Iowa, 178; Springer v. Clay County, 35 Iowa, 243; Kinzie v. Chicago, 3 Ill. (2 Scam.) 188; Bestor v. Powell, 7 Ill. (2 Gilm.) 126; Guffield v. Bowling Green, 45 Ky. (6 B. Mon.) 224; Geary v. City of Kansas, 61 Mo. 378; Colman v. Anderson, 10 Mass. 105; Inhabitants of Fourth School Dist. in Rumford v. Wood, 13 Mass. 193; Attorney General v. Jochim, 99 Mich. 358, 58 N. W. 611; City Council of Charleston v. Moorhead, 12 Rich. Law (S. C.) 430.

consideration is applied to a contract executed by a corporation the same as to an individual.[253]

§ 55. Corporate boundaries.

From the discussion of the subject thus far, it is apparent that the creation or organization of a public corporation consists in the setting apart of a certain geographical area and investing the people residing within the limits of this district with a greater or less degree of control over their local, political, governmental and economic conditions. These agencies of the state exercise certain functions, perform certain duties, and contract certain liabilities. The existence and performance of any or all of these rights and powers affect not only the property but the persons of those coming within their jurisdiction. It will be seen therefore that there exists the most urgent necessity for an accurate and definite establishment[254] of the boundaries in the first instance, under due authority of law, by the proper tribunal, and that if a subsequent change is made in these boundaries the change be also definite and certain, under authority of law, and by the proper tribunal.

In order that a public corporation can properly perform its duties and exercise its powers, it must be in a position to compel obedience to its lawful demands, for, if any uncertainty exists as to the jurisdiction of a public corporation in regard to a particular question, affecting either persons or property, it is clear that it cannot compel that submission which good government requires.

§ 56. Definition of corporate boundaries.

The first essential to the existence of a boundary which shall legally limit and govern the exercise of jurisdiction by a public corporation over persons and property is its accurate and definite establishment and description,[255] either according to natural

[253] Sturtevants v. City of Alton, 3 McLean, 393, Fed. Cas. No. 13,580.

[254] Town of Enterprise v. State, 29 Fla. 128, 10 So. 740; People v. Bennett, 29 Mich. 451; Musser v. Johnson, 42 Mo. 74; Levering v. Town of Memphis, 26 Tenn. (7 Humph.) 553; City of Memphis v. Adams, 56 Tenn. (9 Heisk.) 518; Brennan v. City of Weatherford, 53 Tex. 330; Fidelity Ins. Co. v. Shenandoah Val. R. Co., 32 W. Va. 244; Cutting v. Stone, 7 Vt. 471; Pierce v. Carpenter, 10 Vt. 480.

[255] State of Rhode Island v. State of Massachusetts, 4 How. (U. S.)

boundaries, which are in themselves definite and certain, or lines properly surveyed.

The defining of a boundary line by some natural physical feature easily falls into a four-fold division: Ocean and tributary waters at high or low tide;[256] the channel of a navigable stream;[257]

591, fixing the boundary line between Massachusetts and Rhode Island; Edson v. Crangle, 62 Ohio St. 49, determining the northern boundary line between the United States and Canada contiguous to the state of Ohio.

[256] The Pea Patch Island Case, 1 Wall. Jr. Append. IX, Fed. Cas. No. 18,311; Smith v. Skagit County Com'rs, 45 Fed. 725; The Atlantic, 1 Ware, 121, Fed. Cas. No. 621. The Bay of Passamaquoddy held common for purposes of navigation. City of San Diego v. Granniss, 77 Cal. 511, and Fisher v. San Diego Police Ct., 86 Cal. 158, hold that the municipal jurisdiction of the state extends over the waters of the bay and into the ocean one marine league from the shore.

People v. Oakland Water Front Co., 118 Cal. 234; Thompson v. Blackwell, 5 La. (O. S.) 465; Stevens v. Thatcher, 91 Me. 70, 39 Atl. 282; Adams v. Ulmer, 91 Me. 47; The Fame, 3 Mass. 147; Trull v. Wheeler, 36 Mass. (19 Pick.) 240; Forest River Lead Co. v. City of Salem, 165 Mass. 193.

Atlantic Dock Co. v. City of Brooklyn, 3 Keyes (N. Y.) 445. The liability of the municipality for the destruction of property by mob is considered. The case of Orr v. City of Brooklyn, 36 N. Y. 661, also involves a discussion of the same question.

Tebo v. City of Brooklyn, 57 Hun, 591, 10 N. Y. Supp. 749; affirmed in 134 N. Y. 341; Stryker v. City of New York, 19 Johns. (N. Y.) 179; Orr v. City of Brooklyn, 36 N. Y. 661; Robins v. Ackerly, 91 N. Y. 98; Sage v. City of New York, 154 N. Y. 61; Jarvis v. Lynch, 157 N. Y. 445; State v. Eason, 114 N. C. 787.

Galveston City Surf Bathing Co. v. Heidenheimer, 63 Tex. 559. A city whose boundary line extends to the sea shore and is bounded by it has jurisdiction over the shore and surf for police and sanitary purposes, but it will have no power to grant exclusive privileges for the use of such shore.

Pacific Sheet Metal Works v. Roeder, 26 Wash. 183. See, also, Farnham, Waters, pp. 1482 et seq.

[257] Handly's Lessee v. Anthony, 5 Wheat. (U. S.) 374, deciding that the boundary line of the state of Kentucky extends only to the low-water mark on the western side of the Ohio River. In this case it is also held that where a river, the boundary between two nations or states, is in neither, and there be no convention respecting it, each holds to the middle of the stream. If one state, however, is the original proprietor and grants territory on one side only, it retains the river within its domain and the newly-erected state extends to the river only, and low-water mark is its boundary. See, also, as holding this last proposition with regard to the boundary of Georgia, Howard v. Ingersoll, 13 How. (U. S.) 381; State of Alabama v. State of Georgia, 23 How. (U. S.) 505; Jones v. Soulard, 24 How. (U. S.) 41.

State of Indiana v. State of Ken-

the course of a non-navigable stream;[258] or a line with certain well known natural objects for calls.[259]

tucky, 136 U. S. 479; following Handly's Lessee v. Anthony, 5 Wheat. (U. S.) 374. In this case it was also held that the continuous claiming and exercising of jurisdiction to a certain boundary, i. e., low-water mark, when the evidence of documents and witnesses is conflicting, was decisive in favor of the claim of Kentucky.

State of Iowa v. State of Illinois, 147 U. S. 1, where the expression "middle of the Mississippi River" and "the center of the main channel of that river" are held synonymous terms, and mean the middle of the main navigable channel or channel most used. Here the boundary was established by an enabling act.

St. Joseph & G. I. R. Co. v. Devereux, 41 Fed. 14; Ft. Smith Bridge Co. v. Hawkins, 54 Ark. 509; Waters v. Pool, 130 Cal. 136, 62 Pac. 385.

Pratt v. State, 5 Conn. 388. The channel of the Connecticut River not within the patented limits of either of the towns of Lynne or Saybrook, but the jurisdiction of each town for the service of process and enforcement of law extends by ancient invariable usage to the center of the stream.

Rowe v. Smith, 51 Conn. 266; Simpson v. State, 92 Ga. 41; Village of Brooklyn v. Smith, 104 Ill. 429; Buttenuth v. St. Louis Bridge Co., 123 Ill. 535; People v. Madison County Sup'rs, 125 Ill. 9; St. Louis Bridge Co. v. People, 125 Ill. 226; Keokuk & H. Bridge Co. v. People, 145 Ill. 596; Bellefontaine Imp. Co. v. Niedringhaus, 181 Ill. 426; Chicago & N. W. R. Co. v. City of Clinton, 88 Iowa, 188, 55 N. W. 462, following State of Iowa v. State of Illinois, 147 U. S. 1; Hart v. Rogers, 48 Ky. (9 B. Mon.) 418; Louisville Bridge Co. v. City of Louisville, 81 Ky. 189; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498.

Myers v. Perry, 1 La. Ann. 372. Boundary line between Mississippi and Louisiana held to be the middle of the river. Same of boundary line between Louisiana and Texas. State v. Burton, 105 La. 516.

Granger v. Avery, 64 Me. 292. In State v. Keane, 84 Mo. App. 127, the result upon a boundary of a sudden abandonment of an old channel, with a new course for the stream, is discussed.

Morgan v. Reading, 11 Miss. (3 Smedes & M.) 366; Sioux City Bridge Co. v. Dakota County, 61 Neb. 75; Boscawen v. Canterbury, 23 N. H. (3 Fost.) 188; State v. Canterbury, 28 N. H. (8 Fost.) 195; State v. Davis, 25 N. J. Law (1 Dutch.) 386; State v. Metz, 29 N. J. Law (5 Dutch.) 122; In re Spier, 50 Hun, 607, 3 N. Y. Supp. 438; Udall v. Trustees of Brooklyn, 19 Johns. (N. Y.) 175; Stryker v. City of New York, 19 Johns. (N. Y.) 179.

State v. Eason, 114 N. C. 787. Low-water line and not the thread of the stream held the boundary.

Robinson v. Lamb, 131 N. C. 229. Where a certain stream is designated as a boundary line between two counties, that branch which has always been considered as the main channel of the river will be considered as such boundary.

Booth v. Shepherd, 8 Ohio St. 243. Gilchrist v. Strong, 167 Pa. 628, established the boundary of Wilkes-

Where a boundary line does not follow the course of a natural physical feature it is established by a line properly surveyed and determined according to stated monuments.[260] It is not necessary where a call is "within or about" that the course so designated should be strictly followed, and acquiescence as evidenced by the acts of parties in the course of an incorrect boundary line for many years operates as an estoppel.[261] Following the rule that

barre as extending to the middle of the Susquehanna River.

State v. City of Columbia, 27 S. C. 137.

[258] In re Inhabitants of Ipswich, 30 Mass. (13 Pick.) 431. Boundary follows thread of stream.

Cold Spring Iron Works v. Inhabitants of Tolland, 63 Mass. (9 Cush.) 492; Flynn v. City of Boston, 153 Mass. 372, 26 N. E. 868; Perkins v. Inhabitants of Oxford, 66 Me. 545; People v. Bouchard, 82 Mich. 156; State v. Gilmanton, 9 N. H. 461; Johns v. Davidson, 16 Pa. 512.

[259] Belding v. Hebard, 103 Fed. 532; Rabun County v. Habersham County, 79 Ga. 248, 5 S. E. 198; Beale v. Patterson, 3 Watts & S. (Pa.) 379; Roane County v. Anderson County, 89 Tenn. 259, 14 S. W. 1079; Davidson County v. Cheatham County (Tenn. Ch. App.) 63 S. W. 209.

[260] State of Virginia v. State of Tennessee, 148 U. S. 503; United States v. State of Texas, 162 U. S. 1; Jenkins v. Trager, 40 Fed. 726; Belding v. Hebard, 103 Fed. 532; Drummond v. State, 61 Ala. 64; Link v. Jones, 15 Colo. App. 281, 62 Pac. 339; New Jersey Southern R. Co. v. Chandler, 65 N. J. Law, 173, 46 Atl. 732.

State v. Rainey, 121 N. C. 612, 28 S. E. 366. A charter reading that the boundaries of a town shall be "one-fourth of a mile east, west, north and south from the center of the town and shall run with the four cardinal points of the compass" construed.

Horiston v. City Council of Charleston, 1 McCord (S. C.) 345; Montgomery v. Ives, 21 Miss. (13 Smedes & M.) 161.

State v. Merriman, 6 Wis. 14. Township surveys are not to be taken conclusively as squares of six miles, though prima facie this is true.

[261] State of Virginia v. State of Tennessee, 148 U. S. 503; United States v. State of Texas, 162 U. S. 1. Acquiescence not established. Strosser v. City of Ft. Wayne, 100 Ind. 443; Belknap v. City of Louisville, 93 Ky. 444, 20 S. W. 309; Wickliffe v. City of Lexington, 50 Ky. (11 B. Mon.) 155; Smith v. City of St. Louis, 21 Mo. 36; Omaha v. City of South Omaha, 31 Neb. 378, 47 N. W. 1113; Chosen Freeholders of Union County v. Essex County Freeholders, 43 N. J. Law, 391; People v. Carpenter, 24 N. Y. 86.

Humboldt County v. Lander County, 24 Nev. 461, 56 Pac. 228. Certain facts held not to constitute estoppel or acquiescence.

Hanson v. Russel, 28 N. H. (8 Fost.) 111; Hecker v. Sterling, 36 Pa. 423; Lampasas County v. Coryell County, 27 Tex. Civ. App. 195, 65 S. W. 67.

Smith v. Town of Rockingham, 25 Vt. 645. Acts of adjoining proprietors for a period of twenty years,

that is certain which can be made certain, the calls and courses of a boundary will be held certain and definite if they can be readily ascertained and followed by surveyors or if their location can be established by reference to certain definite objects.[262]

§ 57. Corporate boundaries; how established.

The preceding section deals with the definition and description of boundary lines. In this and following sections will be considered, in detail, the establishment of such lines, with the legal authority and the proper procedure at hearings. The fundamental principle that a public corporation holds its existence and its powers at the will of the sovereign is again suggested. Its boundaries as a part of its legal existence are determined and changed by the same authority. We look therefore to the sovereign, acting directly or through a delegated body, usually the legislature, for the legal authority necessary to the valid establishment or change of boundary lines.[263]

recognizing a certain stone wall as the boundary line between two towns, does not bind the towns. Hamilton v. McNeil, 13 Grat. (Va.) 389; Smith v. Dees, 92 Ga. 549, 17 S. E. 925, and Marsalis v. Garrison (Tex. Civ. App.) 27 S. W. 929, hold, however, to the contrary.

[262] Town of New Decatur v. Nelson, 102 Ala. 556, 15 So. 275; City of San Diego v. Granniss, 77 Cal. 511; County of San Bernardino v. Reichert, 87 Cal. 287; People v. Town of Linden, 107 Cal. 94, 40 Pac. 115.

Hollenbeck v. Sykes, 17 Colo. 317, 29 Pac. 380. Here the rule is also laid down that monuments control courses, and a specific course will control a general one.

Morrison v. Langworthy, 4 G. Greene (Iowa) 177; McClintock v. Rogers, 11 Ill. 279; Cate v. Thayer, 3 Me. (3 Greenl.) 71; Raab v. State, 7 Md. 483; Bechtel v. Village of Edgewater, 45 Hun (N. Y.) 240; Elmendorf v. City of New York, 25 Wend. (N. Y.) 693; New Jersey Southern R. Co. v. Chandler, 65 N. J. Law, 173, 46 Atl. 732; Proprietors of Enfield v. Day, 11 N. H. 520; Eureka County v. Lander County, 21 Nev. 144, 24 Pac. 871; Com. v. Fullerton, 12 Pa. 266; State v. Broach (Tex. Civ. App.) 35 S. W. 86; State v. Wofford, 90 Tex. 514; French v. Bankhead, 11 Grat. (Va.) 136; Cutting v. Stone, 7 Vt. 471; Gray v. Sheldon, 8 Vt. 402; Williams v. Willard, 23 Vt. 369; State v. Hoff (Tex. Civ. App.) 29 S. W. 672.

[263] City of Little Rock v. Parish, 36 Ark. 166; Stilz v. City of Indianapolis, 55 Ind. 515; City of Galesburg v. Hawkinson, 75 Ill. 152; Division of Howard County, 15 Kan. 194; City of New Orleans v. Cazelar, 27 La. Ann. 156. See note to Com. v. City of Roxbury, 75 Mass. (9 Gray) 512. People v. Bennett, 29 Mich. 451; Martin v. Dix, 52 Miss. 53; State v. Crow Wing County Com'rs, 66 Minn. 519, 68 N. W. 767, 69 N. W. 925, 73 N. W. 631; State v. Pioneer Press Co., 66 Minn. 536,

To acts changing or establishing the boundary lines of public corporations, the usual rules of construction apply. The intent of the legislature will be ascertained if possible and given effect, and different acts harmonized.[264]

§ 58. Boundary lines; agency for their establishment.

The legislature having power to fix or establish the boundaries of public corporations in the first instance, and therefore to subsequently change them, it is also within their power, though some cases hold to the contrary, to delegate to some ministerial or judicial body the right to determine them in the manner provided.[265]

The cases holding contrary to this rule base their findings upon the principle that the establishment of boundaries, except so far as ministerial or clerical duties in connection with it are concerned, is a legislative matter, delegated to the legislature itself by the sovereign people, and that under a familiar rule the performance of this legislative duty cannot be delegated.[266] It is quite competent, however, for the legislature to provide for a tribunal to consider the change or the establishment of boundary lines,[267] with power to control proceedings before them,[268] includ-

68 N. W. 769; Schaffner v. Young, 10 N. D. 245, 86 N. W. 733; Stuart v. Kirley, 12 S. D. 245, 81 N. W. 147; Wade v. City of Richmond, 18 Grat. (Va.) 583; Washburn v. City of Oshkosh, 60 Wis. 453.

[264] Link v. Jones, 15 Colo. App. 281, 62 Pac. 339; Indiana, I. & I. R. Co. v. People, 154 Ill. 558; Kaufman County v. McGaughey (Tex. Civ. App.) 32 S. W. 927; Wright v. Jones, 14 Tex. Civ. App. 423, 38 S. W. 249.

[265] Fisher v. San Diego City Police Ct., 86 Cal. 158; Town of Suffield v. Town of East Granby, 52 Conn. 175; City of Jacksonville v. L'Engle, 20 Fla. 344; Town of Cicero v. City of Chicago, 182 Ill. 301; Stilz v. City of Indianapolis, 55 Ind. 515; City of Vincennes v. Windman, 72 Ind. 218; City of Delphi v. Startzman, 104 Ind. 343; City of Emporia v. Smith, 42 Kan. 433; Kelly v. Meeks, 87 Mo. 396; City of Wahoo v. Dickinson, 23 Neb. 426; Whitehouse v. Bickford, 29 N. H. 471; Pitman v. Town of Albany, 34 N. H. 577; Wells v. Jackson Iron Mfg. Co., 48 N. H. 491; People v. Carpenter, 24 N. Y. 86; Blanchard v. Bissell, 11 Ohio St. 96.

[266] People v. Bennett, 29 Mich. 451.

[267] State of Missouri v. State of Iowa, 160 U. S. 688; Belding v. Hebard, 103 Fed. 532; Prince George's County Com'rs v. Village of Bladensburg, 51 Md. 465; Inhabitants of Lisbon v. Inhabitants of Bowdoin, 53 Me. 324.

Inhabitants of Winthrop v. Inhabitants of Readfield, 90 Me. 235. No necessity for taking of notes by commissioners. This case also holds that previous employment as

ing the presentation of evidence,[269] listen to objections, and make an order or finding[270] accompanied by a map or plat[271] which shall establish the boundary and from which there may be an appeal to a higher and judicial tribunal, or upon which a suit can be maintained to determine the question by those who have the right and who are not barred by estoppel or laches.[272] This tribunal on appeal, it was held in one case, had only power to inquire into the conduct and motives of the commissioners making the finding or order. They could not review questions of law or fact involved.[273] The legislative adoption of the report of a commission selected by two states to settle the boundary line beween them does not make a "compact," forbidden by the constitution of the United States without the consent of Congress.[274] The settlement of boundary lines between towns by such organizations, without the intervention of the legislature, cannot affect the title of the commonwealth, so it has been held in Massachusetts, to the seashore within one of the towns.[275]

§ 59. Proceedings for the establishment of corporate boundaries and miscellaneous matters in connection therewith.

The commissioners or officials appointed or elected under the authority authorizing the establishment of a boundary line are not usually considered, in their collective capacity, a judicial body.[276]

surveyor to run the line in dispute does not disqualify a person from acting as one of the commissioners.

Kaufman County v. McGaughey, 3 Tex. Civ. App. 655, 21 S. W. 261; Marsalis v. Creager, 2 Tex. Civ. App. 368, 21 S. W. 545; Wise County v. Montague County, 21 Tex. Civ. App. 444, 52 S. W. 615.

[268] Govers v. Westchester County Sup'rs, 55 App. Div. 40, 67 N. Y. Supp. 27.

[269] Inhabitants of Winthrop v. Inhabitants of Readfield, 90 Me. 235.

[270] State of Indiana v. State of Kentucky, 163 U. S. 520; Memphis & C. Packet Co. v. Pikey, 142 Ind. 304.

[271] Bluefield Waterworks & Imp. Co. v. Sanders, 11 C. C. A. 232, 63 Fed. 333; Inhabitants of Wesley v. Sargent, 38 Me. 315; Bailey v. Rolfe, 16 N. H. 247.

Henniker v. Hopkinton, 18 N. H. 98, where two termini of a line are determined, the line between them must be straight unless the contrary appears by description. The same in State v. City of Columbia, 27 S. C. 137, 3 S. E. 55.

[272] Gunnison County Com'rs v. Saguache County Com'rs, 2 Colo. App. 412, 31 Pac. 183.

[273] Inhabitants of Winthrop v. Inhabitants of Readfield, 90 Me. 235.

[274] State of Virginia v. State of Tennessee, 148 U. S. 503.

[275] Com. v. City of Roxbury, 75 Mass. (9 Gray) 451.

[276] Under Tex. Rev. St. art. 808a,

It is for them to consider evidence that may be offered pertinent to the question before them, without applying, however, as to its introduction, the strict rules of law,[277] and after having considered the evidence or established the boundary in the manner prescribed by lawful authority, make their report with, if occasion requires, findings of fact[278] and possibly conclusions of law.

The expense of such proceedings may be ascertained by them and certified to the proper disbursing officers for payment.

The statutes in some states require, as the initiative of proceedings establishing boundary lines, a petition.[279] This should contain the proper averments, and the description of the proposed boundary should be specific and definite.[280] No notice is required to be given except to interested persons.[281]

§ 60. Objections to the establishment of corporate boundaries.

Whether the power to establish or change boundary lines is vested in a prescribed court or in an elective or appointive board especially provided for the occasion, the rule of law holds that objections to the bringing of such proceedings, to their validity in any respect, or to the jurisdiction of the tribunal, must be made within the time fixed by law. If parties are guilty of laches there can be no relief given even in cases where their objections, if made within the proper time, are well founded. This rule applies not only to the assignment of errors but also to the manner or the place of the pendency of such proceedings.[282]

§ 61. Location of corporate boundaries.

Where the location of boundaries is placed in the hands of an

the district court has full and complete jurisdiction of an action brought by a county to establish a boundary line, though proceedings may be pending in an inferior court for the same purpose. Lampasas County v. Coryell County, 27 Tex. Civ. App. 195, 65 S. W. 67.

[277] McKissick v. Colquhoun, 18 Tex. 148.

[278] State v. Atchison County Com'rs, 44 Kan. 186; Kornburg v. Deer Lodge County Com'rs, 10 Mont. 325, 25 Pac. 1041; Campton v. Holderness, 25 N. H. 225.

[279] Boscawen v. Canterbury, 23 N. H. 188.

[280] Howell v. Kinney, 99 Ga. 544, 27 S. E. 204.

[281] Marsalis v. Garrison (Tex. Civ. App.) 27 S. W. 929.

[282] Ex parte Rhodes, 43 Ala. 373; Belknap v. City of Louisville, 14 Ky. L. R. 420, 20 S. W. 309.

individual, a personal survey is not necessary.[283] His approval of a line surveyed by competent men under his control and direction will be sufficient,[284] and acts in excess of his authority will not affect existing lines.[285]

§ 62. Appeal from order fixing corporate boundaries.

Usually appeals can be taken from an order of commissioners appointed to consider and establish corporate boundary lines,[286] although this right is not essential to the validity of such proceedings or the line established. It is within the discretion of the legislature to provide for an appeal, the establishment of the boundary line in the first instance being a question exclusively for its determination.[287] The time fixed by statute within which the validity of the line can be questioned, either by an appeal from the order of the commissioners or a suit brought to determine the question, is deemed mandatory.[288]

§ 63. Change of corporate boundary.

The boundary lines of a public corporation when established in the manner prescribed by law remain fixed until changed by like authority. On the annexation or division of territory, boundary lines of the old organizations must necessarily be changed or adjusted to suit the new conditions. The legislature having the power in the first instance to determine boundary lines must grant authority for the change,[289] and as in the original estab-

[283] Hinsdale County Com'rs v. Mineral County Com'rs, 9 Colo. App. 368, 48 Pac. 675.

[284] Rice v. Trinity County, 110 Cal. 247.

[285] Humboldt County v. Lander County, 24 Nev. 461, 56 Pac. 228.

[286] City of San Jose v. Uridias, 37 Cal. 339; Routt County Com'rs v. Grand County Com'rs, 4 Colo. App. 306, 35 Pac. 1061; Warren County Com'rs v. State, 15 Ind. 250.

[287] Flynn v. City of Boston, 153 Mass. 372; Pool v. Brown, 98 Mo. 675; In re Plunkett Creek Tp., 148 Pa. 299, 23 Atl. 1041; Roane County v. Anderson County, 89 Tenn. 259; Wise County v. Montague County, 21 Tex. Civ. App. 444.

In Ewing v. State, 81 Tex. 172, 16 S. W. 872, it is held that under Rev. St. of Tex. art. 508, the boundaries of a municipal corporation as established at incorporation are not conclusive.

Washburn v. City of Oshkosh, 60 Wis. 453.

[288] Routt County Com'rs v. Grand County Com'rs, 4 Colo. App. 306, 35 Pac. 1061; Gunnison County Com'rs v. Saguache County Com'rs, 2 Colo. App. 412; Marsalis v. Creager, 2 Tex. Civ. App. 368; Kaufman County v. McGaughey, 3 Tex. Civ. App. 655.

lishment the changed line may be designated in the act or authority; or, in those states where the contrary is not held, the ministerial duties may be delegated to a subordinate body, either judicial or ministerial in its nature,[290] whose duty it is, after due consideration of the petition and evidence submitted to them, to make an order or finding, accompanied usually by a map or a plat,[291] which when properly filed gives force to the change, and new relations are established between persons and property and corporate organizations.

In many cases the change of boundary is made dependent upon the consent of the people residing within the districts affected. This is especially true of municipal corporations proper.[292] A line may not be changed until after the consent of the requisite number of voters or the required majority in the legislature.[293] The duty imposed upon commissioners to change boundary lines

[289] In re Executive Communication of Jan. 16, 1873, 14 Fla. 320; Howell v. Kinney, 99 Ga. 544; Taylor v. Com., 54 Ky. (15 B. Mon.) 11; Walters v. Richardson, 93 Ky. 374, 20 S. W. 279; Adams v. Ulmer, 91 Me. 47, 39 Atl. 347; People v. Mabie, 142 N. Y. 343, 37 N. E. 115; Gorrill v. Whittier, 3 N. H. 265; In re Wetmore Tp., 68 Pa. 340; Harrison Tp. v. Schoolcraft County Sup'rs, 117 Mich. 215, 75 N. W. 456.

City of Westport v. Kansas City, 103 Mo. 141. Where the manner in which city limits can be extended is prescribed by the state constitution, the legislature has no power to pass an act authorizing their extension in a different manner. See, also, People v. Mabie, 73 Hun (N. Y.) 495, which holds that a municipal corporation organized under a special act cannot change its boundaries under the provisions of a general law but is confined to the manner prescribed in the special act or charter.

[290] In re Mathews, 59 App. Div. 159, 69 N. Y. Supp. 203. See State v. Haverly, 62 Neb. 767, 87 N. W. 959, as to effect upon office of county commissioner by change in boundary lines. Van Den Bos v. Douglas County Com'rs, 11 S. D. 190, 76 N. W. 935.

[291] In re Catharine & Frankstown Tps., 31 Pa. 303. In Smith v. Sherry, 54 Wis. 114, the statutory provisions regarding an order or finding by county commissioners relative to the change of boundary lines are mandatory in their character and must be substantially complied with in order to effect such a change.

[292] Dodson v. Town of Ft. Smith, 33 Ark. 508; Strosser v. City of Ft. Wayne, 100 Ind. 443; Morford v. Unger, 8 Iowa, 82; City of Topeka v. Gillett, 32 Kan. 431; Daly v. Morgan, 69 Md. 460; Stone v. City of Charlestown, 114 Mass. 214; Hewitt's Appeal, 88 Pa. 55; Stuart v. Kirley, 12 S. D. 245; State v. City of Waxahachie, 81 Tex. 626.

[293] Jackson v. State, 131 Ala. 21, 31 So. 380. See, also, cases cited in preceding note.

on the presentation to them of a petition properly signed and verified is not discretionary in its character, and its performance may be compelled by mandamus.[294] If a petition is required by statute as preliminary to action, its averments and signatures must follow the provisions of the law.[295]

§ 64. Judicial recognition.

Boundary lines as established by competent tribunals become matters of public record of which the courts will take cognizance and exercise jurisdiction accordingly.[296] Nor can they be collaterally attacked in suits between private individuals.[297]

§ 65. Effect of the establishment or change of a boundary line.

A public corporation, of whatever grade, is given, by the legislature, certain duties for its performance, and, in order to perform these duties, certain rights and powers. Either as an agency of the government or considered as a private corporation, it entertains jurisdiction of, and control over, persons and property within its limits.[298] In order that it may act as an agency of government for the welfare and protection of those entitled, it is necessary that it levy taxes and disburse the proceeds for public purposes, and where boundary lines are changed it is competent for the legislature to authorize the levy of taxes at different rates upon different portions of municipal territory.[299] A change in a boundary line takes from one corporation persons and property, and places them within the jurisdiction of another.[300]

[294] Hawkins v. Starke County Com'rs, 14 Ind. 521.

[295] Foster v. Hare, 26 Tex. Civ. App. 177, 62 S. W. 541.

[296] State v. Dunwell, 3 R. I. 127.

[297] Polk's Lessee v. Gentry, 1 Overt. (Tenn.) 269; Shank v. Town of Ravenswood, 43 W. Va. 223, 27 S. E. 223.

[298] Fleeger v. Pool, 1 McLean, 185, Fed. Cas. No. 4,860; Poole v. Fleeger's Lessee, 11 Pet. (U. S.) 185; Bennett v. Boggs, 1 Baldw. 76, Fed. Cas. No. 1,319; Bigelow v. Nickerson, 70 Fed. 113; Belding v. Hebard, 103 Fed. 532; Duncombe v. Prindle, 12 Iowa, 1; Russ v. City of Boston, 157 Mass. 60, 31 N. E. 708.

[299] United States v. City of Memphis, 97 U. S. 284; Gillette v. City of Hartford, 31 Conn. 357; Durant v. Kauffman, 34 Iowa, 194; Evans v. City of Council Bluffs, 65 Iowa, 238; Courtney v. City of Louisville, 75 Ky. (12 Bush) 419; Cheaney v. Hooser, 48 Ky. (9 B. Mon.) 330; Benoist v. City of St. Louis, 19 Mo. 179. See, also, Cooley, Taxation (2d Ed.) p. 157.

[300] Langford v. Monteith, 102 U. S.

A public corporation exercises the jurisdiction and the powers suggested in the preceding paragraph in many ways: It controls and regulates personal and property rights,[301] and exercises, over all within its borders, its police powers for the protection of life, health, good morals and property;[302] it maintains all the machinery of government, the use of which is granted to it by the sovereign,—judicial, quasi legislative, ministerial and clerical, officers and bodies; it enforces their orders and regulations with all the power of the state; and as these powers and bodies may vary under different organizations, it follows that a change from one to any other is a matter sometimes not lightly to be considered.

Where territory is ceded by a state to the United States, it is entitled to the same sovereignty and jurisdiction originally possessed by the state ceding it.[303]

In Indiana the limits of two different organizations, viz., a civil township and a school township, can be identical, and the jurisdiction and powers of these separate organizations will be full and complete as to their own property and duties.[304]

§ 66. Seat of government.

As essential and necessary to the existence of a public corporation, there must be what is termed the seat of government, the

145; Duncombe v. Prindle, 12 Iowa, 1; Yellowstone County Com'rs v. Northern Pac. R. Co., 10 Mont. 414, 25 Pac. 1058; Baldwin v. Goldfrank, 9 Tex. Civ. App. 269, 26 S. W. 155; Moss v. Gibbs, 57 Tenn. (10 Heisk.) 283.

[301] Smith v. Skagit County Com'rs, 45 Fed. 725.

[302] Ex parte Marsh, 57 Fed. 719; Manchester v. Com. of Massachusetts, 139 U. S. 240, 264; Humboldt Lumber Manufacturers' Ass'n v. Christopherson, 73 Fed. 239. As to concurrent jurisdiction of two states over navigable waters between them, see In re Mattson, 69 Fed. 535; Sherlock v. Alling, 44 Ind. 184; Welsh v. State, 126 Ind. 71; Meyler v. Wedding, 21 Ky. L. R. 1006, 53 S. W. 809; People v. Central R. of New Jersey, 48 Barb. (N. Y.) 478; Neal v. Com., 17 Serg. & R. (Pa.) 67.

The case of In re Mattson, ante, also holds that the provision for concurrent jurisdiction between Washington and Oregon over the Columbia River was not a limitation on the sovereignty of the states nor an interference with their jurisdiction as equal sovereigns.

[303] Columbus Ins. Co. v. Curtenius, 6 McLean, 209, Fed. Cas. No. 3,045; Pollard v. Hagan, 3 How. (U. S.) 212; City of Mobile v. Eslava, 9 Port. (Ala.) 577; Dunlap v. Com., 108 Pa. 607.

[304] Heizer v. Yohn, 37 Ind. 415.

place in which the public officials perform their duties as agencies of the sovereign,[305] where public records are kept, where public buildings are constructed and devoted to public uses, and where all the machinery of government adopted or used by a particular grade of corporation is employed for the purposes authorized by law. The seat of government of the state or sovereign is termed the capital, the location of which is determined by vote of the people or through constitutional provision, and which ordinarily, after its original location, is not changed.[306]

A municipal corporation is itself a center of population,—is itself the seat of its government. The law, therefore, as we find it in the reported cases relating to or discussing seats of government, is limited practically to the establishment of the county seat as the official center of a public quasi corporation, the county, either by act of legislature or under constitutional provisions.[307]

§ 67. Original location of a county seat.

The sovereign acting through its delegated body, the legislature, determines the boundary lines of that particular grade of public corporation known as the county, which, in the United States, is the usual form of organization intended to perform and exercise certain governmental functions and powers. In the original organization of these quasi corporations, the location of the seat of government is usually designated,[308] and it is competent

[305] McNair v. Williams, 28 Ark. 200; Maxey v. Mack, 30 Ark. 472; Kelly v. Tate, 43 Ga. 535; Buckinghouse v. Gregg, 19 Ind. 401; State v. Hamilton County Com'rs, 35 Kan. 640, 15 Am. & Eng. Corp. Cas. 43; State v. Weld, 39 Minn. 426, 24 Am. & Eng. Corp. Cas. 449; State v. Porter, 13 S. D. 126.

[306] Edwards v. Lesueur, 132 Mo. 410, 33 S. W. 1130; Slack v. Jacob, 8 W. Va. 612.

[307] Ex parte Hill, 40 Ala. 121; Jewell v. Weed, 18 Minn. 272 (Gil. 247); Barnes v. Pike County Sup'rs, 51 Miss. 305; Walker v. Tarrant County, 20 Tex. 16; State v. Larrabee, 1 Wis. 200; State v. Washington County Sup'rs, 2 Chand. (Wis.) 247, 2 Pin. 552.

[308] Ex parte Hill, 40 Ala. 121; Frost v. Pfeiffer, 26 Colo. 338, 58 Pac. 147; Allen v. Lytle, 114 Ga. 275, 40 S. E. 238.

Adams v. County of Logan, 11 Ill. 337. The legislature also has the power of removal, even though property was given to the county in consideration of the permanent location of the county seat at a certain place. And the same is held in State v. Sherman County Com'rs, 39 Kan. 293, 18 Pac. 179. Megret v. Parish of Vermillion, 10 La. Ann. 670; Jewell v. Weed, 18 Minn. 272 (Gil. 247); Monet v. Jones, 18 Miss. (10 Smedes

for the legislature to either do this or provide, after organization of the county, that it shall be selected by vote of the people at an election to be held as authorized.[309] And where its location is fixed by either of these two modes it is not within the power of public officials to change it through the construction elsewhere of public buildings ordinarily located at the county seat,[310] or by their failure to remove the public records and offices to the county seat legally selected.[311] The legislature may itself, in an act incorporating or organizing the county, designate, as has been said, the location of the county seat, or it may, in this act, provide for commissioners who shall perform this duty.[312] Under the last condition where the authority is granted commissioners to "select and locate some central and convenient place within the same for a county seat," it is not necessary that the place selected should be at the geographical center of the county so long as it is convenient for the people.[313] The location of the county seat, it has

& M.) 237; State v. Smith, 46 Mo. 60.

Newton v. Mahoning County Com'rs, 26 Ohio St. 618, affirmed 100 U. S. 548. The location of a county seat as a condition for the gift of property to the county does not create a contract between the state and the citizens of that town, preventing a subsequent removal.

Fall River County v. Powell, 5 S. D. 49; Walker v. Tarrant County, 20 Tex. 16.

Gilmore v. Hayworth, 26 Tex. 89, also holds that where there is an absolute donation of land there can be no right of reverter upon the removal of the county seat, and the acceptance by the county of such gift does not create a contract to continue indefinitely the county seat at that place.

State v. Larrabee, 1 Wis. 200; Attorney General v. Fitzpatrick, 2 Wis. 542; State v. Stevens, 112 Wis. 170, 88 N. W. 48.

[309] State v. Crook, 126 Ala. 600, 28 So. 745; Ter. v. Mohave County Sup'rs, 2 Ariz. 248, 12 Pac. 730; Twiford v. Alamakee County, 4 G. Greene (Iowa) 60; State v. Rotwitt, 15 Mont. 29, 37 Pac. 845; Barnes v. Pike County Sup'rs, 51 Miss. 305; Laws v. Vincent, 16 Neb. 208; Welch v. Wetzel County Ct., 29 W. Va. 63, 1 S. E. 377.

[310] Municipality of Lunenburg v. Attorney General, 20 Can. Sup. Ct. 596; State v. Harwi, 36 Kan. 588, 14 Pac. 158.

[311] Wells v. Taylor, 5 Mont. 202, 3 Pac. 255.

[312] Skipwith v. Martin, 50 Ark. 141, 6 S. W. 514; Mitchell v. Lasseter, 114 Ga. 275, 40 S. E. 287; Swartz v. Lake County Com'rs, 158 Ind. 141, 63 N. E. 31; Rice v. Shay, 43 Mich. 380; Tetherow v. Grundy County Ct., 9 Mo. 118; Mills v. Mills, 40 N. C. (5 Ired. Eq.) 244. But see Smith v. Magourich, 44 Ga. 163.

[313] Mitchell v. Lasseter, 114 Ga. 275, 40 S. E. 287.

been held, following a rule of law applying in many instances, cannot be inquired into in a collateral proceeding.[314]

§ 68. Removal of a county seat.

The fixing of a county seat at a certain place does not prevent the legislature from providing for its removal in any manner or at any time which it may designate.[315] Even the acceptance of

[314] State v. Padgett, 19 Fla. 518; Robinson v. Moore, 25 Ill. 135; Cleveland, C., C. & St. L. R. Co. v. Dunn, 63 Ill. App. 531; Board v. Head, 33 Ky. (3 Dana) 489; State v. Piper, 17 Neb. 614.

[315] Elwell v. Tucker, 1 Blackf. (Ind.) 285.

Allen v. Reed (Okl.) 60 Pac. 782. This case holds that statutes of Okl. 1893, c. 23, are void as being inconsistent with act of congress of March 3, 1893, §§ 10, 14.

Alley v. Denson, 8 Tex. 297; Walker v. Tarrant County, 20 Tex. 16; Harrell v. Lynch, 65 Tex. 146; In re County Seat of La Fayette County, 2 Chand. (Wis.) 212, 2 Pin. 523; State v. Washington County Sup'rs, 2 Chand. (Wis.) 247, 2 Pin. 552; State v. Portage County Sup'rs, 24 Wis. 49.

One of the leading cases on this question is that of Newton v. Mahoning County Com'rs, 100 U. S. 548, affirming 26 Ohio St. 618. In the year 1846 the legislature of Ohio passed an act locating the county seat of Mahoning County at Canfield upon the fulfillment of certain prescribed terms and conditions which were fully complied with. In 1874 another act was passed providing for its removal from Canfield to Youngstown. A bill was filed claiming that the act of 1846 with the action under it constituted a contract within the meaning and protection of the contract clause of the Federal Constitution. The court in its opinion by Justice Swayne say in part: "In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated. They involve public interests, and legislative acts concerning them are, necessarily, public laws. Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

"All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them, must necessarily, be of the same character.

"If one may be bargained about, so may the other. In this respect there is no difference in principle between them. The same reasoning, pushed a step farther in the same direction, would involve the same re-

property made conditional upon the location of a county seat at a particular town does not make a contract with property owners of such a nature as to prevent removal.[316] The use of the words "permanently established" or "permanently located" in the original act does not carry the usual significance of the terms.[317] The

sult with respect to the seat of government of a state. If a State Capitol were sought to be removed, under the circumstances of this case with respect to the county seat, whatever the public exigencies or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction."

The court then conceded for the purposes of the opinion that there was a contract as claimed by the plaintiffs in error and proceeded to discuss the rules of construction which should apply to such contracts. "The rules of interpretation touching such contracts are well settled in this court. In Tucker v. Ferguson, 89 U. S. (22 Wall.) 527, we said: 'But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend either in scope or duration beyond what the terms of the concession clearly require.' There must have been a deliberate intention clearly manifested on the part of the state to grant what is claimed. Such a purpose cannot be inferred from equivocal language. * * * It must not be a mere gratuity. There must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure. * * * No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. * * * 'The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court. Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659."

[316] Moses v. Kearney, 31 Ark. 261; Twiford v. Alamakee County, 4 G. Greene (Iowa) 60; Adams v. Logan County, 11 Ill. 337; Harris v. Shaw, 13 Ill. 463; Armstrong v. Dearborn County Com'rs, 4 Blackf. (Ind.) 208; Swartz v. Lake County Com'rs, 158 Ind. 141, 63 N. E. 31; State v. Sherman County Comrs, 39 Kan. 293, 18 Pac. 179; State v. Jones, 23 N. C. (1 Ired.) 414; Newton v. Mahoning County Com'rs, 26 Ohio St. 618; Alley v. Denson, 8 Tex. 297; Gilmore v. Hayworth, 26 Tex. 89.

[317] Newton v. Mahoning County Com'rs, 100 U. S. 548; Armstrong v. Dearborn County Com'rs, 4 Blackf. (Ind.) 208; Harris v. Shaw, 13 Ill. 463.

removal is ordinarily effected pursuant to a legislative act in itself directing a change and naming the new county seat,[318] in some cases passed pursuant to a constitutional provision;[319] or the act may provide for commissioners or a reference to a judicial body to determine this question.[320] Or again, this being the usual method, the constitutional or statutory authority for removal may provide for a change by the consent of the people residing within the county, through an election held in the manner to be considered in succeeding sections.[321] Lawful authority for the removal is the first consideration. It has been held that where a statute provides upon the fixing of a county seat in a particular place "it shall not be lawful to change the county seat again for ten years," such language is not a bar to the filing of a petition for an election to change such county seat before the lapse of

[318] Lake County Com'rs v. State, 24 Fla. 263, 4 So. 795; Attorney General v. Canvassers of Iron County, 64 Mich. 607, 31 N. W. 539; State v. Perry County Com'rs, 5 Ohio St. 497; Noble v. Noble County Com'rs, 5 Ohio St. 524.

[319] Livermore v. Waite, 102 Cal. 113, 36 Pac. 424; People v. Waite (Cal.) 36 Pac. 431; Doan v. Logan County Com'rs, 2 Idaho, 781, 26 Pac. 167; In re County Seat of Osage County, 16 Kan. 296; State v. Sanders, 42 Kan. 228; State v. Burton, 47 Kan. 44; Bayard v. Clinge, 16 Minn. 249 (Gil. 221).

Nichols v. Walter, 37 Minn. 264, 33 N. W. 800. Chapter 272, Laws of Minnesota, 1885, held unconstitutional and void as being special legislation and not uniform in its operation throughout the state.

Attorney General v. Canvassers of Iron County, 64 Mich. 607; Stuart v. Bair, 67 Tenn. (8 Baxt.) 141; Bouldin v. Lockhart, 69 Tenn. (1 Lea) 195; Combs v. Stumple, 79 Tenn. (11 Lea) 26.

[320] Russell v. Jacoway, 33 Ark. 191.

Lake County Com'rs v. State, 24 Fla. 263, 4 So. 795. An act providing for the temporary location of a county seat by the county commissioners, or a majority of them, is not held a delegation of the law-making power.

People v. County Officers of St. Clair, 15 Mich. 85. Where a resolution removing the county seat was passed by the board of supervisors upon the condition that "suitable guarantees should be given, providing for the cost of county buildings at the new county seat," a submission to the vote of the people of the question of removal alone, without the condition, rendered the election void.

Bagot v. Antrim County Sup'rs, 43 Mich. 577.

[321] Varner v. Simmons, 33 Ark. 212; Coleman v. People, 7 Colo. App. 243, 42 Pac. 1041; Adams v. Smith, 6 Dak. 94; Smith v. Magourich, 44 Ga. 163; Conley v. Fleming, 14 Kan. 381; In re County Seat of Linn County, 15 Kan. 500; Edwards v. Police Jury of Avoyelles, 39 La. Ann. 855, 2 So. 804; Simpson v. Bailey, 3 Or. 515; Caruthers v. State, 67 Tex. 132; Welch v. Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

ten years.[322] The doctrine of estoppel will apply to the removal of a county seat where it has been located in a place for over ten years and during that time two elections have been held upon the question of change, each of which has resulted in a defeat of the attempt to remove the same.[323] The expense of proceedings looking to the removal of a county seat where a town becomes a party to them, becomes a valid charge upon such town which can be collected in the usual manner.[324] The cost of erecting buildings at the new county seat is limited by the power of the authorities to levy taxes for the purpose of constructing or repairing public buildings.[325] The general rule obtains that the removal of a county seat involves no liability or obligation on the part of the public corporation for the reimbursement of those who have made donations because of its location at a particular place. The obligation for reconveying real property will depend largely upon the conditions annexed to the grant. If made unconditionally, there is no reverter to the original grantor or his heirs but the existence of special conditions may create the right to demand a reconveyance.[326] It is, of course, perfectly legal and in some cases pre-eminently just for the legislature to authorize the reconveyance to the parties who originally made donations of such property or their legal representatives and the performance of this duty by the proper authorities may be enforced.[327]

§ 69. Petition for removal.

When the agency for the removal of a county seat as authorized by the legislature or constitutional provision is an election, the

[322] Cochran v. Edwards, 38 Ark. 136; State v. Burton, 47 Kan. 44. But see Solomon v. Fleming, 34 Neb. 40, 51 N. W. 304.

[323] Coleman v. People, 7 Colo. App. 243, 42 Pac. 1041.

[324] Wells v. Whittaker, 4 Ill. App. 381.

[325] Callam v. City of Saginaw, 50 Mich. 7.

[326] Adams v. County of Logan, 11 Ill. 337; Harris v. Shaw, 13 Ill. 463. But see Megret v. Vermillion, 10 La. Ann. 670; Armstrong v. Dearborn County Com'rs, 4 Blackf. (Ind.) 208; Twiford v. Alamakee County, 4 G. Greene (Iowa) 60; Kent County Sup'rs v. Grand Rapids, 61 Mich. 144, 27 N. W. 888; Lucas County Com'rs v. Hunt, 5 Ohio St. 488; Alley v. Denson, 8 Tex. 297; Cooley, Const. Lim. (4th Ed.) p. 481.

[327] Harris v. Whiteside County Sup'rs, 105 Ill. 445; but in Wilkinson v. Cheatham, 43 Ga. 258, it was held that the legislature could compel a county to pay the damages resulting to property owners of the town by the removal of the county seat.

proceedings are usually initiated by the drafting of a petition in the form and containing the averments required by law, with its presentation to and consideration by a designated official body.[328] This body is vested with discretionary powers upon the sufficiency of the petition, both in form and subject-matter, and their decisions in this regard ordinarily, in the absence of fraud, are conclusive and cannot be inquired into by courts of law.[329] They may be limited, however, both as to their manner of action and determination of questions by statutory rules and provisions.[330] Statutory provisions relating to the filing of a petition and the establishment of the county seat will not ordinarily prevent successive and subsequent petitions, though the granting of these petitions and the elections held will be controlled by statute.[331] Interested parties have the right to examine all papers on file in connection with removal proceedings, including the preliminary petition for the election.[332]

§ 70. Its form and averments.

Although the commissioners designated by law to whom the petition should be presented have discretionary powers in regard to its sufficiency in averments and form, it is, nevertheless, true that it must contain those required by law and necessary to give jurisdiction to the commissioners,[333] and if its form is prescribed by the statutes, a variation from this will be likely to render the proceedings void.[334] The reason for this rule seems to be that

[328] Lanier v. Padgett, 18 Fla. 842; Douglass v. Baker County Com'rs, 23 Fla. 419, 2 So. 776; Mode v. Beasley, 143 Ind. 306; Benton v. Nason, 26 Kan. 658; Alley v. Denson, 8 Tex. 297.

[329] Markle v. Clay County Com'rs, 55 Ind. 185; In re County Seat of Linn County, 15 Kan. 500; Slingerland v. Norton, 59 Minn. 351; State v. Langlie, 5 N. D. 594, 67 N. W. 958; Baker v. Louisa County Sup'rs, 40 Iowa, 226; Bennett v. Hetherington, 41 Iowa, 142; Herrick v. Carpenter, 54 Iowa, 340; Currie v. Paulson, 43 Minn. 411. But contra, Rickey v. Williams, 8 Wash. 479.

[330] Herrick v. Carpenter, 54 Iowa, 349.

[331] Kent v. Sigler, 158 Ind. 214, 62 N. E. 491.

[332] Ayres v. Moan, 34 Neb. 210; Crews v. Coffman, 36 Neb. 824.

[333] Clay County Com'rs v. Markle, 46 Ind. 96; Jackson County Com'rs v. State, 147 Ind. 476, 46 N. E. 908; McKinney v. Bradford County Com'rs, 26 Fla. 267; State v. Stock, 38 Kan. 154, 16 Pac. 106; Doolittle v. Cabell County Ct., 28 W. Va. 158.

[334] Benton v. Nason, 26 Kan. 658. In this case the statute prescribed no form and it was held that a petition distinctly expressing the wish

the removal of a county seat contemplates the affecting or change of rights established but not vested in their character, and that in order to destroy these, technical statutory provisions must be strictly complied with. The courts will not look so much to the substance of the proceedings in these preliminary matters, but to the technicalities.[335]

Another reason is that the legislature originally had and ever retains, in the absence of constitutional provision, the right of control over the location of county seats, and as the availability of this right exists in statutes these must be strictly followed.

Amendments to the petition when made within a time not affecting the validity of the proceedings will be considered proper.[336]

§ 71. Petition and its signers.

There is less difficulty in determining the proper form and averments of a petition for the removal of a county seat than in ascertaining the right to sign. The law usually limits such right to "qualified" or "legal voters,"[337] "residents" or "resident electors,"[338] "property owners"[339] or "householders," and prescribes as the requisite number "one-third,"[340] "one-half," "two-thirds," "a number greater than the remonstrants,"[341] or some other proportion.[342] In counting the signers to the petition,

of the petitioners was sufficient, the precise language being immaterial.

[335] In re Dallas Boundary Line, 10 Kulp (Pa.) 64; Ayres v. Moan, 34 Neb. 210.

[336] Mode v. Beasley, 143 Ind. 306.

[337] Loomis v. Bailey, 45 Iowa, 400; Mode v. Beasley, 143 Ind. 306; Wilson v. Bartlett, 7 Idaho, 271, 62 Pac. 416; State v. Eggleston, 34 Kan. 714; State v. Polk County Sup'rs, 88 Wis. 355.

Crews v. Coffman, 36 Neb. 824. Where objection is made to a petition on the ground that some of the signers are minors, other names are fictitious, and still others signed under improper influences, it is the duty of the board to set a time for the hearing of these objections.

[338] Ayres v. Moan, 34 Neb. 210.

[339] Crafford v. Warwick County Sup'rs, 87 Va. 110, 12 S. E. 147. The term "person" as used in the statute, "upon the application of persons paying one-third of the taxes on real estate," includes corporations paying taxes on real estate as well as natural persons.

[340] Butler v. Mills, 61 Ark. 477; Loomis v. Bailey, 45 Iowa, 400.

[341] Loomis v. Bailey, 45 Iowa, 400.

[342] Mode v. Beasley, 143 Ind. 306; State v. Stock, 38 Kan. 154, 16 Pac. 106; State v. Phillips County Com'rs, 26 Kan. 419; State v. Butler County Com'rs, 31 Kan. 460; State v. Eggleston, 34 Kan. 714. "Three-fifths of the legal electors." Crews v. Coffman, 36 Neb. 824.

names appearing upon both the petition for and the remonstrance to the change of county seat, or those whose names have been procured by bribery or the offer of a bonus, or signers expressing a desire to withdraw from the petition, should be deducted in order to ascertain whether the legal number have signed.[343] The designation of the residence of signers by the use of ditto marks has been held sufficient.[344]

§ 72. Signers' right of withdrawal.

That a qualified resident property owner has signed a petition asking for an election looking to the removal of a county seat does not bar him from subsequently withdrawing his name. The act of signing is optional.[345] Such withdrawal should be made, however, before action upon the petition by the proper authorities.[346]

§ 73. Petition for removal; its filing. Notice.

The filing of a petition showing on its face the required number of qualified signers is sufficient to give the commissioners authority to act upon the question of removal[347] by making an official order for an election to be held in the manner and time provided by law, at which those entitled shall vote upon the question submitted. In order to insure its validity, notice must be given of the election for the length of time before its date and

[343] Jamison v. Louisa County Sup'rs, 47 Iowa, 388; Duffees v. Sherman, 48 Iowa, 287; Ayres v. Moan, 34 Neb. 210; State v. Eggleston, 34 Kan. 714.

[344] Wilson v. Bartlett, 7 Idaho, 271, 62 Pac. 416.

[345] Slingerland v. Norton, 59 Minn. 351; State v. Geib, 66 Minn. 266; State v. Crow Wing County Com'rs, 66 Minn. 519.

[346] State v. Nemaha County Com'rs, 10 Neb. 32; La Londe v. Barron County Sup'rs, 80 Wis. 380; State v. Polk County Sup'rs, 88 Wis. 355.

[347] State v. Lien, 9 S. D. 297, 68 N. W. 748; McClelland v. Shelby County, 32 Tex. 17; Worsham v. Richards, 46 Tex. 441.

Doolittle v. Cabell County Ct., 28 W. Va. 159. When a petition as prescribed by law is presented to the county court duly verified by affidavit and signed by the requisite number of legal voters of the county to permit it to be filed and have the order made as prayed for, the court has no discretion to refuse the filing of such petition or the making of the necessary order requested. It becomes then an absolute and ministerial duty imposed upon the county court, the performance of which can be compelled by mandamus.

in the manner required by the provisions of the statute. Legal notice is necessary to the legality of subsequent steps. Notice to interested parties is an essential element to the validity of proceedings whatever their nature. The statute may provide the form of this notice[348] and designate the manner of its publication or service[349] in the case of special proceedings looking to the removal of a county seat. Or if the election is held pursuant to general election statutes, the forms and the modes prescribed by them must be strictly followed.[350] The technical provisions of the law govern. The precise time for the giving of notice is discretionary with the commissioners where the margin of time is sufficient.[351] When commissioners have power to pass upon the question of removal, the same rules apply, regarding the giving of notice prior to action upon the petition.[352]

§ 74. Official action.

In proceedings for the removal of a county seat, the next step is an order by the proper tribunal calling an election. It is needless to say that such an order depends for its validity on all preceding acts. In many cases, where not otherwise provided by law, the courts have held that the ordering of an election is not a discretionary matter, but imperative upon the filing of the proper petition. The authority to make such order, however, must exist.[353] The performance of this duty can be enforced by mandamus.[354] It seems that the number of elections held may not be limited so long as they successively result in a defeat of

[348] Attorney General v. Iron County Canvassers, 64 Mich. 607, 31 N. W. 539; Attorney General v. Lake County Sup'rs, 33 Mich. 289; Peck v. Berrien County Sup'rs, 102 Mich. 346; People v. Hamilton County Com'rs, 3 Neb. 244; Whitaker v. Dillard, 81 Tex. 359.

[349] Dishon v. Smith, 10 Iowa, 212; State v. Sherman County Com'rs, 39 Kan. 293, 18 Pac. 179; State v. Scott County Com'rs, 43 Minn. 322; Welch v. Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337.

[350] Attorney General v. Iron County Canvassers, 64 Mich. 607, 31 N. W. 539; State v. Langlie, 5 N. D. 594, 67 N. W. 958.

[351] Lake County Com'rs v. State, 24 Fla. 263, 4 So. 795; Doan v. Logan County Com'rs, 2 Idaho, 781, 26 Pac. 167.

[352] State v. Scott County Com'rs, 42 Minn. 284; State v. Butler, 81 Minn. 103, 83 N. W. 483.

[353] Brown v. State, 44 Kan. 291, 24 Pac. 345.

[354] Wells v. Ragsdale, 102 Ga. 53, 29 S. E. 165; Jackson County Com'rs v. State, 147 Ind. 476, 46 N. E. 908; Slingerland v. Norton, 59 Minn. 351; State v. Garrett, 76 Mo. App. 295;

the attempt to remove the county seat.[355] Some authorities hold that after the order for the election is made its validity cannot be contested on the ground that a less number than required by statute signed the petition or application.[356]

§ 75. Time and manner of election.

The provisions of the statute or constitution with regard to the time and manner of holding an election must be strictly followed or it may be considered invalid. This is true whether these particulars are specified in the law or by the commissioners acting thereunder.[357] The election when held must be at the place, on the day, and within the hours designated.[358] Attempts at bribery[359] or intimidation,[360] or fraudulent acts by the officers of election, have each been held sufficient to render it void. It is the imperative duty of the inspectors or officers in charge not only to refrain from doing these acts but to prevent others.[361] What constitutes bribery or when is a bonus offered of such a character as to be considered a bribe, are questions often raised, and in some cases the dividing line between an illegal attempt to influence voters and a proper offer of public advantage becomes doubtful and difficult to distinguish.[362] The offer by individuals or localities to construct county buildings is not usually considered the offer of a bribe so as to invalidate an election at which the change is made.[363]

Scarbrough v. Eubank, 93 Tex. 106; Rayner v. Forbes (Tex. Civ. App.) 52 S. W. 568; La Londe v. Barron County Sup'rs, 80 Wis. 380.

[355] Atherton v. San Mateo County Sup'rs, 48 Cal. 157.

[356] Clarke County Com'rs v. State, 61 Ind. 75; Baker v. Louisa County Sup'rs, 40 Iowa, 226; Bennett v. Hetherington, 41 Iowa, 142; Currie v. Paulson, 43 Minn. 411; State v. Nelson, 21 Neb. 572; State v. Goowin, 69 Tex. 55; Scarbrough v. Eubank, 93 Tex. 106.

[357] Gossard v. Vaught, 10 Kan. 162; State v. Washoe County, 6 Nev. 104.

[358] State v. Baker County Com'rs, 22 Fla. 29; Cole v. Jackson County Sup'rs, 11 Iowa, 552; Mather v. Converse, 12 Iowa, 352.

[359] Rice v. Smith, 9 Iowa, 570; Sweatt v. Faville, 23 Iowa, 321; State v. Malo, 42 Kan. 54, 120; followed in State v. Dillman, 42 Kan. 96; State v. Fulton, 42 Kan. 164; State v. Sullivan, 44 Kan. 43.

[360] State v. Kearny County Com'rs, 42 Kan. 739.

[361] State v. Malo, 42 Kan. 54, 120; followed in State v. Dillman, 42 Kan. 96.

[362] Berry v. Hull, 6 N. M. 643.

[363] Neal v. Shinn, 49 Ark. 227, 4 S. W. 771; Douglass v. Baker County Com'rs, 23 Fla. 419; Thompson v. Mercer County Sup'rs, 40 Ill. 379.

In Douglass v. Baker County Com'rs, cited supra, the court said: "We do not think the offer of McClenny to build a court house at Macclenny, if the voters would locate the county site there, and his performance of the offer, invalidates the election. * * * The authorities recognize such offers of public convenience as legitimate in such contests. They cannot be regarded as corrupt agencies or as influencing corrupt voting. The locality as to which such offers are made presents itself in the contest as possessing the improvements or facilities covered by the offer, and where these improvements are made in accordance with the offer, there is no deception or fraud. It is unlike the case of a candidate for office who proposes to the electors to take for his services if elected, less than the legal salary, and undertakes thereby to overcome the honest objection of a voter on account of deficiencies believed to exist in him as a proper person for the office. The latter case may involve the integrity of the government and the unfitness of officials, while the former does not, but only offers to supply an actual public convenience." The failure on the part of election inspectors to take the required oath does not necessarily invalidate the election or the votes cast.[364] In Michigan it is held that where the question of removal is before the electors

Dishon v. Smith, 10 Iowa, 212. The court said: "We do not think the giving facilities for the public convenience to the whole county, such as furnishing a building for the courts and offices, and thus relieving the county from a burden of expense, amounts to bribery. Nor would the giving property, though not of that specific character, but yet adapted to reducing the expense of a change. If the people of a town desire a county seat located at such place, there is no wrong and no corruption in their offering and giving facilities to produce that result. Either in buildings and offices direct, for the use of the public, or in property or money to procure the facilities, they may offer to take away or to lessen the pecuniary burden which would come upon that public, the county, by the location, or by a change of location. And this cannot be bribery. And it may be doubted whether such an act can become bribery when the offer is to the whole county, and upon a matter of county interest only. In a case like the present, there is no duty upon the county from which it or its citizens may be induced to swerve. They may adopt which place they see fit, and it is offering additional inducements only in favor of one, to offer as above mentioned." Attorney General v. Lake County Sup'rs, 33 Mich. 289; Wells v. Taylor, 5 Mont. 202, 3 Pac. 255; State v. Purdy, 36 Wis. 225. See, also, 15 L. R. A. 501.

[364] State v. Baker County Com'rs, 22 Fla. 29.

it is not necessary to have separate ballots reading "for" and "against" the proposition, but a single ballot with both these words upon it and a space, within which the voter can designate his choice, is sufficient.[365]

§ 76. Qualifications of voters.

The legislature has the right to determine the qualifications of voters at an election for the removal of a county seat, and some of these have already been suggested in section 71 discussing qualifications of signers to the petition for removal. The law usually limits the right of signing the petition to those who can vote thereafter at the election. Various phrases are used, as "qualified electors," "residents," "qualified voters."[366]

§ 77. Votes necessary to a removal.

The continual reference to the absolute power of the legislature to determine all the questions looking to the organization, government, and administration, of the affairs of public corporations, may seem unnecessary, but in order to understand the questions discussed from time to time this absolute power must be kept constantly in mind. The only limitations upon the legislature are constitutional provisions, if such exist, otherwise the legislature, as being the law-making power of the sovereign, is free to act. It has therefore the right to determine not only the eligibility of voters but also the number of votes necessary to effect the removal of a county seat, and the phrases which we find in the decisions are repetitions of statutory or constitutional words which control. The existence of a constitutional provision that no county seat shall be changed "without the consent of a majority of the qualified voters of the county" does not prevent the legislature from passing a law providing that a larger vote shall be requisite to such change.[367] Some of the phrases used are

[365] Peck v. Berrien County Sup'rs, 102 Mich. 346.

[366] State v. Crook, 126 Ala. 600, 28 So. 745; Saunders v. Erwin, 49 Ark. 376, 5 S. W. 703; Eagle County Com'rs v. People, 26 Colo. 297, 57 Pac. 1080; State v. Stock, 38 Kan. 154, 16 Pac. 106; Hall v. Marshall, 80 Ky. 552.

[367] St. Joseph Tp. v. Rogers, 83 U. S. (16 Wall.) 644; McCrary, Elections, § 183 et seq.; Vance v. Austell, 45 Ark. 400; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; State v. Renick, 37 Mo. 272; Louisville & N. R. Co. v. Davidson County Ct., 33 Tenn. (1 Sneed) 692; Cocke v. Gooch, 52 Tenn. (5 Heisk.) 294;

"majority of the qualified voters of the county," "majority vote," "majority of the electors,"[368] "two-thirds of all the legal votes cast,"[369] "plurality of votes cast,"[370] "fifty-five per cent,"[371] or "three-fifths."[372]

Bouldin v. Lockhart, 69 Tenn. (1 Lea) 195.

[368] Blackshear v. Turner, 53 Ark. 533; Brown v. State, 44 Kan. 291; Alexander v. People, 7 Colo. 155; People v. Wiant, 48 Ill. 263; State v. Grace, 20 Or. 154; Adkins v. Lien, 10 S. D. 436, 73 N. W. 909; State v. Porter, 13 S. D. 126; Groves v. Grant County Ct., 42 W. Va. 587.

Alley v. Denson, 8 Tex. 297. To effect the removal of a county seat, a majority only of all the votes cast is required, not a majority of all the qualified electors at such election.

Worsham v. Richards, 46 Tex. 441; Ex parte Towles, 48 Tex. 413.

Taylor v. Taylor, 10 Minn. 107 (Gil. 81). The court in this case construing Minn. Const. art. 11, § 1, "and all laws changing county lines in counties already organized or for removing county seats shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby at the next general election after the passage thereof and be adopted by a majority of such electors," said, "The plaintiff claims that this section requires an absolute majority of those qualified to vote in the county at the time of the election. This construction is perhaps in accordance with the letter of the constitution, but it leads to such practical inconvenience, hardship, and absurdity, we cannot believe it to be in accordance with the spirit and meaning of that instrument. It will be observed that the returns of the canvassing officers would not be even prima facie evidence of the result of such election, for such returns could only show the numbers voting and the result of the vote. In every case it would be necessary, if this construction is correct, to show by legal evidence the actual number of persons legally qualified to vote in the county at the time of such election, and we are unable to see how this could be determined except by a suit or proceeding in a court qualified to decide authoritatively and finally such questions. The difficulty of making such proof in many cases would be so great as to make it impracticable." See, also, as sustaining this rule, Vance v. Austell, 45 Ark. 400; People v. Warfield, 20 Ill. 159; Bayard v. Klinge, 16 Minn. 249 (Gil. 221); Everett v. Smith, 22 Minn. 53; State v. Sutterfield, 54 Mo. 391. But see Braden v. Stumph, 84 Tenn. (16 Lea) 581, which holds that there must be an active concurrence of the qualified voters of a county, not a passive acquiescence, and, therefore, the required proportion of the qualified electors must actually vote in favor of the removal.

[369] People v. Grand County Com'rs, 7 Colo. 190; Eagle County Com'rs v. People, 26 Colo. 297, 57 Pac. 1080; Wells v. Ragsdale, 102 Ga. 53; Hogg v. Baker, 17 Ky. L. R. 577, 31 S. W. 726; State v. Sutterfield, 54 Mo. 391; State v. Langlie, 5 N. D. 594, 67 N. W. 958; Stuart v. Bair, 67 Tenn. (8 Baxt.) 141; Bouldin v. Lockhart, 69

§ 78. Canvass and return of votes.

It generally becomes the duty of the commissioners, after the election has been held for the removal of a county seat, to meet, canvass the returns, and declare the result of the election.[372] This duty is a continuing one. When one set of election officers have been prevented by injunction, or other reason, from declaring the result as to certain precincts, it then becomes the duty of their successors on the dissolution of the injunction, to canvass and return those votes.[374] If the intent of the voter is clear from the ballot cast, although it may not be as definite as desired, this is sufficient to warrant the counting of the ballot.[375] The canvass-

Tenn. (1 Lea) 195; Caruthers v. State, 67 Tex. 132; State v. Alcorn, 78 Tex. 387.

[370] State v. Padgett, 19 Fla. 518. A constitutional provision which prescribes that "a plurality of votes given at an election by the people shall constitute a choice when not otherwise provided by this Constitution" was probably not intended to cover any other cases than election of officers; "and it is reasonable to suppose that in the choice of a place which would be most convenient for the people to transact their county business the wishes of a majority of the voters who felt an interest in the matter should be consulted, rather than that a small minority of the whole, in a contest between half a dozen or more localities, should prevail."

[371] Smith v. Renville County Com'rs, 64 Minn. 16. All ballots cast, unintelligible as well as otherwise, must be considered in ascertaining the required percentage.

[372] State v. Roper, 46 Neb. 724; Peck v. Berrien County Sup'rs, 102 Mich. 346.

Davis v. Brown, 46 W. Va. 716, and cases cited. This case also holds that where the act requires for relocation three-fifths of all the votes cast at such election upon the question, the relocation is carried, though the votes cast on this particular proposition are less than three-fifths of the votes cast upon other matters.

[373] Herrick v. Carpenter, 54 Iowa, 349. In Pinkerton v. Staninger, 101 Mich. 273, 59 N. W. 611, the determination of the supervisors in canvassing and declaring the vote in removal proceedings is held conclusive, the law providing for no appeal.

State v. Nerland, 7 S. C. (7 Rich.) 241; State v. Hicks (Tenn. Ch. App.) 52 S. W. 691; Ex parte Towles, 48 Tex. 413.

Brown v. Randolph County Ct., 45 W. Va. 827, 32 S. E. 165. Under the statutes the county court has authority to canvass and announce the result of an election for relocation of county seat. State v. Fetter, 12 Wis. 566, construing Wis. Gen. Laws 1860, c. 110.

[374] State v. Kearny County Com'rs, 42 Kan. 739. Davis v. Police Jury of Bossier Parish, 42 La. Ann. 968. This case also discusses effect upon official action of an injunction properly served.

Ewing v. Duncan, 81 Tex. 230.

[375] Blackshear v. Turner, 53 Ark.

ing board must meet as a collective body and perform their duties, including the declaration of the result, in their official capacity,[376] which is usually considered conclusive in the absence of fraud.[377] Properly identified duplicate returns of votes from election precincts where the originals have been lost or destroyed can be used.[378] Provisions of the statute concerning the manner of making returns when mandatory must be strictly followed, otherwise, when considered discretionary or directory in their character,[379] a substantial compliance with the law is sufficient.

§ 79. Contests.

The result of an election held to determine the relocation of a county seat may be contested either upon jurisdictional grounds or questions pertaining to the manner and time of the election or the canvass and return of votes. It is impossible to state a general rule applying to contests. The provisions of the law relating to all of the proceedings may differ in each state. They are construed strictly and technically. Different remedies may be provided by the different states for the correction of errors. The two favorite remedies are mandamus[380] and injunction,[381] though others are used.[382] The remedial statutes of each state,

533; Whitaker v. Dillard, 81 Tex. 359. See, also, People v. Grand County Com'rs, 7 Colo. 190, 2 Pac. 912.

[376] Cole v. Jackson County Sup'rs, 11 Iowa, 552; State v. Harwood, 36 Kan. 236; State v. Judge Second Judicial Dist. Ct., 43 La. Ann. 125, 9 So. 348.

[377] Hipp v. Board Charlevoix County Sup'rs, 62 Mich. 456. See State v. Whitney, 12 Wash. 420, holding a canvassing board not estopped to deny their authority to canvass returns. Heffner v. Snohomish County Com'rs, 16 Wash. 273.

[378] State v. Kearny County Com'rs, 42 Kan. 739.

[379] Welch v. Wetzel County Ct., 29 W. Va. 63, 1 S. E. 337; Heffner v. Snohomish County Com'rs, 16 Wash. 273.

[380] Terr. v. Mohave County Sup'rs (Ariz.) 12 Pac. 730; State v. Hamilton County Com'rs, 35 Kan. 640; State v. Stearns, 11 Neb. 104; McWhirter v. Brainard, 5 Or. 426; State v. Porter, 15 S. D. 387, 89 N. W. 1012; Poteet v. Cabell County Com'rs, 30 W. Va. 58, 3 S. E. 97.

[381] Mitchell v. Lasseter, 114 Ga. 275, 40 S. E. 287; Doan v. Logan County Com'rs, 2 Idaho, 781, 26 Pac. 167; Du Page County Sup'rs v. Jenks, 65 Ill. 275; Todd v. Rustad, 43 Minn. 500.

Caruthers v. Harnett, 67 Tex. 127, 2 S. W. 523. A court of equity has no jurisdiction to determine questions raised on contest.

Rickey v. Williams, 8 Wash. 479.

[382] Willeford v. State, 43 Ark. 62; Herrick v. Carpenter, 54 Iowa, 349; Mode v. Beasley, 143 Ind. 306; State

however, are construed liberally, which in a contest gives a certain degree of advantage in the use of a remedy. The required contest papers must show affirmatively upon their face the error desired to be corrected, and that if true such result must necessarily follow.[383] In judicial proceedings contesting the result of an election removing a county seat, ordinary rules of practice as to the introduction of evidence apply;[384] and an elector of the county is held to have sufficient interest to entitle him to contest such election on the ground of the unconstitutionality of the law authorizing it.[385] If on appeal the error assigned be found harmless, the proceedings will not be held void.[386]

§ 80. Authority of commissioners.

Statements have been made in the preceding paragraphs as to the legal nature or character of the authority of commissioners appointed or designated by the legislature to consider and pass upon the proceedings necessary in the removal of a county seat. It is usually considered that their action, upon the sufficiency of preliminary papers presented to them, is conclusive in the absence of fraud.[387] They are not deemed, in the eye of the law, judicial bodies proper, though some cases hold them to be quasi judicial. They are vested with discretionary powers in all matters looking to the carrying out of statutory provisions not manda-

v. Ravalli County Com'rs, 21 Mont. 469, 54 Pac. 939; Remington v. Higgins, 6 S. D. 313, 60 N. W. 73; Ex parte Towles, 48 Tex. 413.

[383] Wilson v. Bartlett, 7 Idaho, 271, 62 Pac. 416. The court say: "The affidavit of the contestant must show that the list of names that he desires to contest, if stricken from the petition, would reduce the number of names on the petition to less than the number required by law; and if it does not do that the trial court ought to deny his contest."

[384] Peters v. Morey, 34 Neb. 82.

[385] Adams v. Smith, 6 Dak. 94; Sebering v. Bastedo, 48 Neb. 358, 67 N. W. 148. One elector in his own name not entitled to contest county seat election. As affecting the right of an elector, see Berry v. Hull, 6 N. M. 643, 30 Pac. 936; Rayner v. Forbes (Tex. Civ. App.) 52 S. W. 568. See contra, however, Thomas v. Franklin, 42 Neb. 310.

[386] Mode v. Beasley, 143 Ind. 306.

[387] Herrick v. Carpenter, 54 Iowa, 349; Luce v. Fensler, 85 Iowa, 596, 52 N. W. 517; Walton v. Greenwood, 60 Me. 356; People v. Benzie County Com'rs, 34 Mich. 211.

State v. Ravalli County Com'rs, 21 Mont. 469, 54 Pac. 939. The court held here that in so acting they exercised judicial functions and a writ of review could be granted.

Ellis v. Karl, 7 Neb. 381; Williams v. Boynton, 71 Hun, 309. See this case for effect of act ratifying action of board of supervisors.

tory in their nature. As to those, a strict performance is required. Where subordinate courts are given the power to consider and determine the result of any one step in the removal of a county seat, the rules of law controlling such judicial organization will apply.[388] The time and place of their meeting, unless designated by law, are usually considered within their discretion,[389] and except in the case of a judicial body the usual rules of law as to the introduction of evidence do not apply. It is customary, and has been held imperative in some instances, to keep a record of their proceedings, which should recite all the necessary jurisdictional facts, including the authority under which they proceed.[390] The petition for a submission of the question of removal to the voters of a county, it has been held in Iowa, can only be considered by the board of supervisors at a regular not an adjourned meeting.[391]

§ 81. Declaration of the result and its effect.

When the officer or body designated by law as having authority declares, in an order or finding, the result of the election held, and names the county seat, it becomes such by operation of law from the date of this order;[392] and governmental duties, acts and powers, of whatever character, can then only be valid when exercised at and promulgated from such county seat by the public quasi corporation.[393] These duties and powers should be thus exercised even when there are proceedings pending contesting the result of the election changing a county seat.[394]

[388] State v. Alcorn, 78 Tex. 387; Ewing v. Duncan, 81 Tex. 230; Whitaker v. Dillard, 81 Tex. 359; Scarbrough v. Eubank, 93 Tex. 106.

[389] Edwards v. Hall, 30 Ark. 31. In this case the court also said: "It may be that the location is an injudicious one, such as a majority of the taxpayers and voters of the county do not approve. If such unfortunately should be the case, whilst it is to be regretted that injury (if any) is the result of the election of incompetent or dishonest commissioners, their acts being in accordance with law and the power conferred, must be submitted to."

State v. Harwood, 36 Kan. 236; People v. Cook, 14 Barb. (N. Y.) 290; Clark v. Crane, 5 Mich. 154.

[390] Douglass v. Baker County Com'rs, 23 Fla. 419; Buck v. Fitzgerald, 21 Mont. 482, 54 Pac. 942; Rousey v. Wood, 57 Mo. App. 650.

[391] Ellis v. Harrison County Sup'rs, 40 Iowa, 301.

[392] Hamilton v. Tucker County Ct., 38 W. Va. 71; Minear v. Tucker County Ct., 39 W. Va. 627.

[393] McNair v. Williams, 28 Ark. 200; Williams v. Reutzel, 60 Ark. 155.

[394] Maxey v. Mack, 30 Ark. 472.

CHAPTER III.

LEGISLATIVE POWER OVER PUBLIC CORPORATIONS AND ITS LIMITATIONS.

§ 82. In general.
83. Legislative control over public funds.
84. Power of the legislature over public revenues.
85. Legislative control over corporate boundaries.
86. Over municipal boundaries.
87. Legislative power over public property.
88. Over corporate contracts.
89. Legislative control over trust property held by public corporations.
90. The power of the legislature to compel the payment of debts.
91. Retention of jurisdiction.
92. Constitutional limitations on legislative power.
93. Limitations on the passage of what is termed "special legislation."
94. Constitutionality of laws classifying public corporations.
95. Other constitutional objections.
96. The impairment or destruction of vested rights as a limitation.
97. Control over the corporation in its private capacity.

§ 82. In general.

A public corporation is organized primarily to act as an agent of the sovereign in the performance of governmental duties and the administration of public affairs. A private corporation is created under authority of law by a group or association of individuals for the purpose, primarily, of advancing their personal interests. The organization of all corporations, private as well as public, is an advantage to the state and results, in the case of a public corporation, directly in a benefit; in the case of a private corporation indirectly. The basis of the continued existence of a public corporation is the will of the sovereign; of the private corporation, the contract between itself and the state. As between the state and the public corporation or the members comprising it, there exists no contract relation. This difference in purpose of organization and authority for corporate life leads, as can be in-

ferred, to a fundamental and far-reaching difference in the power of the sovereign over them.[1]

In considering the question there must also be kept in mind the distinctions already suggested between the different grades of public corporations. We have public corporations as a generic term, including municipal corporations proper and public quasi corporations,—ignoring the cases holding that the state itself may be considered a corporation. As a fundamental principle of law this is not true. The sovereign cannot be considered a corporation except as a matter of convenience for some purposes.

Referring to definitions already given of municipal corporations proper and public quasi corporations, it will be remembered that a public quasi corporation is that form of organization used for the exercising of governmental powers over territory less thickly settled than the territory usually included within the limits of a municipal corporation proper. The municipal corporation proper includes cities, towns (not the township organization) and villages, or congested centers of population. The wants and needs of the two classes differ essentially, and as agencies of the government they can each best perform their functions in a different manner. The property of public corporations acquired through the levy and collection of taxes or by grant and devise for public purposes can only be devoted to such uses.

Public corporations of all grades may assume the character of a private corporation and acquire property in that character or as an individual. Their rights in the acquisition, holding and disposal of this property, acquired in their capacity of private corporations, are the same as those pertaining to other private persons. The legislature cannot exercise over these the same degree

[1] Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; State v. City of Mobile, 24 Ala. 701; Willimantic School Soc. v. First School Soc. in Windham, 14 Conn. 457; Hartford Bridge Co. v. Town of East Hartford, 16 Conn. 172; State v. City of Savannah, R. M. Charlt. (Ga.) 250; Union Baptist Soc. v. Town of Candia, 2 N. H. 20; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Sill v. Village of Corning, 15 N. Y. 297; People v. Draper, 15 N. Y. 532; McKim v. Odom, 3 Bland (Md.) 407; Inhabitants of Ashby v. Wellington, 25 Mass. (8 Pick.) 524; City of Baltimore v. State, 15 Md. 376; Inhabitants of Hampshire v. Inhabitants of Franklin, 16 Mass. 76; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12.

of control which it ordinarily exercises over the public corporation and its public property.[2]

To state concisely the rule of control: A public corporation, in its capacity as a public corporation, is absolutely under the control and at the mercy of the sovereign, subject only to constitutional provisions and the fundamental law that property contract, and vested rights of third parties dealing with it, cannot be impaired or destroyed.[3] Acting as a private corporation, ei-

[2] People v. Wren, 5 Ill. (4 Scam.) 273; State v. County of Dorsey, 28 Ark. 378; County of Richland v. County of Lawrence, 12 Ill. 1; Robertson v. City of Rockford, 21 Ill. 451; Town of Freeport v. Stephenson County Sup'rs, 41 Ill. 495; People v. Cook County Com'rs, 176 Ill. 576; Sloan v. State, 8 Blackf. (Ind.) 361; Guilder v. Town of Dayton, 22 Minn. 366; State v. McFadden, 23 Minn. 40; City of St. Louis v. Russell, 9 Mo. 507; State v. Swift, 11 Nev. 128; In re Farnum's Petition, 51 N. H. 376; City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law (4 Zab.) 385; Corning v. Greene, 23 Barb. (N. Y.) 33; Town of Marietta v. Fearing, 4 Ohio, 427; Lusher v. Scites, 4 W. Va. 11.

[3] See elaborate notes in 1 L. R. A. 757, 48 L. R. A. 465, and also cases cited generally in this section.

Terrett v. Taylor, 9 Cranch (U. S.) 43. "In respect also, to public corporations which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased."

Sinton v. Carter County, 23 Fed. 535; State v. City of Mobile, 24 Ala. 701; People v. Burr, 13 Cal. 343; Churchill v. Walker, 68 Ga. 681; Crook v. People, 106 Ill. 237; Town of Cicero v. City of Chicago, 182 Ill. 301; Morford v. Unger, 8 Iowa, 82; Boyd v. Chambers, 78 Ky. 140; Layton v. City of New Orleans, 12 La. Ann. 515; Pumphrey v. City of Baltimore, 47 Md. 145; Prince v. Crocker, 166 Mass. 347; Weymouth & B. Fire Dist. v. Norfolk County Com'rs, 108 Mass. 142; People v. Common Council of Detroit, 28 Mich. 228; City of St. Louis v. Sheilds, 52 Mo. 351; Opinion on Tp. Organization Law, 55 Mo. 295; State v. Holden, 19 Neb. 249; Berlin v. Gorham, 34 N. H. 266; Fish v. Branin, 23 N. J. Law (3 Zab.) 484; Morris v. People, 3 Denio (N. Y.) 381; People v. Morris, 13 Wend. (N. Y.) 325; People v. Pinckney, 32 N. Y. 377.

City of Philadelphia v. Fox, 64 Pa. 169. "It is merely an agency, instituted by the sovereign for the purpose of carrying out in detail the objects of government, essentially a revocable agency, having no vested right to any of its powers or franchises, the charter or act of erection being in no sense a contract with the state, and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify

ther in the acquirement of property or the exercise of certain powers, the public corporation, so far as legislative control is concerned, stands on an equal basis with a private corporation or an individual.[4] A municipal corporation proper more frequently acts as and assumes this character of a private corporation.

its internal arrangement, or destroy its very existence with the mere breath of arbitrary discretion. Sic volo, sic jubeo, that is all the sovereign authority need say."

State v. Frost, 103 Tenn. 685; Graham v. City of Greenville, 67 Tex. 62; Atkins v. Town of Randolph, 31 Vt. 226. The author of Andrews' American Law attacks with much vigor and feeling the principle stated in the text and especially as applied to municipal corporations proper. These, he claims (pp. 538, 539), "do not derive their existence from the legislature and are above and beyond the power of the legislature to destroy. * * * It may readily be admitted that the administration of governmental powers which the legislature have a right to impose upon its citizens may be imposed upon the inhabitants of any locality without their consent and that such a power may be withdrawn at will; but the proposition that our local municipal organizations—townships, counties and cities,—exist at the behest of the legislature only, and only for so long as the legislature sees fit is a proposition finding no support in any decision where the point has been involved." See, also, People v. Hurlbut, 24 Mich. 44; People v. Draper, 15 N. Y. 532, dissenting opinion; People v. Albertson, 55 N. Y. 50.

Rathbone v. Wirth, 150 N. Y. 459. "If not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view. * * * The principle is one which it takes but little reflection to convince the mind of being fundamental in our governmental system, and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local or political subdivisions of the state the people of the locality shall administer their own local affairs to the extent that that right is not restricted by some constitutional provision. * * * The theory of the constitution is that the several counties, cities, towns and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by an act of the legislature, or of any or all the departments of the state government combined."

[4] City of Louisville v. University of Louisville, 54 Ky. (15 B. Mon.) 642. See, also, New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478, where it is said that a municipal corporation "is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated and not common to the state or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. It possesses two class-

Without discussing at present the rights of the public as a private corporation, it can be said that public corporations, as governmental agents, so far as the exercise of their governmental powers are concerned, their corporate existence, boundaries, funds, revenues, property and contract rights, are subject to the will of the state, which may modify their franchises, increase or diminish their corporate powers, amend their charters, enlarge or reduce their privileges or annul their corporate existence, as, in its judgment, the general good requires, and irrespective of consent or objection on the part of the inhabitants of the territory affected, except so far as it is restrained by provisions in the constitution or fundamental law.[5] The limitations usually found in state constitutions are those which prohibit special legislation; laws not having "a uniform operation throughout the state," or relating to the "business," the "affairs" or "internal affairs" of the corporation. It follows as a corollary that whatever the state directly or indirectly can originally do, it may, if there is no constitutional obstacle, subsequently ratify, except in criminal matters, and if action is taken ratifying a past act of a public corporation such action will be deemed the equivalent of an original grant of power, operating back to the date of the act by the doctrine of relation and making legal such action.[6]

es of powers and two classes of rights—public and private. In all that relates to one class, it is merely the agent of the state and subject to its control; in the other it is the agent of the inhabitants of the place —the corporators—maintains the character and relations of individuals and is not subject to the absolute control of the legislature, its creator. Among this latter class is the right to acquire, hold and dispose of property; to sue and be sued."

[5] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Barnes v. District of Columbia, 91 U. S. 540; Town of Mt. Pleasant v. Beckwith, 100 U. S. 514; State v. Jennings, 27 Ark. 419; Eagle v. Beard, 33 Ark. 497; Underhill v. Trustees of City of Sonora, 17 Cal. 172; City of San Francisco v. Canavan, 42 Cal. 541; Fragley v. Phelan, 126 Cal. 383; Town of Valverde v. Shattuck, 19 Colo. 104, 34 Pac. 947; People v. City of Chicago, 51 Ill. 17; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; Hooper v. Emery, 14 Me. 375; Town of Hagerstown v. Sehner, 37 Md. 180; State v. Linn County Ct., 44 Mo. 504; City of St. Louis v. Sheilds, 52 Mo. 351; Van Horn v. State, 46 Neb. 62; Rader v. Southeasterly Road Dist. of Union, 36 N. J. Law, 273; Jersey City v. Jersey City & B. R. Co., 20 N. J. Eq. (5 C. E. Green) 360; In re Clinton St. in Doylestown, 2 Brewst. (Pa.) 599; Harriss v. Wright, 121 N. C. 172; Al-

§ 83. Legislative control over public funds.

The funds of a public corporation, acquired in its capacity as such, are raised by the imposition of taxes on taxable interests within its jurisdiction. In this country the basis of the legal imposition of taxes is the use of the proceeds for public purposes. The legislature therefore has the right to regulate and control either the original levy and collection of taxes, in whatever form, by a public corporation, or to dispose of funds thus acquired[7]

len v. Reed, 10 Okl. 105, 60 Pac. 782, 63 Pac. 867.

[6] Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720; City of Oakland v. Oakland Water-Front Co., 118 Cal. 160; Kohler v. Town of Guttenberg, 38 N. J. Law, 419.

[7] Home Ins. Co. v. City Council of Augusta, 93 U. S. 116; City of New Orleans v. Clark, 95 U. S. 644.

Pennie v. Reis, 132 U. S. 464. "The direction of the state that the fund should be one for the benefit of the police officer or his representative under certain conditions was subject to change or revocation at any time at the will of the legislature; there was no contract on the part of the state that its disposition should always continue as originally provided."

People v. Williams, 8 Cal. 97; People v. San Luis Obispo County Sup'rs, 50 Cal. 561; People v. Lynch, 51 Cal. 15; Pike County Com'rs v. State, 11 Ill. 202.

Gutzweller v. People, 14 Ill. 142. The court here say: "So, too, it was for the legislature to determine who should issue licenses to sell strong liquors, and to specify whether the money thus raised should be devoted to the support of paupers, or the maintenance of the police, or to any other purpose. It gave the city no more a vested right to issue licenses, because the legislature specified the objects to which the money should be applied, than if it had been put into the general fund of the city. If the legislature could not take from the city authority the power to issue licenses it certainly had no right to deprive the counties of the same authority. Cities are as much the creatures of legislative will as are counties, and what may be done with the one they have authority to do with the other. Trustees of Schools v. Tatman, 13 Ill. 27, and notes. * * * From this it is too plain to be argued, that it was the intention of the legislature to withdraw all authority which had ever been conferred upon any subordinate governmental agencies to grant licenses for the sale of liquor; and that thenceforth the sale of ardent spirits in less quantities than one quart should be absolutely prohibited. By this law the power is as much taken from the city of Alton, as if she had been expressly named in the act. It was pro tanto a repeal of the city charter and was for that purpose as effectual as if the entire charter had been taken away; and if the legislature had the right to do the latter, they certainly had authority to do the former." People v. Power, 25 Ill. 187. The court say upon this point, "The whole state has an interest in the

without the consent of the people within its limits, so long as they are applied to public uses and purposes.[8] The public funds of a public corporation are not private property. Another limitation upon the legislative right to dispose of funds other than the one suggested is that those raised through taxation of taxable interests within a certain district cannot be used for the benefit and advantage of others.[9] In other words, the use to which public funds can be applied by the legislature is local as well as public, and a fund raised by special taxation upon certain interests for a special public purpose, it has been held, cannot be applied to another.[10]

revenue of a county, and for the public good, the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation is a political power and its application, when collected, must necessarily be within the control of the legislature for political purposes."

Florer v. State, 133 Ind. 453, 32 N. E. 829; City of Indianapolis v. Indianapolis Home for Friendless Women, 50 Ind. 215; State v. Morrow, 26 Mo. 131; Spaulding v. Andover, 54 N. H. 38; Bank of Rome v. Village of Rome, 18 N. Y. 38; People v. Devlin, 33 N. Y. 269; People v. Ingersoll, 58 N. Y. 1; People v. Fields, 58 N. Y. 491; Love v. Schenck, 34 N. C. (12 Ired.) 304; Governor v. McEwen, 24 Tenn. (5 Humph.) 241.

The state may exempt property from municipal taxation. See, also, City of Richmond v. Richmond & D. R. Co., 21 Grat. (Va.) 604.

[8] Sinton v. Ashbury, 41 Cal. 525; Weismer v. Village of Douglas, 64 N. Y. 91; Allen v. Inhabitants of Jay, 60 Me. 124; Feldman & Co. v. Charleston City Council, 23 S. C. 57.

[9] Sibley v. Mobile, 3 Woods, 535, Fed. Cas. No. 12,829.

State v. St. Louis County Ct., 34 Mo. 546. This case also holds that an act directing the application of the funds of a county to a particular purpose is not unconstitutional as impairing the obligation of a contract or involving the destruction of a vested right. The legislature, so it is said, cannot deprive a public corporation of its property, but it has the full power to direct the mode in which this property shall be used for the benefit of the community.

Greene v. Niagara County, 55 App. Div. 475, 67 N. Y. Supp. 291; Cage v. Hogg, 20 Tenn. (1 Humph.) 48.

[10] Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518. "It may also be admitted," says Justice Story, "that corporations for mere public government, such as towns, cities and counties, may, in many respects, be subject to legislative control but it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may at its will take away the private property of the corporation or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter

§ 84. Power of the legislature over public revenues.

The legislature, as the law-making arm of the sovereign, in the absence of constitutional restrictions, has the power to provide and regulate the manner in and the purpose for which the revenues of a public corporation may be raised[11] and employed. The sovereign has the inherent power of levying taxes for the purpose of raising revenue for its uses, which are presumably public. As it therefore possesses in the first instance the sole power, it has the right to direct the manner in which its mere agencies shall raise funds, either for their special and local public wants[12] or for general purposes,[13] and this right of the legislature

without any default or consent of the corporators?"

Terrett v. Taylor, 9 Cranch (U. S.) 43; Conlin v. City and County of San Francisco Sup'rs, 114 Cal. 404; Board of Levee Com'rs v. Hemmingway, 66 Miss. 289, 6 So. 235.

State v. Haben, 22 Wis. 660. "Was it competent," it was inquired in this case, "for the legislature, without the assent of the city or its inhabitants, thus to divert the funds raised and in the hands of the treasurer for the purpose of erecting a suitable high school building, and to declare that they should be appropriated, not for that purpose, but for the purpose of purchasing a site for a state normal school in the city? We are clearly of the opinion that it was not. It is well settled as to all matters pertaining to vested rights of property, whether real or personal, and to the obligation of contracts, that municipal corporations are as much within the protection of the federal constitution as private individuals are. The legislature cannot divest a municipal corporation of its property without the consent of its inhabitants, nor impair the obligation of a contract entered into with or in behalf of such corporation." Milwaukee County Sup'rs v. Pabst, 45 Wis. 311.

[11] Gilman v. Sheboygan, 2 Black (U. S.) 510; Myers v. English, 9 Cal. 341; Schneck v. City of Jeffersonville, 152 Ind. 204. An act to legalize city bonds not held special legislation within constitutional provision. City of Baltimore v. State, 15 Md. 376; Town of Hagerstown v. Sehner, 37 Md. 180; Detroit Citizens' St. R. Co. v. Common Council of Detroit, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809; People v. Commissioners of Taxes of N. Y. City, 47 N. Y. 501; Brownell v. Town of Greenwich, 114 N. Y. 518; Duke v. County of Williamsburg, 21 S. C. 414; Wingate v. Ketner, 8 Wash. 94; City of Guthrie v. Ter., 1 Okl. 188.

[12] Willard v. Presbury, 81 U. S. (14 Wall.) 676; Meriwether v. Garrett, 102 U. S. 472; Gibbons v. Mobile & G. N. R. Co., 36 Ala. 410; Sinton v. Ashbury, 41 Cal. 525; Burnes v. City of Atchison, 2 Kan. 454; Allen v. Inhabitants of Jay, 60 Me. 124. A private enterprise held not public purpose. Smith v. Stephan, 66 Md. 381; Skinner's Ex'r v. Hutton, 33 Mo. 244.

[13] City of New Orleans v. Turpin, 13 La. Ann. 56; State v. Mason, 153

goes not only to the original grant of power, but also to its modification,[14] change or repeal,[15] and the mode of collection.[16] The revenues of a public corporation are at the control of the legislature both in regard to their levy and disposal,[17] subject to constitutional restrictions and inherent limitations,[18] but not to revision by the courts.[19]

Further considering this power of the legislature there are cases holding, based upon sound reasons, that a public corporation cannot be compelled to undertake a public improvement purely local, not public or governmental in its character, to be paid for ultimately by compulsory taxation,[20] without the consent of the peo-

Mo. 23, citing Ray County v. Bentley, 49 Mo. 236; State v. Field, 119 Mo. 593; State v. Owsley, 122 Mo. 68; State v. Board of Education of St. Louis, 141 Mo. 45.

[14] Gilman v. City of Sheboygan, 2 Black (U. S.) 510.

[15] County of Calloway v. Foster, 93 U. S. 567.

County of Scotland v. Thomas, 94 U. S. 682. Authority already granted, it is here held, cannot be taken away.

State v. Sullivan County, 51 Mo. 522. See, also, State v. Greene County, 54 Mo. 540; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1.

[16] State v. Carson, 6 Wash. 250, 33 Pac. 428.

State v. Hundhausen, 26 Wis. 432. "It being a matter of legislative discretion, how far, in chartering a city, it will make use of the city officers for the collection of the revenues within the municipality, it is of course within its discretion to withdraw such powers once conferred, and restore them to the county officers, within whose jurisdiction, the city as well as all the towns in the county is located."

[17] Conlin v. City & County of San Francisco Sup'rs, 114 Cal. 404. "Assuming that the legislature may appropriate the funds in the state treasury for any public purpose, it does not follow that it has the same power over municipal funds. While the funds in a municipal treasury are in a certain sense public, they are so only for the limited public which has contributed them, but not for the entire state, and the power of the legislature over these funds is not co-extensive with its power of the state funds, but is limited by certain provisions of the constitution." See, also, Cooley, Taxation, p. 700; Cooley, Const. Lim. (6th Ed.) 283 et seq.

[18] People v. Ingersoll, 58 N. Y. 1.

[19] Parks v. Soldiers' & Sailors' Home Com'rs, 22 Colo. 86, 43 Pac. 542.

[20] In Cooley, Taxation (2d Ed.) p. 688 et seq., the author states in discussing the nature of municipal corporations, "They may be endowed with peculiar powers and capacities for the benefit and convenience of their own citizens, and in the exercise of which they seem not to differ in any substantial degree from the private corporations which the state charters. They have thus their public or political character, in which they exercise a part of the sovereign power of the state for gov-

ple paying such taxes.[21] The same principle has also been applied in the granting of aid to railroad or other quasi public corporations, and it has been held in several cases that municipal corpo-

ernmental purposes, and they have their private character in which, for the benefit or convenience of their own citizens, they exercise powers not of a governmental nature, and in which the state at large has only an incidental concern, as it may have with the action of private corporations. It may not be possible to draw the exact line between the two, but provisions for local conveniences for the citizens, like water, light, public grounds for recreation, and the like, are manifestly matters which are not provided for by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their corporators exclusively. In their public, political capacity, they have no discretion but to act as the state which has created them shall, within constitutional limits, command, and the good government of the state requires that the power should at all times be ample to compel obedience, and that it should be capable of being promptly and efficiently exercised. In the capacity in which they act for the benefit of their corporators merely, there would seem to be no sufficient reason for a power in the state to make them move and act at its will, any more than in the case of any private corporation." This statement Judge Cooley makes the basis of the principle stated in the text applying it to the exercise of the power of taxation by the state, citing many cases. People v. City of Chicago, 51 Ill. 17; Wider v. City of East St. Louis, 55 Ill. 133; Williams v. Town of Roberts, 88 Ill. 11; Hanson v. Vernon, 27 Iowa, 28; Inhabitants of Hampshire County v. Franklin County, 16 Mass. 76.

Park Com'rs v. Detroit Common Council, 28 Mich. 229. In the able opinion by Justice Cooley it was said: "The proposition which asserts the amplitude of legislative control over municipal corporations, when confined, as it should be, to such corporations as agencies of the state in its government, is entirely sound. They are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed it would be easy to show that it is not from the standpoint of state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can for the most part be very well performed through the usual township and county organizations. It is because, where an urban population is collected, many things are necessary for their comfort and protection which are not needed in the country, that the state is then called upon to confer larger powers and to make the locality a subordinate commonwealth. It is a fundamental principle in this state, recognized and perpetuated by express provision of the

rations cannot be compelled against their consent, even by act of the legislature, to give such aid where the only means of meeting the obligation is by levying local taxes.[22] Public revenues may be raised through the imposition of general or special taxes, license fees[23] or charges for the use of water and light,[24] and these subjects will be considered in detail later.

Constitution, that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government. But authority in the legislature to determine what shall be the extent of the capacity in a city to acquire and hold property is not equivalent to, and does not contain within itself authority to deprive the city of property actually acquired by legislative permission. As to property it thus holds for its own private purposes, a city is to be regarded as a constituent in State government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state is a right of regulation, not of appropriation. It cannot be deprived of such property without due process of law. And when a local convenience or need is to be supplied in which the people of the State at large, or in any portion thereof outside the city limits, are not concerned, the State can no more by process of taxation take from the individual citizens the money to purchase it, than they could, if, it had been procured, appropriate it to the state use."

State v. Tappan, 29 Wis. 664. But see Kimball v. Mobile County, 3 Woods, 555, Fed. Cas. No. 7,774; Hagar v. Reclamation Dist., 111 U. S. 701; Mobile County Com'rs v. State, 45 Ala. 399; Hagar v. Yolo County Sup'rs, 47 Cal. 222; Talbot County Com'rs v. Queen Anne's County Com'rs, 50 Md. 245, and State v. St. Louis County, 34 Mo. 546; People v. Flagg, 46 N. Y. 401; Williams v. Town of Duanesburgh, 66 N. Y. 129.

[21] People v. Salomon, 51 Ill. 37; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; Allison v. Corker, 67 N. J. Law, 596, 52 Atl. 362; People v. Batchellor, 53 N. Y. 128; Weismer v. Village of Douglas, 64 N. Y. 91.

[22] Township of Elmwood v. Marcy, 92 U. S. 289; Hessler v. Drainage Com'rs, 53 Ill. 105; Madison County v. People, 58 Ill. 456; Sleight v. People, 74 Ill. 47; People v. State Treasurer, 23 Mich. 499; People v. Batchellor, 53 N. Y. 128, a leading case citing and reviewing many authorities. But see Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1, where the court held that the Legislature had power to impose local taxation to carry out the construction of a purely local enterprise.

[23] State v. Union Cent. L. Ins. Co. (Idaho) 67 Pac. 647; In re Martin, 62 Kan. 638, 64 Pac. 43; State v. Dwyer, 21 Minn. 512; State v. Mason, 153 Mo. 23; Trustees of Aberdeen Academy v. Town of Aberdeen 21 Miss. (13 Smedes & M.) 645.

[24] Agua Pura Co. of Las Vegas v. City of Las Vegas, 10 N. M. 6, 60 Pac. 208; Bellingham Bay Imp. Co. v. City of New Whatcom, 20 Wash. 53.

§ 85. Legislative control over corporate boundaries.

The boundaries of public corporations as agents of the sovereign come within the doctrine of absolute control by the legislature. Originally possessing the right to create these agencies or subagencies, it can exercise the lesser power of changing or altering their boundaries.[25] The right of the people within the districts affected to consent to such change or alteration may be given as a matter of favor.[26] The sovereign may cede a portion of territory without the consent of the people affected, and upon such cession it will pass from its jurisdiction.[27] Ministerial acts in con-

[25] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; Laramie County Com'rs v. Albany County Com'rs, 92 U. S. 307; Manchester v. Com., 139 U. S. 240; Kelly v. Tate, 43 Ga. 535; Sabin v. Curtis, 3 Idaho, 662, 32 Pac. 1130; Monford v. Unger, 8 Iowa, 82; In re Division of Howard County, 15 Kan. 194; Chandler v. City of Boston, 112 Mass. 200; Opinion of the Supreme Court, 60 Mass. (6 Cush.) 578; Roos v. State, 6 Minn. 428 (Gil. 291); Woods v. Henry, 55 Mo. 566; Eskridge v. McGruder, 45 Miss. 294; Portwood v. Montgomery County Sup'rs, 52 Miss. 523; Inhabitants of Gorham v. Inhabitants of Springfield, 21 Me. 59; Rumsey v. People, 19 N. Y. 41; Columbus Mills v. Williams, 33 N. C. (11 Ired.) 558; Dare County Com'rs v. Currituck County Com'rs, 95 N. C. 189.

Schaffner v. Young, 10 N. D. 245. Change of boundaries in North Dakota controlled by constitutional provision. Johns v. Davidson, 16 Pa. 512; Stuart v. Kirley, 12 S. D. 245.

In Tennessee legislative action controlled by constitutional provisions. Gotcher v. Burrows, 28 Tenn. (9 Humph.) 585; Macon & Smith Counties v. Trousdale County, 61 Tenn. (2 Baxt.) 1; McMillan v. Hannah, 106 Tenn. 689, 61 S. W. 1020; Washburn v. City of Oshkosh, 60 Wis. 453. See, also, sections on corporate boundaries and annexation or division of territory: Dillon, Mun. Corp. (4th Ed.) § 183, "The fundamental idea of a municipal corporation proper, both in England and in this country, is to invest compact or dense populations with the power of local self-government. Indeed the necessity for such corporations springs from the existence of centers or agglomerations of population having by reason of density and numbers, local or peculiar interests and wants not common to adjoining sparsely settled or agricultural regions. It is necessary to draw the line which defines the limits of the place and people to be incorporated; this is, with us, a legislative function."

[26] Reynolds v. Holland, 35 Ark. 56; Taylor v. Taylor, 10 Minn. 107 (Gil. 81). Consent necessary under constitutional provision. Mills v. Williams, 33 N. C. (11 Ired.) 558.

[27] Benson v. U. S., 146 U. S. 325. "It is contended by appellant's counsel that * * * jurisdiction passed to the general government only over such portions of the reserve as are actually used for military purposes and that the particular part of the

nection with the change of boundaries in some states can be assigned by the legislature to subordinate bodies or officials, and in such cases, the courts have held, there is no delegation of legislative powers.[28] Where constitutional limitations exist, either as to population or the territorial extent of subordinate agencies of the state, it has been held that courts may take judicial notice of the fact that an act of the legislature will reduce certain territory below the constitutional limit.[29]

§ 86. Over municipal boundaries.

The preceding section treated in a general way of legislative control over boundaries. In this section a few of the cases re-

reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the government. * * * The character and purposes of its occupation having been officially and legally established by that branch of the government which has control over such matters, it is not open to the courts on a question of jurisdiction to inquire what may be the actual uses to which any portion of the reserve is temporarily put." Citing Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, and Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 542; McCracken v. Todd, 1 Kan. 148.

[28] Kayser v. Trustees of Bremen, 16 Mo. 88; Osgood v. Clark, 26 N. H. 307; Allison v. Corker, 67 N. J. Law, 596, 52 Atl. 362; Blanchard v. Bissell, 11 Ohio St. 96; Devore's Appeal, 56 Pa. 163. But see People v. Town of Nevada, 6 Cal. 143; City of Galesburg v. Hawkinson, 75 Ill. 152.

People v. Bennett, 29 Mich. 451. A Michigan statute passed in 1873 providing for the general incorporation of villages within certain districts was held unconstitutional because it permitted those petitioning for incorporation to decide upon the extent of territory to be incorporated which was held a delegation of legislative powers in this respect to private citizens.

Willett v. Bellville, 79 Tenn. (11 Lea) 1.

Jasper County Com'rs v. Spitler, 13 Ind. 235. In this case under a constitutional provision which conferred upon the general assembly power to delegate to the county boards local administrative power, the court said: "Under this provision the legislature seems to be plainly authorized to confer the power embraced in the act before us. In cases like the present the taking effect of the law is not the result of any action on the part of the commissioners; nor do they decide whether the act is or is not in force but simply whether it applies to the case made by the petition which the act prescribes. This is evidently not the exercise of delegated legislative power; but merely the application of the provisions of a general law to a given case local in its character."

[29] Woods v. Henry, 55 Mo. 560.

ferring to and considering this control relative to the corporate boundaries of municipal corporations proper will be considered. The same general principles of law apply, and these, so far as the application of them in detail is concerned, have been discussed in the sections relating to corporate boundaries, their establishment and change.[30] The reason for the creation of a municipal corporation proper is the existence of a congested center of population. The legislature having power to create a public corporation has the right to determine the basis for the organization of municipal corporations, one of the classes of public corporations, and this can be any determining factor it may consider a valid and expedient one[31] in the absence of constitutional restrictions. Some states even hold that this is a discretionary matter with the legislature, uncontrolled by subsequent constitutional provisions.[32] A municipal corporation proper may have established by the legislature for its basis of existence a certain population within certain limits,[33] or the arbitrary organization of a minimum territory.[34] To put it concisely, the creation of a municipal corporation proper may be dependent either upon population or geographical area. If there are constitutional provisions which limit the power of the legislature in these respects, such control. This power to establish or change corporate boundaries is law-making in its nature and an attempted delegation of its exercise to the courts or a quasi judicial body or to executive officials will be held void, it being incapable of delegation.[35] Courts have no power to control or interfere with, in any way,

[30] See §§ 35 to 40, and 55 to 65.

[31] City of Chicago v. Rumsey, 87 Ill. 348; Stoner v. Flournoy, 28 La. Ann. 850; People v. Bradley, 36 Mich. 447; Manly v. City of Raleigh, 57 N. C. (4 Jones, Eq.) 370; Williams v. City of Nashville, 89 Tenn. 487, 15 S. W. 364.

[32] Mattox v. State, 115 Ga. 212, 41 S. E. 709; McCallie v. Town of Chattanooga, 40 Tenn. (3 Head) 317; Wade v. City of Richmond, 18 Grat. (Va.) 583; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93.

[33] Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964. See cases cited § 13.

[34] City of St. Louis v. Allen, 13 Mo. 400; Com. v. Blackley, 198 Pa. 372, 47 Atl. 1104; Perry v. State, 9 Wis. 19. See cases cited § 14.

[35] City of Galesburg v. Hawkinson, 75 Ill. 152. In this case the Court say: "The same power cannot be either legislative or judicial, as the legislature may incline to retain it, or surrender it to the judiciary. If the boundaires of municipal corporations can be altered and changed by the legislature in its discretion, and the authorities are

the exercise of this discretionary law-making power by the legislature.[36] Where such action may change or affect the lines of legislative, judicial or other districts, if the jurisdiction and powers of the altered districts remain the same it is usually held that such change will not be invalid.[37] Where there is a constitutional provision to the effect that a change of the boundary of a city or other local division of a state, when it would alter the boundary of an assembly district, cannot be made at any other time than the decennial enumeration of population, a change except at that time is invalid.[38]

§ 87. Legislative power over public property.

The power of the legislature is full, ample and supreme over the property of the public corporation, acquired and held in its capacity as such and for public purposes. This property is usually acquired through the exercise of the power of taxation, —a direct gift of the sovereign. The legislature has the power to provide means for its acquisition, its control and management,[39] and its final disposition.[40] The rule as to the disposal of property applies not only to an act giving present authority, but also

all that way, then it is impossible that the courts can be invested with such power." See authorities cited note 28, § 85.

[36] Stilz v. City of Indianapolis, 55 Ind. 515; City of New Orleans v. Cazelar, 27 La. Ann. 156; Martin v. Dix, 52 Miss. 53.

[37] Howard v. McDiarmid, 26 Ark. 100; Sabin v. Curtis, 3 Idaho, 662, 32 Pac. 1130; Galley v. Guichard, 27 La. Ann. 396; State v. Williams, 29 La. Ann. 779; Lafayette F. Ins. Co. v. Remmers, 29 La. Ann. 419; Opinion of the Supreme Court, 33 Me. 587; Opinion of the Supreme Court, 60 Mass. (6 Cush.) 578; People v. Bradley, 36 Mich. 447; Smith v. City of Saginaw, 81 Mich. 123, 45 N. W. 964; State v. Blasdel, 6 Nev. 40; Farr v. City of Bayonne, 54 N. J. Law, 125, 22 Alt. 1006. See In re Contested Election of Law Judges, 109 Pa. 337.

[38] Kinne v. City of Syracuse, 2 Abb. Dec. (N. Y.) 534. See, also, People v. Holihan, 29 Mich. 116, and People v. Bradley, 36 Mich. 447, construing a Mich. Const. limitation on the right of the legislature to change municipal boundaries in such a manner as to interfere with representative districts.

[39] Potter v. Collis, 19 App. Div. 392, 46 N. Y. Supp. 471; McCollum v. Smith, 19 Tenn. (Meigs) 342, citing Story, Confl. of Laws, § 447.

[40] Inhabitants of North Yarmouth v. Skillings, 45 Me. 133; Barton County v. Walser, 47 Mo. 189; Consolidated Ice Co. v. City of New York, 53 App. Div. 260, 65 N. Y. Supp. 912, but see this case to the contra.

to one validating previous transfers by a public corporation.[41] The only limitations upon this power are those already stated and well-recognized, viz., the use of public revenues for public purposes, and the retention of local property and revenues for public local uses. If property has been acquired by a public corporation in its capacity as a private corporation, the control of the legislature is limited by the general laws and rules applying to private property.[42] Such ownership of property may become a property, a contract or a vested right which the legislature cannot impair or destroy. A municipal corporation proper may possess two classes of powers and rights,—public and private. In all its private relations it maintains the character of an individual. In its public capacity it is merely an agent of the state and subject to its control.

The rules as laid down in the preceding paragraph apply to the real and personal property of a public corporation,[43] including streets and highways.[44]

[41] Payne v. Treadwell, 16 Cal. 220.

[42] Grogan v. City of San Francisco, 18 Cal. 590.

Coyle v. Gray, 7 Houst. (Del.) 44. A system of waterworks acquired by a municipal corporation for the purpose of supplying its inhabitants with water was held not private property.

Bradford v. Shine, 13 Fla. 393; City of Savannah v. Steamboat Co. of Ga., R. M. Charlt. (Ga.) 342; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; City of Wellington v. Wellington Tp., 46 Kan. 213; New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478; Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695; People v. Common Council of Detroit, 28 Mich. 228; Benson v. City of New York, 10 Barb. (N. Y.) 245; People v. Porter, 26 Hun, 622; affirmed 90 N. Y. 68; Atkins v. Town of Randolph, 31 Vt. 226; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93.

[43] In Meriwether v. Garrett, 102 U. S. 472, in the dissenting opinion, Justice Strong said in part: "Its character as a municipal corporation does not affect the nature of its obligations to its creditors or its cestuis que trust or impair the remedies they would have if the city was a common debtor or trustee. While as a municipal corporation the city had public duties to perform, yet, in contracting debts authorized by the law of its organization, or in performing a private trust, it is regarded by the law as standing on the same footing as a private individual with the same rights and duties and with the same liabilities as attend such persons. Over its public duties, it may be admitted, the legislature has plenary authority. Over its private obligations it has not."

Small v. Inhabitants of Danville, 51 Me. 359; State of Wisconsin v. Torinus, 26 Minn. 1; Oliver v. City

This power of the legislature is sufficiently broad to enable it to grant to railroad companies the right to occupy the streets and highways of subordinate public corporations without securing

of Worcester, 102 Mass. 489. See, also, 25 Am. Law Rev. 398, where the following is quoted from an opinion by Judge East discussing the character and nature of a municipal corporation: "The functions of a municipality are twofold; first, political, discretionary, legislative; secondly, ministerial. While acting within the sphere of the former they are exempt from liability inasmuch as the corporation is a part of the government to that extent and its officers to the same extent are public officers and as such entitled to the protection of this principle; but, within the sphere of the latter, they drop the badges of governmental officers and become, as it were, the representatives of a private corporation in the exercise of private functions. The distinction between those legislative powers which it holds for public purposes as a part of the government of the country and those private franchises which belong to it as a creature of the law is well taken." Bailey v. City of New York, 3 Hill (N. Y.) 531; Lindsey v. State, 27 Tex. Civ. App. 540, 66 S. W. 332; Single v. Marathon County Sup'rs, 38 Wis. 363. See, also, Cooley, Taxation (2d Ed.) p. 688.

Dillon, Mun. Corp. (4th Ed.) § 66. "In its governmental or public character, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded quo ad hoc as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent."

New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478. See, also, cases cited §§ 82 and 84.

[44] Note 26 Am. Law Rev. 520; City of Clinton v. Cedar Rapids & M. R. R. Co., 24 Iowa, 455; City of New Orleans v. Hopkins, 13 La. (O. S.) 326; Spaulding v. Nourse, 143 Mass. 490; Com. v. Plaisted, 148 Mass. 375; Prince v. Crocker, 166 Mass. 347; Dietrich v. Schremms, 117 Mich. 298, 75 N. W. 618; Guilder

their consent, on the theory that highways and streets are dedicated to a public use and the legislature as representing the community or government at large has complete control over public property.[45]

§ 88. Over corporate contracts.

Public corporations may, during their existence either as corporations de facto or de jure, enter into contract relations with third parties, and if these, at the time of their inception, are valid, the legislature cannot, although its powers are broad as to the control of public corporations in all respects, pass laws changing or repealing the powers of the corporation in such a manner as to impair the obligations of these contract rights or relations, protected by provisions of the Federal and state constitutions.[46] Laws in force at the time of the making of such contracts and which were their authority in whole or in part, enter into and form a part of the same.[47] Contracts enuring to the benefit of

v. Town of Otsego, 20 Minn. 74 (Gil. 59); Wager v. Troy Union R. Co., 25 N. Y. 526; People v. Kerr, 27 N. Y. 188; People v. Flagg, 46 N. Y. 401; Fearing v. Irwin, 55 N. Y. 486; Simon v. Northup, 27 Or. 487; Irvin v. Turnpike Co., 2 Pen. & W. (Pa.) 466; Mercer v. Pittsburgh, Ft. W. & C. R. Co., 36 Pa. 99; Ford v. Chicago & N. W. R. Co., 14 Wis. 609.

[45] See post, chapter IX, discussing the control of public property.

[46] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; City of Galena v. Amy, 72 U. S. (5 Wall.) 705; Lee County v. Rogers, 74 U. S. (7 Wall.) 185; Broughton v. City of Pensacola, 93 U. S. 266; Wolff v. City of New Orleans, 103 U. S. 358; State v. Jennings, 27 Ark. 419; City of San Francisco v. Canavan, 42 Cal. 541; Columbia County Com'rs v. King, 13 Fla. 451; Boyd v. Chambers, 78 Ky. 140; City of St. Louis v. Shields, 52 Mo. 351; State Board of Education v. City of Aberdeen, 56 Miss. 518; Helena Consol. Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382; Cleveland v. Board of Finance & Taxation, 38 N. J. Law, 259; Gabler v. City of Elizabeth, 42 N. J. Law, 79; Munday v. Assessors of Rahway, 43 N. J. Law, 338; Rader v. Township Committee of Union, 44 N. J. Law, 259; Tax Assessors of Rahway v. Munday, 44 N. J. Law, 395; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; Brown v. City of New York, 63 N. Y. 239; Belo v. Forsythe County Com'rs, 76 N. C. 489; Bigler v. City of New York, 5 Abb. N. C. 51; Goodale v. Fennell, 27 Ohio St. 426; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; State v. City of Madison, 15 Wis. 30; State v. City of Milwaukee, 25 Wis. 122.

[47] Ralls County Ct. v. U. S., 105 U. S. 733; German Sav. Bank v. Franklin County, 128 U. S. 526; Columbia County Com'rs v. King, 13

third parties or to the corporation itself, become property and vested rights, protected sacredly by all the power of the state, and which cannot be impaired or destroyed by subsequent legislation or even constitutional provision.[48] Particular powers of taxation granted to public corporations may become a part of such a contract, and subsequent legislation lessening or destroying such powers will be held unconstitutional as legislation impairing the obligation of a contract.[49] The principle applies to provisions for a sinking fund and also to any property or security which at the time of legislation authorizing an issue of bonds was devoted to their payment; such sinking fund or means of payment, it has been held, cannot be diverted to other uses nor such legislation repealed.[50] It has been held, however, that creditors or

Fla. 451; Terrett v. Taylor, 9 Cranch (U. S.) 43.

In Van Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535, the court says: "It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

[48] County of Moultrie v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631; State of Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; City of Detroit v. Detroit Citizens' St. R. Co., 184 U. S. 368; State of Minnesota v. Duluth & I. R. R. Co., 97 Fed. 353. In People v. State Auditors, 42 Mich. 422, a contract by the legislature for the publication of supreme court reports was held not binding on its successors.

Cape May & S. L. R. Co. v. City of Cape May, 35 N. J. Eq. (8 Stew.) 419; Smith v. City of Appleton, 19 Wis. 468. But see City of St. Louis v. Sheilds, 52 Mo. 351.

[49] State of Louisiana v. Pilsbury, 105 U. S. 278; State of Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; Town of Mobile v. Watson, 116 U. S. 289; Seibert v. Lewis, 122 U. S. 284; Sawyer v. Parish of Concordia, 12 Fed. 754; People v. Bond, 10 Cal. 563; Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21; Morris v. State, 62 Tex. 728; State v. City of Madison, 15 Wis. 30.

[50] State of Louisiana v. City of New Orleans, 102 U. S. 203. "The obligation of a contract in the constitutional sense is the means provided by law by which it can be enforced, by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of this means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened."

State of Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; Seibert v. Lewis, 122 U. S. 284. Provisions authorizing the levy and collection of a special tax to pay bonds are a part of the contract with the creditor and cannot be repealed

those holding contract obligations have no vested right to a particular form of remedy and the legislature may abolish or alter a remedy without impairing the contract obligation provided it supply one which is equally efficacious and available.[51] Where a remedy is limited or abolished, this will constitute an impairment of a contract obligation for, as has been said, "nothing is more important than the means of enforcement."[52] This protec-

unless a remedy equally efficacious is substituted.

Fazende v. City of Houston, 34 Fed. 95; Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21.

Munday v. Assessors of Rahway, 43 N. J. Law, 338. A statute was passed relating to the issue of writs of mandamus and supplementing certain authority for the issue of bonds by the city of Rahway, the effect of which was to deprive bondholders of their immediate right to such writ. The statute was held unconstitutional and the court said: "The act would strip him of his priority and attempts what in Martin v. Somerville Water-Power Co., 3 Wall. Jr. 206, Fed. Cas. No. 9,165, was decided to be beyond legislative power. It is as if the legislature enacted that no execution should issue to enforce a pre-existing judgment to the prejudice of the interests of creditors whose claims were not yet due."

People v. Common Council of Buffalo, 140 N. Y. 300. Any law materially abridging a remedy for the enforcement of a contract existing when it was made is an impairment of its obligation unless it provides a remedy equally adequate. Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893; Terry v. Wisconsin M. & F. Ins. Co. Bank, 18 Wis. 87.

[51] State of Louisiana v. City of New Orleans, 102 U. S. 203. In National Bank of Western Ark. v. Sebastian County, 5 Dill. 414, Fed. Cas. No. 10,040, Judge Parker held that in reference to the obligation of contracts this provision of the Federal Constitution "embraces those laws alike which affect its validity, construction, discharge and enforcement," and that "an act of a state legislature which provides that counties are no longer corporations —that they cannot be sued—is void as to obligations legally issued by such counties when the law of the state provided they could be sued, when set up against a party seeking a remedy upon the obligations of a county in a federal court, because the state legislature cannot take away the right of a holder of such county obligations to sue in a federal court when such right is given him by the constitution and laws of the United States, and because such a law impairs the obligation of such contracts." But see Meriwether v. Garrett, 102 U. S. 472, and Thompson v. Wiley, 46 N. J. Law, 476, where the agencies were removed through which the courts could alone act in enforcing the rights of creditors.

[52] Edwards v. Kearzey, 96 U. S. 595. The court in its opinion by Justice Swayne in defining the obligation of a contract say: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of

tion is not afforded, however, to the public corporation in its capacity as such. It is the personal property, contract or vested right of the individual which is protected.

In discussing the subject of the charter of the corporation, one of the differences suggested between public and private corporations was that the charter or grant of powers by the sovereign to public corporations did not partake of the nature of a contract as between the donor and donee.[53] The charter of a private corporation is considered a contract, construed and enforced as such. The charter, however, of a public corporation may contain, so it has been held in some instances, grants or gifts of power which partake of the nature of a contract and of which the sovereign cannot willfully or arbitrarily dispossess them. It is true that rights of this character are seldom granted, but it is none the less true that when granted the rule of law applies as applied to the grant or gift of a power to a private corporation.[54] Contracts between sovereign states can only be entered into[55] and enforced in the manner provided in the constitution of the United States. Over such contracts the power of the legislature is necessarily limited, if possessed at all. The state may, by the passage of legislation, create a contract obligation which cannot be destroyed by subsequent legislation.[56]

enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the thing.'" See, also, quotation from State of Louisiana v. City of New Orleans, 102 U. S. 203, cited ante; Gabler v. City of Elizabeth, 42 N. J. Law, 79.

[53] See § 22.

[54] City of Richland v. County of Lawrence, 12 Ill. 1; Bowdoinham v. Richmond, 6 Me. (6 Greenl.) 112; County of Hampshire v. County of Franklin, 16 Mass. 75; State v. Moores, 55 Neb. 480, 76 N. W. 175.

[55] Green v. Biddle, 8 Wheat (U. S.) 1. See, also, as to the construction of the compact between Kentucky and Virginia relating to "all private rights and interests of lands within the district of Kentucky derived from the laws of Virginia prior to such separation," Hawkins v. Barney's Lessee, 5 Pet. (U. S.) 457, and Fisher's Lessor v. Cockerell, 5 Pet. (U. S.) 248; Chesapeake & O. Canal Co. v. Ohio R. Co., 4 Gill & J. (Md.) 1; Brien v. Elliot, 2 Pen. & W. (Pa.) 49; Hyde's Lessee v. Torrence, 2 Yeates (Pa.) 440.

[56] Antoni v. Greenhow, 107 U. S. 769.

§ 89. Legislative control over trust property held by public corporations.

The control of the legislature over property or contract rights of the public corporation includes not only property belonging to the corporation in its public capacity, but also to property which it holds as a trustee for the benefit of a cestui que trust. The only limitation upon the power of the legislature in such a case is that the purpose for which the property or its income is to be applied must not be changed. This principle was settled in a case involving the right of the city of Philadelphia to control, through a certain board, the property devised by Stephen Girard to it, as trustee, for the purpose of maintaining, upon the conditions set forth in the grant, Girard College, situated within the limits of the municipality.[57] The control over this trust property was affected indirectly through a change in municipal organization.

§ 90. The power of the legislature to compel the payment of debts.

Public corporations like individuals have certain characteristics, one of these being, unfortunately, too often possessed,—the desire to avoid the payment of a moral or legal obligation. A corporation may have acquired property directly or indirectly, which it retains and of which it receives the full benefit; it has been or is used by the corporation for its legitimate public purposes; the people of the community in their collective and public capacity enjoy its use. The corporation, however, declines to pay those who have parted with it in good faith, the excuse for non-payment perhaps being inability to pay; an alleged constitutional provision preventing the levy of taxes for such purpose, or, in many cases, the dishonest wish on the part of the inhabitants to avoid the assumption of burdens after having enjoyed the benefits of the transaction, the debt being perhaps the result of an im-

[57] Girard v. City of Philadelphia, 7 U. S. (7 Wall.) 1; Trustees Ill. Industrial University v. Champaign County Sup'rs, 76 Ill. 184; State v. Springfield Tp., 6 Ind. 83; North Yarmouth v. Skilling, 45 Me. 133; Chambers v. City of St. Louis, 29 Mo. 543; Greenville v. Mason, 53 N. H. 515; Sargent v. Cornish, 54 N. H. 18; White v. Fuller, 39 Vt. 193; Bass v. Fontleroy, 11 Tex. 698; Town of Montpelier v. Town of East Montpelier, 27 Vt. 704; Id., 29 Vt. 12.

provident contract. Under these conditions it is clearly within the power of the legislature to compel a payment of legal and honest obligations by the public corporation in the manner which it may provide,[58] and to enforce obedience to the directions contained in its positive laws through proper process of the judicial branch of the sovereign power. The legislature can provide for the levy and collection of taxes with which to meet this obligation.[59] The power of the sovereign through its law-making branch goes still further, so it has been held, even to the payment under compulsion of a debt or obligation owing by a public corporation which technically can be avoided but in favor of which there exist the strongest moral reasons.[60] It is also within the

[58] City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190; Jackson County Sup'rs v. La Crosse County Sup'rs, 13 Wis. 490; Sedgwick County Com'rs v. Bunker, 16 Kan. 498; Weister v. Hade, 52 Pa. 474; Guilford v. Chenango County Sup'rs, 13 N. Y. (3 Kern.) 143; Carter v. Cambridge, 104 Mass. 236; Brewster v. City of Syracuse, 19 N. Y. 116; City of New Orleans v. Clark, 95 U. S. 644; City of New York v. Tenth Nat. Bank, 111 N. Y. 446.

[59] State of Louisiana v. U. S., 103 U. S. 289; New York L. Ins. Co. v. Cuyahoga County Com'rs, 106 Fed. 123; State v. Parkinson, 5 Nev. 17; Berrian v. City of New York, 27 N. Y. Super. Ct. (4 Rob.) 538.

[60] Sedgwick, St. Const. Law, 313, 314; United States v. Baltimore & O. R. Co., 84 U. S. (17 Wall.) 322.

City of New Orleans v. Clark, 95 U. S. 644. "Assuming then, that the bonds were invalid, for the omission stated, they still represented an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which its charter authorized. It was, therefore, competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from the payment of which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one, where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly, the interest on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services

power of the legislature, where there has been an alleged assumption of corporate powers under a misapprehension of authority,

or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys, and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city."

United States v. Realty Co., 163 U. S. 427. "The term 'debts' includes those debts or claims which rest upon a mere equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law."

Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528. "We regard the power of the territorial legislature to pass this act as indisputable. In United States v. Realty Co., 163 U. S. 427, 439, the power of Congress to recognize a moral obligation on the part of the nation and to pay claims which, while they are not of a legal character, are nevertheless meritorious and equitable in their nature, was affirmed. The territorial legislature at least had the same authority as that possessed by Congress to recognize claims of the nature described." The court further say: "It is not necessary to say in this case that the legislature had the power to donate the funds of the municipality for the purpose of charity alone. The facts show plain moral grounds for the act, a consideration existing in the benefits received and enjoyed by the city or by its predecessors from whom it took such benefits."

New York L. Ins. Co. v. Cuyahoga County Com'rs, 106 Fed. 123; People v. Burr, 13 Cal. 343; Creighton v. City & County of San Francisco Sup'rs, 42 Cal. 446; Carter v. Cambridge, 104 Mass. 236.

Friend v. Gilbert, 108 Mass. 408. "The fact that the town was under no legal obligation to pay does not make it a gift without equivalent. It has been decided in several cases, that towns may vote money to indemnify their agents who may incur a liability in the performance of their duties, though the towns were under no legal obligation to do so."

People v. Onondaga Tp. Sup'rs, 16 Mich. 254; State v. Bruce, 50 Minn. 491. "But the distinction between valid and invalid legislation on this subject has been pointed out many times, and it is well settled that, if there rests upon the designated municipality any obligation or duty, moral or equitable (using these words in a large and popular sense) to pay the claim, then a legislative act requiring its payment is supported as valid by the great weight of authority. Coles v. Washington County, 35 Minn. 124, 27 N. W. 497;

to compel the payment of debts contracted by a void organization after it has become legally incorporated.[61]

In this connection it might be well to refer again to the power of the legislature as the law-making branch of the state to compel the creation of an obligation or the incurring of an indebtedness by public corporations. They are created as agencies of the sovereign to exercise on its behalf governmental functions and to administer public affairs to a greater or less degree under its direction. It seems to be within the province and power of the legislature to insist that public corporations, as governmental agents, shall properly perform those duties and functions which ordinarily devolve upon the government and which have for their

State v. Foley, 30 Minn. 350, and cases cited. As the legislature possesses the constitutional power to compel a municipal corporation, out of funds in its treasury, or by means of taxes imposed for that purpose, to meet and discharge a claim, which in good conscience it ought to pay, although no legal liability has previously existed, it simply remains for us to discover and determine whether there rested at any time upon the county, or upon the state, for that matter, a moral or equitable obligation or duty to refund the amounts paid by the relator."

Steines v. Franklin Co., 48 Mo. 167; North Missouri R. Co. v. Maguire, 49 Mo. 490.

Guilford v. Chenango County Sup'rs, 13 N. Y. (3 Kern.) 143. The court say: "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation, in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms."

Brewster v. City of Syracuse, 19 N. Y. 116; People v. Green, 63 Barb. (N. Y.) 390; City of New York v. Tenth Nat. Bank, 111 N. Y. 446; O'Hara v. State, 112 N. Y. 146; City of Philadelphia v. Field, 58 Pa. 320; Burns v. Clarion County, 62 Pa. 422. But see People v. Lynch, 51 Cal. 15; Hoagland v. City of Sacramento, 52 Cal. 142.

Mosher v. Independent School Dist. of Ackley, 44 Iowa, 122, holding to the contrary, governed by constitutional limitation of indebtedness, and Baldwin v. City of New York, 42 Barb. (N. Y.) 549; Id., 45 Barb. 359. The above cases holding contrary to the rule stated in the text are based upon the proposition which is unquestionably true that a public corporation cannot be compelled to pay a claim against it where no obligation either moral, legal or equitable exists.

[61] Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528. But see Ex parte Wells, 21 Fla. 280, to the contrary; Cooper v. Springer, 65 N. J. Law, 594, 48 Atl. 605; Coast Co. v. Borough of Spring Lake, 56 N. J. Eq. 615; City of Guthrie v. Ter., 1 Okl. 188.

purpose the protection of life, health, property, the maintenance of government, and the administration of public affairs; nongovernmental purposes, not within the proper province of a governmental agent, the legislature cannot compel public corporations to accomplish or to perform.[62] The division between the obligations which the legislature can compel a public corporation to assume and those which it cannot, can hardly be characterized by the use of the word "local," although to a certain extent this states the proper basis. To illustrate, the supreme court of the state of Michigan held that the legislature could not compel the people of the city of Detroit to create an indebtedness for the purpose of laying out and improving a public park within the limits of that city, such purpose being one, as it were, of an embellishment of the external appearance of the city. On the other hand it is quite clear that if the city of Detroit failed to provide a proper system of sewerage, it could be compelled to do this without the consent of the people, the construction and the maintenance of a system of sewerage being highly essential to the proper preservation of the health of the people, a governmental function beyond doubt.[63]

§ 91. Retention of jurisdiction.

The sovereign may, in the organization of public corporations, retain such control over criminal and other proceedings coming within their jurisdiction, as it may elect.[64]

§ 92. Constitutional limitations on legislative power.

In preceding sections it has been suggested that the only limitations upon the power of the legislature to deal with public corporations as it may elect, are to be found in constitutional provisions or in inherent fundamental principles of equity. These

[62] State v. Atkin, 64 Kan. 174, 67 Pac. 519; People v. City of Chicago, 51 Ill. 17; Harward v. St. Clair & M. Levee & Drainage Co., 51 Ill. 130; People v. Common Council of Detroit, 28 Mich. 228. See, also, §§ 83 and 84, where many authorities are cited and considered.

[63] Park Commission v. Common Council of Detroit, 28 Mich. 228; People v. Flagg, 46 N. Y. 401; Bank of Rome v. Village of Rome, 18 N. Y. 38.

[64] United States v. Baum, 74 Fed. 43; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; United States v. Thompson, 1 Sumn. 168, Fed. Cas. No. 16,492.

constitutional limitations upon legislation in regard to either the creation of public corporations or the management and control of their boundaries, revenues and property, are usually found in provisions prohibiting the passage of special acts; laws concerning the "business," the "affairs" or the "internal affairs" of public corporations; laws not uniform in their operation throughout the state, or regulations directly determining the manner in which changes in the organic life of public corporations may be effected, and other provisions affecting the passage of legislation.[65]

§ 93. Limitations on the passage of what is termed "special legislation."

During the early legislative history of this country there existed no limitations of this character upon the power of the different state law-making bodies. Nearly all legislation was special in its nature. A particular emergency or condition was met or provided for by the passage of a special act. It will be readily understood that such a system led to great abuses. The powers of particular corporations or rights granted to persons depended not on what they deserved or should properly exercise, but upon the influences brought to bear upon the law-making body to grant them the powers and the privileges they desired. Not only did this system of passing laws lead to the granting of undeserved favors and powers to be exercised by improper and incompetent bodies, but it led to an uncertain, indefinite and un-uniform condition of legislation affecting all interests. The same conditions existed to a large extent in England under the system by which the crown, unrestrained, granted charters to public corporations, and which led there to the passage by parliament of the Municipal Corporations Act, 5 & 6 Wm. IV, c. 76, to remedy the evils and abuses which existed as a result of the absence of limitations and regulations.

Different states of the Union have adopted in their constitutions, or in amendments, limitations upon the right of legislatures to pass acts special in their nature or to meet a special condition or action. The wording of the constitutional provision in Min-

[65] Stanly County Com'rs v. Coler,Cal. 46; State v. Cheetham, 21 Wash. 96 Fed. 284; People v. Coleman, 4437.

nesota is a good illustration of the form usually adopted, though many do not include the details there enumerated.[66]

The particular subjects usually covered by constitutional provisions prohibiting the passage of special legislation affecting the creation or the life of public corporations, relate to their creation, the amendment or repeal of their charters,[67] the alteration or

[66] Minn. Const. art. 4, § 33: "In all cases when a general law can be made applicable no special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting, or changing the lines of any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of, or fixing, or relating to the compensation, salary or fees of the same, or the mode of election or appointment thereto; authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; * * * locating or changing county seats; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; * * * creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. Provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated." See, also, Const. of Ark. art. XII, § 3; Cal. art. XI, § 6; Colo. art. XIV, § 13; Idaho, art. XII, § 1; Iowa, art. VIII, § 1, Kan. art. XII, § 5; Ky. § 59; Mo. art. IX, § 7; N. J. art. IV, § 7, par. 11; N. D. art. VI; Ohio, art. XIII, § 6; S. D. art. X, § 1; Tex. art. XI, §§ 4, 5. This provision applies only in case of cities and towns having less than 10,000 inhabitants; Wash. Const. art. XI, § 10; W. Va. Const. art. XI, § 1; Wis. Amend. IV, § 32; Wyo. Const. art. 13. A majority of the electors must consent to the incorporation of any district as a municipality.

[67] See notes in § 9. State v. Duval County Com'rs, 23 Fla. 483; City of Atchison v. Bartholow, 4 Kan. 124; State v. Capdevielle, 104 La. 561, 29 So. 215; City of Wyandotte v. Wood, 5 Kan. 603; State v. Leffingwell, 54 Mo. 458, where that provision of the Mo. Const. that corporations cannot be created by special act except for municipal purposes is fully considered. The court holds that a corporation for "municipal purposes" must be one connected with a municipal corporation itself and organized and created for the purpose of carrying out some of the objects for which such corporations are organized. People v. Draper, 15 N. Y. 561.

Atkinson v. Marietta & C. R. Co., 15 Ohio St. 21. "These provisions of the constitution are too explicit

change of their boundaries, their mode of raising revenues,[68] and their expenditure of public moneys.[69]

The power of the legislature to pass general laws under constitutional authority classifying public corporations and authorizing the exercise of different powers by the different classes is a subject of sufficient importance to be discussed in a succeeding section.[70]

The constitutional provision in Minnesota to the effect that the question of whether a general law could have been made applicable in any case was a judicial question and to be "judicially determined" without regard to any legislative assertion on that subject is one not everywhere followed.[71] A general law has been defined as "a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special."[72] The mere arbitrary

to admit of the least doubt that they were intended to disable the General Assembly from either creating corporations, or conferring upon them corporate powers, by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon a perfect equality as to all future grants of power of making such laws applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation; and finally, of making all judicial constructions of their powers, or the restrictions imposed upon them, equally applicable to all corporations of the same class."

State v. City of Cincinnati, 20 Ohio St. 18. But see State v. Denny, 118 Ind. 382, 21 N. E. 252, and City of Evansville v. State, 118 Ind. 426, 21 N. E. 267, discussing the right of the people in incorporated municipalities to local self-government.

[68] City of Wyandotte v. Wood, 5 Kan. 603; State v. City of Cincinnati, 20 Ohio St. 18; Com. v. Macferron, 152 Pa. 244; Rohde v. Seavey, 4 Wash. 91, 29 Pac. 768; City of Port Townsend v. Sheehan, 6 Wash. 220, 33 Pac. 427.

[69] Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082; San Luis Obispo County v. Graves, 84 Cal. 75.

[70] See § 94, post.

[71] Guthrie Nat. Bank v. City of Guthrie, 173 U. S. 528; People v. Levee Dist. No. 6 of Sutter County (Cal.) 63 Pac. 342; City of St. Louis Com'rs v. Shields, 62 Mo. 247; Von Phul v. Hammer, 29 Iowa, 222; Hermann v. Town of Guttenburg, 63 N. J. Law, 616, 44 Atl. 758.

[72] In Pepin Tp. v. Sage (C. C. A.) 129 Fed. 657, it was said, quoted from Nichols v. Walter, 37 Minn. 264, "A law is general and uniform in its operation which operates equally upon all the subjects within the class of subjects for which the rule is adopted; but, as we have said, the legislature cannot adopt a mere arbitrary classification, even though the law be made to operate equally upon each subject of each

grouping, classifying or arranging of certain objects will not of itself make legislation general. There must be a logical basis for the desired effect independent of conditions or circumstances then existing. As has been said: "It is not necessary that a law should operate upon all counties and cities to be constitutional. If the law is general and uniformly operating upon all of a certain necessary or reasonable class, or upon all who are brought within the relations and circumstances provided in the act, and such law has provision for future as well as present operation, it is not obnoxious to limitations against special and local legislation."[73]

of the classes adopted. An illustration and example of that we take from Richards v. Hammer, 42 N. J. Law, 435, 440: 'Thus a law enacting that in every city in the state in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties,' would present a specimen of such law. So in the matter we have supposed, of granting powers and privileges to incorporated villages, if those situated on rivers were placed in a class for the purpose of conferring on them special powers and privileges not referring to nor suggested by the peculiarity of their situation—as, for instance, for the purpose of maintaining high schools—the classification would be merely arbitrary." Wheeler v. City of Philadelphia, 77 Pa. 338.

See, also, State v. Cooley, 56 Minn. 540, where, on reargument, p. 549, Justice Collins said in discussing the distinction between a general and special law: "Hence, a general law does not import universality in the subject or operation of the law. 'General' is defined by Webster as relating to a genus; pertaining to a whole class or order. The line of demarcation between general laws and special laws often seems indefinite and difficult to draw; but, if the principles upon which the distinction rests are kept in mind, the difficulty is not nearly so great as might seem. A law is general, in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law; while a special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act, or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable. And in this connection there should be kept in mind the distinction between 'public' and 'private,' and 'general' and 'special,' as the latter terms are used in these constitutional restrictions; for special legislation in the constitutional sense may be either public or private."

[73] Harwood v. Wentworth, 162 U. S. 547; Fellows v. Walker, 39 Fed. 651; City of Topeka v. Gillett, 32 Kan. 431; State v. Kansas City, 50 Kan. 508, 31 Pac. 1102; Devine v. Cook County Com'rs, 84 Ill. 591; West Chicago Park Com'rs v. Mc-

§ 94. Constitutionality of laws classifying public corporations.

In a preceding section, attention has been called to the constitutional limitations upon the power of the legislature to pass

Mullen, 134 Ill. 170, 25 N. E. 677; Cummings v. City of Chicago, 144 Ill. 563, 33 N. E. 855; State v. Cooley, 56 Minn. 540, where the court said on reargument: "By necessity is meant practical, and not absolute, necessity. But the characteristics which will serve as a basis of classification must be substantial, and not slight or illusory. For example, distinctions due merely to pre-existing repealable special legislation would not, of themselves, constitute a proper basis of classification, for that would tend to perpetuate the very peculiarities which the constitution was designed ultimately to remove." State v. Herrmann, 75 Mo. 340; Nichols v. Walter, 37 Minn. 272, where the court say "we quote again from Richards v. Hammer, 42 N. J. Law, 435, 'but the true principle requires something more than mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis for classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation,'" and continue, "Or, to state it differently, though not so well, the true practical limitation of the legislative power to classify is that the classification shall be upon some apparent natural reason—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." Anderson v. City of Trenton, 42 N. J. Law, 487; State v. Spaude, 37 Minn. 322, 34 N. W. 165; Codlin v. Kohlhousen, 9 N. M. 565; State v. Mitchell, 31 Ohio St. 592; State v. Anderson, 44 Ohio St. 247; Bronson v. Oberlin, 41 Ohio St. 476.

Wheeler v. City of Philadelphia, 77 Pa. 338. "Legislation is intended not only to meet the wants of the present, but to provide for the future. It deals not with the past, but in theory at least, anticipates the needs of a state, healthy with a vigorous development. It is intended to be permanent. At no distant day, Pittsburgh will probably become a city of the first class. In the meantime, is the classification as to cities of the first class bad because Philadelphia is the only one of the class? We think not. Classification does not depend upon numbers. The first man, Adam, was as distinctly a class when the breath of life was breathed into him as at any subsequent period. The word is used not to designate numbers, but a rank or order of persons or things; in society it is used to indicate equality, or persons distinguished by common characteristics; as, the trading classes, the laboring

what is ordinarily termed "special legislation," these requiring the passage of laws general in their nature and under the provisions of which all bodies fulfilling or meeting the conditions specified can become organized. The necessity for legislation classifying public corporations arises from the fact, so often repeated, that the density of population varies in different portions of the state, and that those portions thickly populated experience wants and require for their proper government, and for the proper administration of public and governmental affairs and functions, organizations or forms of government more complex in their character than those required by sparsely settled regions. The constitutionality of legislation providing for the classification of public corporations is well established, so long as it comes within the constitutional inhibition, and is based upon some distinction that renders the legislation reasonable and expedient.[74] A classification is inoperative when based upon unsubstantial, arbitrary or illogical differences or characteristics. "There must be substantial distinctions having a reference to the subject-matter of the proposed legislation between the objects."[75] There exists, as one basis of classification, density of population,[76] and as another

classes; in science, it is a division or arrangement containing the subordinate divisions of order, genus, and species."

Com. v. Patton, 88 Pa. 258; Davis v. Clark, 106 Pa. 377; Morrison v. Bachert, 112 Pa. 322; City of Scranton v. Silkman, 113 Pa. 191, 6 Atl. 146; Lloyd v. Smith, 176 Pa. 213, 35 Atl. 200; Burkholtz v. State, 84 Tenn. (16 Lea) 71.

[74] Darcy v. City of San Jose, 104 Cal. 642; Carpenter v. People, 8 Colo. 116.

Green v. Com., 95 Ky. 233. The assignment of a city to a particular class is a legislative act and cannot be interfered with by the courts for the reason that it has not the necessary population to entitle it to a place in such class.

Brown v. Holland, 97 Ky. 249; Kansas City v. Stegmiller, 151 Mo. 189; State v. Babcock, 25 Neb. 709; State v. Stuht, 52 Neb. 209; Gibbs v. Morgan, 39 N. J. Eq. (12 Stew.) 126; Van Riper v. Parsons, 40 N. J. Law, 123; Anderson v. Trenton, 42 N. J. Law, 486; Van Giesen v. Bloomfield, 47 N. J. Law, 442; Long Branch Police, S. & I. Commission v. Sloane, 49 N. J. Law, 356; State v. Borough of Clayton, 53 N. J. Law, 277; McLaughlin v. City of Newark, 57 N. J. Law, 298; State v. City of Cincinnati, 52 Ohio St. 419; City of Reading v. Savage, 124 Pa. 328; Johnson v. Martin, 75 Tex. 33; People v. Page, 6 Utah, 353.

[75] Richards v. Hammer, 42 N. J. Law, 435; State v. Borough of Clayton, 53 N. J. Law, 277; Ayars' Appeal, 122 Pa. 266.

[76] Donlon v. Jewett, 88 Cal. 530; Kumler v. San Bernardino County Sup'rs, 103 Cal. 393; Darcy v. Com-

the character of the powers and duties and functions necessary to be performed and exercised.[77] Acts passed classifying public corporations have been attacked most frequently upon the constitutional ground of special legislation. Sometimes the power is given to the legislature of the state to determine for itself whether a special condition can be satisfied under the provisions of general laws governing such circumstances, or whether it is necessary to pass a law which it may hold general. In other cases, as has been already suggested, this power of deciding when a general law is applicable is given to the judicial branch of the state.[78]

In determining the character of certain legislation as special or otherwise, coming within the constitutional prohibition, its application should not be considered. That it may apply to but one municipality or public corporation in the state does not establish or fix its character, therefore, as a special act.[79] That the

mon Council of San Jose, 104 Cal. 642; Fragley v. Phelan, 126 Cal. 383; Pratt v. Browne, 135 Cal. 649; People v. Cooper, 83 Ill. 585; Green v. Com., 95 Ky. 233, 24 S. W. 610; Alexander v. City of Duluth, 77 Minn. 445; Kelly v. Meeks, 87 Mo. 396; In re Sewer Assessment for Passaic, 54 N. J. Law, 156, 23 Atl. 517; Wood v. Atlantic City, 56 N. J. Law, 232, 28 Atl. 427; Closson v. Board of License & Excise of Trenton, 48 N. J. Law, 438; Paul v. Judge of Circ. Ct. of Gloucester County, 50 N. J. Law, 585; Warner v. Hoagland, 51 N. J. Law, 62. In State v. Wall, 47 Ohio St. 499, a mere increase in population held not to advance a city from second to first class without complying with the provisions of the statute relative to such a change. Kilgore v. Magee, 85 Pa. 401; Luzerne County v. Glennon, 109 Pa. 564; Land, Log & Lumber Co. v. Brown, 73 Wis. 294.

[77] Darcy v. Common Council of San Jose, 104 Cal. 642; People v. Londoner, 13 Colo. 303, 22 Pac. 764; Rohde v. Seavey, 4 Wash. 91, 29 Pac. 768.

[78] See cases cited in § 92; Earle v. Board of Education of San Francisco, 55 Cal. 489; City of Topeka v. Gillett, 32 Kan. 431; State v. Herrmann, 75 Mo. 340; Van Giesen v. Inhabitants of Bloomfield, 47 N. J. Law, 442; State v. Pugh, 43 Ohio St. 98; Scowden's Appeal, 96 Pa. 422.

[79] Fellows v. Walker, 39 Fed. 651; Darrow v. People, 8 Colo. 417; State v. Kolsem, 130 Ind. 434, 29 N. E. 595; Louisville School Board v. Superintendent of Public Instruction, 102 Ky. 394, 43 S. W. 718; State v. Graham, 16 Neb. 74; State v. Stuht, 52 Neb. 209, 71 N. W. 941; Marmet v. State, 45 Ohio St. 63. But State v. Jackson County Ct., 89 Mo. 237, holds a law that can apply to but one county in a state special legislation. See, also, State v. Anderson, 44 Ohio St. 247, that decides legislation local and special classifying cities upon the basis of population where, according to the last Federal census, there is but one city fulfilling the conditions required.

law has for its basis of classification reasonable and uniform conditions, and genuine and substantial distinctions which may apply to the future as well as existing conditions, seems to be the test,[80] though some cases hold that where the purpose of the law is temporary only, if it creates a distinctive class based upon existing circumstances it may still be constitutional.[81] The act passed by a legislature may provide that before it shall become operative the consent of the people affected shall be given, and this condition does not, necessarily, constitute it special legislation.[82]

§ 95. Other constitutional objections.

The unconstitutionality of legislation affecting public corporations has been urged not only upon the ground that it is special legislation but also because state constitutions may contain provisions that all laws relating to certain matters "shall be uniform in their operation throughout the state,"[83] or there may be also provisions which prohibit the legislature from passing any local or special law "regulating the affairs of counties, cities, etc.,"[84]

[80] Ewing v. Hoblitzelle, 85 Mo. 64; Kelly v. Meeks, 87 Mo. 396; Foley v. City of Hoboken, 61 N. J. Law, 478, 38 Atl. 833; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; State v. Hawkins, 44 Ohio St. 98.

[81] Iowa R. Land Co. v. Soper, 39 Iowa, 112; Nichols v. Walter, 37 Minn. 272; Cobb v. Bord, 40 Minn. 479; State v. Cooley, 56 Minn. 548; Flynn v. Little Falls Elec. & Water Co., 74 Minn. 180; State v. City of Thief River Falls, 76 Minn. 15; Alexander v. City of Duluth, 77 Minn. 445.

[82] People v. Kipley, 171 Ill. 44. In State v. Copeland, 66 Minn. 315, Minnesota Laws 1895, c. 228, granting certain cities charter powers to take effect when adopted by a city, held unconstitutional as being in contravention of Const. art. 4, §§ 33 and 34. City of Reading v. Savage, 124 Pa. 328; Warner v. Hoagland, 51 N. J. Law, 62; Com. v. Reynolds, 137 Pa. 389. Pittsburgh's Petition for Board of Viewers, 138 Pa. 401. This case construes Pennsylvania Act June 14, 1887, and holds it constitutional against the objection that it was a local act, because providing a certain time within which it should go into operation as to cities of a certain grade.

[83] City of Kenton v. State, 52 Ohio St. 59, 38 N. E. 885.

[84] Appeal of Scranton School Dist., 113 Pa. 176; Appeal of Ayars, 122 Pa. 266; City of Reading v. Savage, 124 Pa. 328. See, also, Const. of Cal. art. IV, § 25, par. 9; Colo. art. V, § 25; Idaho, art. III, § 19; Ill. art. IV, § 22; Ind. art. IV, § 22; Mo. art. IV, § 53; Mont. art. V, § 26; Neb. art. III, § 15; Nev. art. IV, § 20; N. J. art. IV, § 7, par. 11; N. D. art. II, § 69, pars. 4, 32; Pa. art. III, § 7; S. D. art. III, § 23, par. 4; Tex. art. III, § 56; W. Va. art. VI, § 39; Wyo. art. III, § 27.

or "regulating the internal affairs of towns and counties,"[85] and acts or resolves of the legislature may come within the prohibitions contained in these provisions. That a bill deals with more than one subject, one only being expressed in its title, is another constitutional objection urged against legislation looking to the organization or control of public corporations. Such a provision is intended to afford a protection to the people and to legislators against the passage of bills dealing with more than one subject, some of which might not be, but for this prohibition, included in the title.[86] It is not necessary, however, in the title of a bill, to recite in detail all its provisions. General information or notice of the subject legislated upon is sufficient.[87]

[85] Meredith v. City of Perth Amboy, 60 N. J. Law, 134, 36 Atl. 779; Grey v. City of Dover, 62 N. J. Law, 40, 40 Atl. 640; Hermann v. Town of Guttenberg, 63 N. J. Law, 616, 44 Atl. 758. See, also, constitutional references in preceding note.

[86] Montclair v. Ramsdell, 107 U. S. 147, where the court in an opinion written by Judge Harlan construing such a constitutional provision of the state of New Jersey said: "The objections should be grave and the conflict between the statute and the constitution palpable before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object or if but one object that it was not sufficiently expressed by the title." Otoe County v. Baldwin, 111 U. S. 1; Ackley School Dist. v. Hall, 113 U. S. 135; Mahomet v. Quackenbush, 117 U. S. 509; Carter County v. Sinton, 120 U. S. 517; State v. Haverly, 62 Neb. 767; Astor v. Arcade R. Co., 113 N. Y. 93, where many cases are cited in the briefs. Judge Earl in his opinion on page 109 says on the purpose of such a provision, "The constitutional provision referred to has been deemed by statesmen and jurists, conditores legum, of so much importance that it is found in the fundamental laws of most of the states. Its purpose is to prevent fraud and deception by concealment, in the body of acts, of subjects not by their titles disclosed to the general public and to legislators who may rely upon them for information as to pending legislation. When the subject is expressed, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act and are germane to the title. The title must be such, at least, as fairly to suggest or give a clue to the subject dealt with in the act, and unless it comes up to this standard it falls below the constitutional requirement." In re Airy St., 113 Pa. 281. See, also, section, post, "Title of ordinances."

[87] State of Illinois v. Illinois Cent. R. Co., 33 Fed. 730; Lockhart v. City of Troy, 48 Ala. 581; City of Savannah v. State, 4 Ga. 26; Hill v. Town of Decatur Com'rs, 22 Ga. 203; Davis v. Woolnough, 9 Iowa, 104; People v. Mahaney, 13 Mich.

§ 96. The impairment or destruction of vested rights as a limitation.

The legislature of a state may pass laws either creating public corporations, regulating and controlling, or attempting to regulate and control their affairs, dividing their boundaries, providing for the disposition of their revenues and the manner in which taxes shall be levied and collected, such laws not coming within the constitutional objections set forth in the preceding paragraphs and therefore not unconstitutional and void, but subject to fundamental principles of law and if violating them invalid or subject to other constitutional provisions relating to the impairment of contract obligations and other rights.[88] The control of the sovereign, as has been said, is full, ample and supreme over public corporations, but the existence of this power does not permit even the sovereign, much less the legislature, its agent, to impair or destroy contract, property and vested rights owned by aliens or citizens, within the jurisdiction of the state and protected by fundamental law. In short, the cases hold without exception that the legislature cannot pass a law affecting either the creation, life or duties of a public corporation which in effect impairs or destroys the right of a creditor of that corporation. Creditors possess vested rights which even the state, controlled by constitutional limitations, cannot take away. Rights of this character may consist of a remedy given by the state to enforce the collec-

481; Walter v. Town of Union, 33 N. J. Law, 350; Harris v. People, 59 N. Y. 599; State v. Wright, 14 Or. 365; Luehrman v. Taxing Dist. of Shelby County, 70 Tenn. (2 Lea) 425. See, also, the following cases holding bills unconstitutional as not complying with the rule stated in the text. Brieswick v. City of Brunswick, 51 Ga. 639; Ayeridge v. Town Com'rs of Social Circle, 60 Ga. 404; Village of Lockport v. Gaylord, 61 Ill. 276; Williamson v. City of Keokuk, 44 Iowa, 88; City of Watertown v. Fairbanks, 65 N. Y. 588; Astor v. Arcade R. Co., 113 N. Y. 93; Durkee v. City of Janesville, 26 Wis. 697. See, also, many cases cited Dillon, Mun. Corp. (4th Ed.) pp. 87-90.

[88] Milner v. City of Pensacola, 2 Woods, 632, Fed. Cas. No. 9,619; Shapleigh v. City of San Angelo, 167 U. S. 646; People v. Burr, 13 Cal. 343; Davidson v. City of New York, 27 How. Pr. (N. Y.) 342; Wallace v. Sharon Tp. Trustees, 84 N. C. 164, holds contrary to the general doctrine; Morris v. State, 62 Tex. 728. In Wade v. City of Richmond, 18 Grat. (Va.) 583, it is held that the annexation of territory forming a part of a county to an adjoining city does not impair the obligation of a contract between the county and its creditors.

tion of a valid obligation,[89] or it may be a means provided for the payment of an indebtedness at the time of the granting of the original authority to incur such indebtedness, a corporate power of taxation conferred,[90] or again it may be specific property or revenues placed at the disposal of the creditor under certain circumstances and conditions.[91]

§ 97. Control over the corporation in its private capacity.

In its capacity as an individual, a public corporation deals with the legislature or the sovereign upon the same basis of equality as a private person or corporation. The property, of whatever character, which it may acquire and hold, is acquired and held subject to all the rules and remedies of the law affecting private property and interests. The legislature can no more arbitrarily pass laws affecting these interests and property than it can those of private individuals.[92] As recently said, "they (the courts) are

[89] Milner v. City of Pensacola, 2 Woods, 632, Fed. Cas. No. 9,619; Rader v. Southeasterly Road Dist. of Union, 36 N. J. Law, 273; Ganson v. City of Buffalo, 2 Abb. Dec. (N. Y.) 236; Upper Darby Tp. v. Borough of Lansdowne, 174 Pa. 203. See, also, many authorities cited in § 88.

[90] City of Covington v. Kentucky, 173 U. S. 231; Devereaux v. City of Brownsville, 29 Fed. 742; Columbia County Com'rs v. King, 13 Fla. 451. See Palmer v. City of Danville, 166 Ill. 42, as to effect of change in manner of levying and collecting special tax upon right of contractor for city improvements; Board of Education of Hawesville v. Louisville, H. & St. L. R. Co., 110 Ky. 932, 62 S. W. 1125; Broadfoot v. City of Fayetteville, 124 N. C. 478; Ladd v. City of Portland, 32 Or. 271. See, also, authorities cited under § 88.

[91] Warner v. Hoagland, 51 N. J. Law, 62, 16 Atl. 166; Weekes v. City of Galveston, 2 Tex. Civ. App. 102, 51 S. W. 544; Smith v. City of Appleton, 19 Wis. 468. See, also, § 88.

[92] Town of East Hartford v. Hartford Bridge Co., 10 How. (U. S.) 511; Grogan v. City of San Francisco, 18 Cal. 590; People v. City of Chicago, 51 Ill. 17; New Orleans, M. & C. R. Co. v. City of New Orleans, 26 La. Ann. 478.

Police Jury of Jefferson Parish v. McCormack, 32 La. Ann. 624. Here it is held that the public property of a parish cannot be converted into private property by the territorial division of the parish.

Proprietors of Mt. Hope Cemetery v. City of Boston, 158 Mass. 509. In the opinion given by Judge Allen it is said "by a quite general concurrence of opinion this legislative power of control is not universal and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political but in respect to which a city or town is deemed rather to have a right of private ownership of which it can-

also more and more recognizing that, from the point of view of the inviolable private rights of municipal corporations, these bodies may hold property as private in character and therefore as inviolable in character by any governmental action as the property of individuals. It is indeed true that this position has not been reached without considerable reluctance."[93] In the

not be deprived against its will save by the right of eminent domain with payment of compensation. * * * The conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character as a private corporation might own it and that its ownership is protected under the constitutions of Massachusetts and of the United States so that the legislature has no power to require its transfer without compensation." Judge Allen also says: "The city of Boston is possessed of much other property which, in a certain sense, and to a certain extent, is held for the benefit of the public, but in other respects is held more like the property of a private corporation. Notably among these may be mentioned its system of waterworks, its system of parks, its markets, its hospital, and its library. In establishing all of these the city has not acted strictly as an agent of the state government for the accomplishment of general public or political purposes, but rather with special reference to the benefit of its own inhabitants. If its cemetery is under legislative control, so that a transfer of it without compensation can be required, it is not easy to see why the other properties mentioned are not also; and all the other cities and towns which own cemeteries or other property of the kinds mentioned might be under a similar liability." People v. Common Council of Detroit, 28 Mich. 228. In this case it is intimated that parks are in the nature of private property. Spaulding v. Town of Andover, 54 N. H. 38, 56; Benson v. City of New York, 10 Barb. (N. Y.) 223; Webb v. City of New York, 64 How. Pr. (N. Y.) 10; People v. Ingersoll, 58 N. Y. 1; People v. Fields, 58 N. Y. 491; Milam County v. Bateman, 54 Tex. 153; Town of Montpelier v. Town of East Montpelier, 29 Vt. 12; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93; State v. Haben, 22 Wis. 660; State v. Schweickardt, 109 Mo. 496, 19 S. W. 47. See, also, note 35 Am. St. Rep. 529. But see the case of David v. Portland Water Committee, 14 Or. 98, where the court say, "Public parks, gas, water and sewage in towns and cities may ordinarily be classed as private affairs but they often become matters of public importance and when the legislature determines that there is a public necessity for their use in a certain locality, I do not think they can be designated as mere private affairs; that is a relative question."

[93] Darlington v. City of New York, 31 N. Y. 164. See, also, Terrett v. Taylor, 9 Cranch (U. S.) 43, 52; Town of Pawlet v. Clark, 9 Cranch (U. S.) 292; and the authorities cited under § 87.

opinion of Justice Story in the Dartmouth College Case,[94] he says: "But it will hardly be contended that even in respect to such (public) corporations the legislative power is so transcendent that it may, at its will, take away the private property of the corporation or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses, * * * does the legislature under our forms of limited government possess the authority to seize upon those funds and appropriate them to other uses at its own arbitrary pleasure against the will of the donors and donees?"

[94] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518.

CHAPTER IV.

CORPORATE ELECTIONS.

§ 98. Corporate elections.
99. Notice.
100. Time and place of holding.
101. The town meeting; its powers.
102. Its powers, continued.
103. Purpose for which held; levy of taxes; election of officers.
104. The town meeting; right and authority for holding.
105. Officers and their duties.
106. Voters and their qualifications.
107. Miscellaneous matters.

§ 98. Corporate elections.

The limits of this work will not permit the extended discussion or treatment of the law relating to general elections. This is a subject of sufficient importance to warrant an extended treatise. A few principles of law and cases will be given relating to the town meeting as a particular form of election.

That discriminating and keen observer, De Tocqueville, ascribes the success of American political institutions and ideas, in a great measure, to the existence of the New England town as a political organization and the opportunity afforded each individual at town meetings to participate in and assume the exercise of governmental duties.

In his opinion: "Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a free government, but without municipal institutions, it cannot have the spirit of liberty."

"The township of New England possesses two advantages, which strongly excite the interest of mankind, namely, independence and authority. Its sphere is limited, indeed; but within that sphere its action is unrestrained. This independence alone gives it a real importance, which its extent and population would not insure."

"The New Englander is attached to his township, not so much because he was born in it, but because it is a free and strong community, of which he is a member, and which deserves the care spent in managing it. In Europe the absence of local public spirit is a frequent subject of regret to those who are in power; every one agrees that there is no surer guaranty of order and tranquility, and yet nothing is more difficult to create."

"The township, at the center of the ordinary relations of life, serves as a field for the desire of public esteem, the want of exciting interest, and the taste for authority and popularity; and the passions which commonly embroil society change their character, when they find a vent so near the domestic hearth and the family circle."

"The native of New England is attached to his township because it is independent and free; his co-operation in its affairs insures his attachment to its interest; the well-being it affords him secures his affection; and its welfare is the aim of his ambition and of his future exertions. He takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms without which liberty can only advance by revolutions; he imbibes their spirit; he acquires a taste for order, comprehends the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights."[1]

This particular form of public quasi corporation is the favorite model for all governmental agencies intended to effect the same results. The idea embodied is local self-government; the right of the people residing within a certain locality to meet, discuss and supply their wants, controlled only by the state. In some localities the agency employed for attaining the highest development of local self-government is the New England town, commonly so-called, first adopted in New England, hence its name. It has spread to all those parts of the United States settled and dominated by New England ideas. In other parts of the country the form of the organization intended to accomplish the same purpose is what is known as the county or shire. The agency, however, is immaterial. All forms of public corporations, including municipal, have for their purpose, their sole object, the

[1] De Tocqueville, Democracy in America, c. 5.

better government of the people within a certain locality. It may not be out of place at this time to say that distinctions and differences have been drawn, or attempted, as between the different grades of public corporations. Such distinctions and differences exist, however, only as based upon the relative destiny of population of certain localities. They are all agencies of the government, administering public affairs, exercising governmental duties, each differently and in the manner best calculated to effect the end or the purpose for which they exist. The more frequent exercise of a power does not change its quality or character. A confusion of ideas necessarily follows a multiplication of differences and distinctions which do not exist except in the cunning minds of theorists.

The town meeting, the representative assembly or election of the town, is nothing more nor less than the meeting, at the time designated by law, of all the qualified voters of the town at a public place, to elect officers for the ensuing year and to discuss and take action upon measures looking to their greater convenience and better government.[2]

§ 99. Notice.

That this meeting be legal, independent of statutory provisions, it is necessary that those entitled to assemble and participate in its deliberations should have notice.[3]

In England the courts apply the rule that if all the corporators are present, notice may be dispensed with by unanimous consent.[4] But in New England, even though all are present at the town meeting, in the absence of notice, it is not valid, and all acts performed are void.[5] The form of notice is immaterial, unless prescribed by law, so long as the result to be accomplished is effected.[6] It is necessary that the notice should direct attention

[2] See interesting discussion on local self-government in Andrews' American Law, §§ 452 et seq.

[3] Reynolds v. Inhabitants of New Salem, 47 Mass. (6 Metc.) 340; Pratt v. Town of Swanton, 15 Vt. 147; Hubbard v. Town of Williamstown, 61 Wis. 397; McVichie v. Town of Knight, 82 Wis. 137.

[4] Rex v. Theodorick, 8 East, 545.

[5] Hayward v. School Dist. No. 13, 56 Mass. (2 Cush.) 419; Brewster v. Hyde, 7 N. H. 206.

[6] Baldwin v. North Branford, 32 Conn. 47; Colman v. Anderson, 10 Mass. 105, and Inhabitants of Bucksport v. Spofford, 12 Me. 487, hold seals of selectmen calling the town meeting not essential to the validity of the warrant. Cragie v. Mel-

to particular business to be transacted at the meeting called, and the powers of the town are limited strictly, except as authorized by statute, to the matters included within the notice.[7] But the rule also obtains that the notice or warrant for a town meeting need only state with reasonable certainty the matters of business to be acted upon at the meeting called.[8] The time and place of meeting should be definitely stated in the notice.[9] This notice may be served either by posting,[10] at the place provided by law

len, 6 Mass. 7; Reynolds v. Inhabitants of New Salem, 47 Mass. (6 Metc.) 340; Wheeler v. Carter, 180 Mass. 382, 62 N. E. 471. In McVichie v. Town of Knight, 82 Wis. 137, a notice was held insufficient signed by a name without any official designation and nothing in it to show the official character of the person so signing.

[7] Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121; Willard v. Borough of Killingworth, 8 Conn. 247; Woodward v. Reynolds, 58 Conn. 486; Evans v. Osgood, 18 Me. 213; Inhabitants of Cornish v. Pease, 19 Me. 184; Austin v. Inhabitants of York, 57 Me. 304; Drisko v. Inhabitants of Columbia, 75 Me. 73; Wood v. Inhabitants of Quincy, 65 Mass. (11 Cush.) 487; Brackett v. Whidden, 3 N. H. 17.

[8] Bull v. Town of Warren, 36 Conn. 83; Davenport v. Inhabitants of Hallowell, 10 Me. 317; Deane v. Washburn, 17 Me. 100; Belfast & M. L. R. Co. v. Inhabitants of Brooks, 60 Me. 568; Brown v. Inhabitants of Winterport, 79 Me. 305; Blackburn v. Inhabitants of Walpole, 26 Mass. (9 Pick.) 97; Alden v. Rounseville, 48 Mass. (7 Metc.) 218; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340; Sherman v. Torrey, 99 Mass. 472; Inhabitants of Westhampton v. Searle, 127 Mass. 502; Com. v. Wentworth, 145 Mass. 50; Smith v. Crittenden, 16 Mich. 152; Tucker v. Aiken, 7 N. H. 385; Town of Pittsburg v. Davenport, 56 N. H. 272; Marden v. Champlin, 17 R. I. 423; Ovitt v. Chase, 37 Vt. 196; Kittredge v. Town of Walden, 40 Vt. 211; Wyley v. Wilson, 44 Vt. 404.

[9] Chamberlain v. Inhabitants of Dover, 13 Me. 466; Brown v. Inhabitants of Winterport, 79 Me. 305; Sherwin v. Bugbee, 16 Vt. 439. "We have no doubt the place of holding the meeting must be definitely specified. It would hardly do to warn a meeting to be held at some place in the district, or at a designated village, or at one of two or more dwelling-houses. So, too, in regard to time, there seems to be a propriety in having it definitely fixed. If the day, only, is named, the question immediately arises, shall the inhabitants be required to attend the whole day? or when can the meeting transact the business for which they meet, so as to bind the absent members? * * * The fact that the meeting adjourned to another day and hour will not help the matter, on the obvious principle that the adjourned meeting could have no more authority than the original meeting, which was void." State v. Davidson, 32 Wis. 114; State v. Waterbury, 79 Wis. 207; State v. Doyle, 84 Wis. 678.

[10] Tompson v. Mussey, 3 Me. (3 Greenl.) 305; Brown v. Witham, 51

or by-law of the town,[11] publication, or personal service[12] upon the qualified voters of the town, and this should be done for the length of time, before the meeting, fixed by law.[13] Where the statute requires the time and place of meeting to be stated in the notice, a strict compliance with the law is necessary, otherwise there can be no legal liability based upon action taken at the meeting when held.[14] Record of the time and manner of the giving of this notice, and its substance, should be kept by the town clerk or clerical officer,[15] and this record is prima facie evidence of the sufficiency and legality of the acts recited.[16] The return, on the warrant or notice calling the town or parish meeting, of the officer designated by law, it is held, is the only proper evidence that the meeting was legally warned. If this return is defective, parol evidence is not admissible to remedy the defect,[17]

Me. 29; Parker v. Titcomb, 82 Me. 180; Beals v. James, 173 Mass. 591; Norris v. Eaton, 7 N. H. 284; Brewster v. Hyde, 7 N. H. 206.

[11] In Com. v. Sullivan, 165 Mass. 183, posting at the place where the meeting was to be held was held to sufficiently comply with the by-law of the town requiring notice of the town meeting to be posted at the town hall, that building having burned down. Briggs v. Murdock, 30 Mass. (13 Pick.) 305; Scammon v. Scammon, 28 N. H. 429; Stoddard v. Gilman, 22 Vt. 568.

[12] Beals v. James, 173 Mass. 591; Wood v. Quimby, 20 R. I. 482.

[13] Brooklyn Trust Co. v. Town of Hebron, 51 Conn. 22; People v. Trustees of Fairbury, 51 Ill. 149; Wardens of Christ Church v. Woodward, 26 Me. 172; Jones v. Sanford, 66 Me. 585; Gerry v. Herrick, 87 Me. 219; Williams v. Inhabitants of School Dist. No. 1, in Lunenburg, 38 Mass. (21 Pick.) 75; Rand v. Wilder, 65 Mass. (11 Cush.) 294; Com. v. Shaw, 48 Mass. (7 Metc.) 52; Locke v. Selectmen of Lexington, 122 Mass. 290; Osgood v. Blake, 21 N. H. 550; Pratt v. Town of Swanton, 15 Vt. 147; Hubbard v. Town of Williamstown, 61 Wis. 397; McVichie v. Town of Knight, 82 Wis. 137.

[14] Chamberlain v. Inhabitants of Dover, 13 Me. 466; Haines v. School Dist. No. 6, in Readfield, 41 Me. 246; Kingsbury v. Centre School Dist. in Quincy, 53 Mass. (12 Metc.) 99; Sherwin v. Bugbee, 16 Vt. 439.

[15] Bearce v. Fossett, 34 Me. 575; Allen v. Archer, 49 Me. 346; Brown v. Witham, 51 Me. 29; Hamilton v. Inhabitants of Phipsburg, 55 Me. 193; Com. v. Shaw, 48 Mass. (7 Metc.) 52; Town of Lemington v. Blodgett, 37 Vt. 215. State v. Town of Decatur Sup'rs, 58 Wis. 291, holds the recording of a request for special town meeting merely directory, and that proceedings will not be invalidated by the failure of the town clerk to do so.

[16] Isbell v. New York & N. H. R. Co., 25 Conn. 556; Evarts v. Killingworth, 20 Conn. 457.

[17] Tuttle v. Cary, 7 Me. 426; Houghton v. Davenport, 40 Mass. (23 Pick.) 235; State v. Williams, 25 Me. 561; Wardens of Christ Church v. Wood-

but amendments to this return, so it is held, can be made any time by the officer while he continues in office.[18] A return if defective, unless amended, establishes the illegality of the meeting,[19] and is conclusive evidence, in collateral proceedings, of the facts recited.[20] The notice or warrant required by law is usually signed by the selectmen of the town, but provision may be made, in case of their refusal, for the signatures of legal voters.[21]

§ 100. Time and place of holding.

A town meeting should be held at the time fixed in the warrant to render action taken at such meeting valid.[22]

In England the time and place of holding meetings is regulated by express provision in the municipal corporations act.[23] The hours of holding may be designated by statute, and the meeting must be held at the hour or within the hours so specified. If no statutory provision is made for the time of holding a special or an adjourned meeting, the hour fixed in the notice controls,[24] and action taken at a meeting thus held will be binding upon the

ward, 26 Me. 172; Briggs v. Murdock, 30 Mass. (13 Pick.) 305; Com. v. Shaw, 48 Mass. (7 Metc.) 52; Proprietors of Cardigan v. Page, 6 N. H. 182; Nelson v. Pierce, 6 N. H. 194. But see contra, Ford v. Clough, 8 Me. 334.

[18] Kellar v. Savage, 17 Me. 444; Thayer v. Stearns, 18 Mass. (1 Pick.) 109.

[19] Cottrill v. Myrick, 12 Me. 222; State v. Williams, 25 Me. 561; Wardens of Christ Church v. Woodward, 26 Me. 172; Fossett v. Bearce, 29 Me. 523; Bearce v. Fossett, 34 Me. 575; Hamilton v. Inhabitants of Phipsburg, 55 Me. 193; Williams v. Inhabitants of School Dist. No. 1, in Lunenburg, 38 Mass. (21 Pick.) 75; Nelson v. Pierce, 6 N. H. 194. The Massachusetts cases, however, seem to permit greater informality in the making of a return without holding it sufficient to invalidate the meeting as called. See Briggs v. Murdock, 30 Mass. (13 Pick.) 305; Houghton v. Davenport, 40 Mass. (23 Pick.) 235; Com. v. Shaw, 48 Mass. (7 Metc.) 52, and Rand v. Wilder, 65 Mass. (11 Cush.) 294.

[20] Tuttle v. Cary, 7 Me. (7 Greenl.) 426; Saxton v. Nimms, 14 Mass. 315; Proprietors of Cardigan v. Page, 6 N. H. 182; Schoff v. Gould, 52 N. H. 512.

[21] Southard v. Inhabitants of Bradford, 53 Me. 389; Fletcher v. Inhabitants of Lincolnville, 20 Me. 439.

[22] Chamberlain v. Inhabitants of Dover, 13 Me. 466; People v. Board of Audit of Hempstead, 4 Hun (N. Y.) 95; People v. Martin, 5 N. Y. (1 Seld.) 22.

[23] 5 & 6 Wm. IV, c. 76, §§ 69 et seq.

[24] Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; Goodel v. Baker, 8 Cow. (N. Y.) 286; People v. Austin, 20 App. Div. 1, 46 N. Y. Supp.

corporation. This is true of annual meetings where no statutory provision fixes the exact time at which they shall be held.[25]

The meeting must also be held at the place designated. If there are statutory provisions fixing the place and regulating the manner of conducting the meeting, these must be followed.[26] If, however, there are no provisions either in the statute or the by-laws of the town, or if the matter is left discretionary with certain officers, the place as fixed by such officers will govern, and a meeting there held pursuant to notice will not be considered invalid.[27] The officers in charge of the meeting may, when authorized by statute, adjourn the same to a time and at a place designated. This power of adjournment may be discretionary or incidental.[28]

§ 101. The town meeting; its powers.

The town meeting being practically the legislative forum of the qualified voters of the town, it follows that it can be called only for the purpose of passing upon such matters as may be authorized by law.[29] The governmental agent holding the meeting

526; State v. Racine County Sup'rs, 70 Wis. 543.

[25] State v. Hoff, 88 Tex. 297; Mitchell v. Tolan, 33 N. J. Law, 195.

[26] Chamberlain v. Inhabitants of Dover, 13 Me. 466; Brown v. Inhabitants of Winterport, 79 Me. 305; Auditor General v. Duluth, S. S. & A. R. Co., 116 Mich. 122; State v. Davidson, 32 Wis. 114; State v. Waterbury, 79 Wis. 207; McVichie v. Town of Knight, 82 Wis. 137; State v. Doyle, 84 Wis. 678.

[27] Chamberlain v. Inhabitants of Dover, 13 Me. 466. Here a town meeting was called at a school house. The clerk with a few others met in the street opposite the school house, half an hour after the time appointed, read the warrant and adjourned to a store a mile distant on the borders of the town, leaving no notice of this adjournment at the school house. Action taken at this adjourned meeting was not held binding on the town.

[28] Chamberlain v. Inhabitants of Dover, 13 Me. 466; Inhabitants of Canton v. Smith, 65 Me. 203; Reed v. Inhabitants of Acton, 117 Mass. 384; Goodel v. Baker, 8 Cow. (N. Y.) 286. In Hark v. Gladwell, 49 Wis. 177, the court said in speaking of this subject: "It will not do to apply to the orders and resolutions of such bodies nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body." Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1.

[29] Crittenden v. Robertson, 13 Mich. 58; Schoff v. Bloomfield, 8 Vt. 472: the town authorized in this

is directed or permitted by the sovereign to administer certain public affairs and exercise certain powers looking to its own local government and benefit as well as the benefit and advantage of the community at large. Action taken at such meeting upon business not authorized will be clearly invalid.[30]

The law goes further and requires that action at a meeting, to be valid, must be taken pursuant to the warrant or notice calling it, which shall state with reasonable certainty, as already suggested,[31] the matters of business expected to be considered at such meeting.[32] It need not state all subjects to be considered where by usage or custom certain questions are discussed, considered

case to act upon matters other than those mentioned in the warrant calling the meeting. Bradley v. Town of Hammonton, 38 N. J. Law, 430. This case holds that under the provisions of New Jersey Act of April 4, 1871, the town may indemnify its officers out of town monies for reasonable expenses incurred by them in a bona fide discharge of their duties. See, also, authorities cited under § 99, note 7.

[30] Inhabitants of Cornish v. Pease, 19 Me. 184; Kean v. Stetson, 22 Mass. (5 Pick.) 492; Wharton v. Koster, 38 N. J. Law, 308; Atwood v. Lincoln, 44 Vt. 332. A town not authorized to borrow money for the purpose of paying bounties, when the warrant for the town meeting read "to see if the town will vote a tax to pay a bounty." See, also, authorities cited § 99, note 8.

[31] See authorities cited, § 99, note 8.

[32] Bull v. Town of Warren, 36 Conn. 83; Belfast & M. L. R. Co. v. Inhabitants of Brooks, 60 Me. 568; Drisko v. Inhabitants of Columbia, 75 Me. 73; Blackburn v. Inhabitants of Walpole, 26 Mass. (9 Pick.) 97; Torrey v. Millbury, 38 Mass. (21 Pick.) 64. The warrant in this case called a meeting "to see if the town would make an appropriation towards purchasing a fire engine." It was held that the town under this warrant was authorized to pass a vote "to raise an appropriate amount" for that purpose.

Avery v. Stewart, 55 Mass. (1 Cush.) 496. Wood v. Inhabitants of Quincy, 65 Mass. (11 Cush.) 487. Here a town was not authorized to discontinue a portion of a town way and set off the land to a private individual when the warrant for the meeting recited as one of its purposes to "choose a committee or to hear and act upon the report of any committee the town may think proper when assembled." Hadsell v. Inhabitants of Hancock, 69 Mass. (3 Gray) 526; Smith v. Abington Sav. Bank, 171 Mass. 178; Kittredge v. Inhabitants of North Brookfield, 138 Mass. 286; Tucker v. Aiken, 7 N. H. 113; Pittsburg v. Danforth, 56 N. H. 272; Birge v. Berlin Iron Bridge Co., 62 Hun, 618, 16 N. Y. Supp. 596; Town of Oyster Bay v. Harris, 21 App. Div. 227, 47 N. Y. Supp. 510; Smith v. Town of Westerly, 19 R. I. 437; Alger v. Curry, 40 Vt. 437.

and passed upon without such notice, or where certain action has been taken for some time past under a special wording in the warrant.[33] But unless questions are by usage or custom thus entitled to be considered at a town meeting, it is necessary that the warrant calling the meeting should distinctly and separately specify them. The purpose of the meeting must be brought to the attention of all who will be affected by its action or who are entitled to take part in the proceedings. This last rule is unqualifiedly true where the statutes provide that the warrant or notice calling the meeting shall contain a statement of the business to be considered.[34]

§ 102. Its powers, continued.

In the preceding section, the authority of the town meeting to pass upon and take action regarding matters not included in the warrant or notice has been discussed. Further illustrations will be given in this section of the controlling principles there stated. Except where governed by usage, custom or statute, the town meeting has no authority to take action regarding matters not named or specified in the warrant calling the meeting. Under this rule it was held in a Connecticut case that a vote of the town limiting the right of fishing in a free and common fishery was void unless the meeting at which such vote was passed was specially warned for that purpose, and it was also held in this case that the burden was upon the one seeking to avail himself of the benefits of such action.[35]

[33] Davenport v. Inhabitants of Hallowell, 10 Me. 317; Kingsbury v. Centre School Dist. in Quincy, 53 Mass. (12 Metc.) 99; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340: The town was authorized in this case to vote a sum of money recommended by a committee previously appointed under a call in the warrant "to hear the report of any committee heretofore chosen and pass any vote in relation to the same."

[34] Pinney v. Brown, 60 Conn. 164; Inhabitants of Canton v. Smith, 65 Me. 203. A public act authorizing town aid to railroads need not be noticed in the warrant calling an election to vote such aid.

Inhabitants of Ludlow v. Sikes, 36 Mass. (19 Pick.) 317; Passage v. School Inspectors of Williamstown, 19 Mich. 330, held true as to a meeting of board of school inspectors; Brackett v. Whidden, 3 N. H. 17; Marden v. Champlin, 17 R. I. 423, 22 Atl. 938; Smith v. Town of Westerly, 19 R. J. 437.

[35] Hayden v. Noyes, 5 Conn. 391; Willard v. Borough of Killingworth, 8 Conn. 247. In speaking of the doctrine as stated in the text the

Authority given at a meeting for the accomplishment of certain results is not exhausted by a single vote raising an insufficient amount. This sum can be increased by successive votes at adjourned meetings until sufficient is raised to effect the desired result.[36]

An article in a warrant for a town meeting "to see what measures the town will take to build a certain bridge, or in matters and things relating thereto," was held sufficient to authorize the raising of money for that purpose.[37]

A town meeting has the inherent power to elect officers to direct its proceedings in case of the absence or inability of those already elected to perform those duties.[38]

§ 103. Purpose for which held; levy of taxes; election of officers.

Action can be taken, at a town meeting levying taxes and providing for the expenditure during the ensuing year, of moneys thus raised. The appropriations for town purposes must be public in their character. It is not necessary in the authority for the levying of certain taxes to meet annual expenditures authorized by law that a specific appropriation should be made for each purpose. It has been held that a vote to raise a certain sum for the expenditures of the current year is sufficient.[39]

court in this case says: "This doctrine I am inclined to adopt as being reasonable and in analogy to general principles which govern such questions. The borough and the town are confessedly inferior corporations. They act not by any inherent right of legislation, like the legislature of the state; but their authority is delegated and their powers must therefore be strictly pursued. Within the limits of their charter their acts are valid; without it they are void. It having been established in the case of Hayden v. Noyes, 5 Conn. 391, that to render an act of the town precisely of this character valid it must appear that the meeting of the town had been specially warned for that purpose; and this not appearing on the doings of the town in this case, nor from any proof aliunde to establish the fact, the judgment is erroneous. Perhaps it should appear on the face of the proceedings; but at least he who seeks to enforce the act should prove such warning to have been given."

[36] Farrar v. Perley, 7 Me. 404.

[37] Ford v. Clough, 8 Me. (8 Greenl.) 334. See, also, Osgood v. Bradley, 7 Me. (7 Greenl.) 411; Jewett v. Burroughs, 15 Mass. 464.

[38] Kellar v. Savage, 17 Me. 444; Attorney General v. Simonds, 111 Mass. 256; Attorney General v. Crocker, 138 Mass. 214; Tucker v. Aiken, 7 N. H. 113; State v. Town of Vershire, 52 Vt. 41. If a person is permitted to act as moderator without objection on the part of the

Another authorized and legal purpose for which a town meeting can be held is the election of town officers for the coming year. The administration of the government of the town is placed in the hands of certain officials or agents who represent the corporation.[40] They act for and bind the town by their action. The officers to be elected are usually designated by law, as well as the manner of their election.[41] If, however, the statutes do not provide for the precise manner in which they shall be elected, usage or custom prevails. It has been held in Iowa that the word "election" in the constitution which requires "that all elections by the people shall be by ballot" has no application to meetings of electors of a township.[42] As a rule the authority of officers elected at town meetings will be upheld and their action sustained. The fact that the warrant or notice calling the meeting may be imperfect is generally held insufficient to sustain a collateral attack upon de facto officers or their acts done in an official capacity.[43]

§ 104. The town meeting; right and authority for holding.

The town meeting is one of the essential characteristics per-

voters, the legality of the meeting cannot be subsequently raised because of this fact.

[39] Tucker v. Aiken, 7 N. H. 113. Here the court said: "This is a convenient mode of ascertaining the whole amount necessary to be raised, as estimates are usually made of the amount which each of such objects is likely to require. But excepting the money raised for schools and highways it is not known that it has ever been the practice to require that the sums so designated should be kept separate and distinct, so that in case of a deficiency in the amount raised for one; and an excess in that voted for another, the constituted agents could not apply the whole of the funds raised to the whole necessary expenditure; and we are not able to discover any good which would result from requiring towns to make such appropriations specific and keep them distinct."

[40] Craig v. Scandret, 8 Ky. (1 A. K. Marsh.) 15; Wood v. Jewell, 130 Mass. 270; Com. v. Wentworth, 145 Mass. 50; Kingsbury v. Centre School Dist. in Quincy, 53 Mass. (12 Metc.) 99; Baker v. Shephard, 24 N. H. (4 Fost.) 208.

[41] Damon v. Inhabitants of Granby, 19 Mass. (2 Pick.) 345; Kingsbury v. Centre School Dist. in Quincy, 53 Mass. (12 Metc.) 99; Order of Election of Town Officers, 20 R. I. 784.

[42] Seaman v. Baughman, 82 Iowa, 216, citing Bouvier, Law Dict. tit. "Election"; 6 Am. & Eng. Enc. Law (1st Ed.) 260; Police Com'rs v. City of Louisville, 66 Ky. (3 Bush) 597.

[43] Cottrill v. Myrick, 12 Me. 222; Inhabitants of Bucksport v. Spof-

taining to the town organization. Rights enjoyed and privileges possessed are exercised at that time by the voters of the town. The authority to meet in this manner is given by law, and the right of exercising powers obtained either by usage, custom, or by statute, cannot be destroyed by a failure to exercise such power. If the corporation fails to perform its duties it may be compelled by mandamus or other proper proceeding. This principle was applied in an English case[44] where it was held that a mandamus would lie to the corporation to proceed to the election of a mayor although there was such an officer de facto. Under the decisions in some states, a failure to elect an officer upon the designated day does not destroy the right to hold such election later;[45] though it is held in Vermont that the majority of the electors required by the act of incorporation to annually elect its trustees on a certain day have no power to adjourn a meeting at that time "without day."[46] A town meeting, however, legally called and organized, has, it is generally held, the incidental and inherent power of adjourning to meet at some appropriate place and at some future time definitely and specifically fixed in the adjournment. At such adjourned meeting it is customary and legal to transact such business as could have been properly transacted at the meeting as first held.[47]

§ 105. Officers and their duties.

Officers duly elected and qualified are authorized to perform the duties required of them by law at town meetings whether such duties be executive, ministerial or clerical in their charac-

ford, 12 Me. 487; Sherman v. Torrey, 99 Mass. 472.

[44] Borough of Bossiny's Case, 2 Strange, 1003.

[45] Coles County v. Allison, 23 Ill. 437; Trenton Com'rs v. McDaniel, 52 N. C. (7 Jones) 107; Lynch v. Lafland, 44 Tenn. (4 Cold.) 96.

[46] Stone v. Small, 54 Vt. 498. In following the rule laid down in the text the court said: "This we deem the only safe rule to adopt. Any other rule would open the door to great abuse of power, and place a loyal minority too much in the power of a disloyal majority." See, also, Kimball v. Marshall, 44 N. H. 465; People v. Martin, 5 N. Y. (1 Seld.) 22.

[47] Chamberlain v. Inhabitants of Dover, 13 Me. 466; Inhabitants of Canton v. Smith, 65 Me. 203. The adjourned meeting is a continuation of the original one. Reed v. Inhabitants of Acton, 117 Mass. 384; Goodel v. Baker, 8 Cow. (N. Y.) 286; Wisconsin Cent. R. Co. v. Ashland County, 81 Wis. 1.

ter.[48] Upon the question of eligibility, Mass. St. 1898, ch. 548, § 173, provides that no person shall be eligible or act as an election officer at a town election at which he is a candidate, and that upon becoming such candidate, if he does not resign, the power of removal is given to the selectmen of the town. In a late case[49] it was held that this section did not apply to moderators who were also candidates at town elections, for though acting as officers at such elections their duties were merely incidental to the official duties otherwise performed by them.

§ 106. Voters and their qualifications.

The act of voting is not an inherent or inalienable right; it is a privilege; a special mark of favor given by the state to certain individuals to be exercised by them. As was said in a Missouri case, "It is neither a vested, an absolute, nor a natural right."[50] It being then a matter of favor, the state undoubtedly has the right to prescribe qualifications which must be possessed before the privilege can be lawfully exercised, the limitations upon such qualifications being that they be uniform and certain in their application, not based upon religious belief, and not within prohibitive clauses of either the Federal or state constitutions. The validity of laws prescribing such qualifications has been settled beyond doubt, a doubt arising only as to their application or construction. The two qualifications necessary to consider now are those based on ownership of taxable property within the town,[51] or residence for the length of time prescribed by statute.[52] No affirmative action on the part of the town authorities is necessary to constitute a person possessing the qualifications from becoming a citizen and a legal voter at the moment of his settlement.[53]

[48] Dodds v. Henry, 9 Mass. 262; Kimball v. Lamprey, 19 N. H. 215; Birge v. Berlin Iron Bridge Co., 62 Hun (N. Y.) 618.

[49] Wheeler v. Carter, 180 Mass. 382, 62 N. E. 471.

[50] Blair v. Ridgely, 41 Mo. 63, 97 Am. Dec. 248.

[51] Sparrow v. Wood, 16 Mass. 457; Oakes v. Hill, 27 Mass. (10 Pick.) 333.

[52] Canaan v. Grafton County, 64 N. H. 595, 15 Atl. 18; Inhabitants of Marlboro v. Inhabitants of Freehold, 50 N. J. Law, 509, 14 Atl. 595; Poor Dist. of Lock Haven v. Poor Dist. of Chapman (Pa.) 13 Atl. 742; Town of Topsham v. Town of Williamstown, 60 Vt. 467, 12 Atl. 112. Insanity does not interrupt the gaining of settlement in town based upon residence. Monroe County v. Jackson County, 72 Wis. 449, 40 N. W. 224.

[53] Lord v. Chamberlain, 2 Me. (2 Greenl.) 67; Bradford v. Cary, 5

On the division of a town, the statute may give to those residing upon the dividing line the right to select their legal settlement, a personal privilege to the persons so favored.[54]

§ 107. Miscellaneous matters.

It has been held an indictable offense to violently and rudely disturb a town meeting,[55] and the same is true of "repeating" at town elections.[56] The town meeting is considered a deliberative body to which, except when engaged in the election of officers, the usual rules of parliamentary law apply.[57] In New Hampshire, however, this rule is modified to the extent that the moderator may have the power to prescribe rules for the conduct of the meeting over which he presides.[58]

Me. (5 Greenl.) 339; Inhabitants of Cumberland v. Prince, 6 Me. (6 Greenl.) 408; Inhabitants of Westport v. Inhabitants of Dartmouth, 10 Mass. 341; Cobb v. Kingman, 15 Mass. 197.

[54] Blanchard v. Inhabitants of Cumberland, 18 Me. 113.

[55] Com. v. Hoxey, 16 Mass. 385. See, also, the cases collected in 1 Saund. 135, note 3, and 1 Starkie, Cr. Pl. 228, 232.

[56] Walker v. Winn, 8 Mass. 248; Com. v. Silsbee, 9 Mass. 417; Bradley v. Heath, 29 Mass. (12 Pick.) 163.

[57] Hunneman v. Inhabitants of Grafton, 51 Mass. (10 Metc.) 454; Kimball v. Lamprey, 19 N. H. 215. In State v. Davidson, 32 Wis. 114, the court said: "The subjects upon which a town meeting may take action are numerous and diversified. The course of procedure which is to be pursued is not fully marked out by the statute and I deem it quite safe to say that when the statute does not give direction, the general rules of parliamentary law so far as they may be applicable, should be observed and enforced in conducting the business of a town meeting. It will necessarily follow that propositions upon which the town meeting may lawfully act may be submitted to it by motion or resolution, or in the form of proposed by-laws or orders, by any elector of the town, for the consideration of the meeting. It also follows from such application of the rules of parliamentary law, that the chairman of the meeting cannot prevent action upon any subject within the powers conferred by law upon the meeting, by neglecting or refusing to present the same to the meeting for its action."

[58] Hill v. Goodwin, 56 N. H. 441. "The moderator * * * rules as he understands that he ought to rule. If his ruling is incorrect, any person who is dissatisfied may appeal to the meeting, and its decision, being not against the statute, is final and conclusive."

CHAPTER V.

THE POWERS OF PUBLIC CORPORATIONS.

I. In General.

§ 108. General powers.
109. Implied.
110. Discretionary and imperative powers.
111. Corporate powers; their extent and nature.
112. Their delegation.
113. Rules of construction.
114. Rule of strict construction; how modified.

II. The Police Power.

§ 115. Definitions.
116. General limitations upon its exercise.
117. Constitutional limitations.
118. The preservation of public health.
119. Public agencies for the preservation of health.
120. Boards of health; their jurisdiction and powers.
121. Their liability.
122. Quarantines and quarantine regulations.
123. Police power respecting the regulation of occupations.
124. Inspection of foods.
125. Regulations as to the construction and use of buildings.
126. Regulation and abatement of nuisances.
127. The protection of public morals.
128. Regulations controlling or suppressing gambling.
129. The police power; further illustrations of its exercise.
130. The exercise of the police power in regulating the sale and consumption of intoxicating liquors.
131. The police power; miscellaneous illustrations of its valid exercise.
132. The exercise of the police power continued; the exaction of license fees.
133. The exercise of the police power; further illustrations.
134. Establishment of public markets.
135. Public markets; the power to regulate.
136. The right to authorize private markets.

137. The control of nuisances.
138. Nuisances; their abatement and removal.
139. Objections to the removal or abatement of nuisances.

III. The Power to Incur Indebtedness Other Than by the Issue of Bonds.

§ 140. The corporate power to incur indebtedness.
141. Must be expressly given; it cannot be implied.
142. To what extent discretionary if expressly given.
143. Implied power of the courts to compel the payment of debts.
144. Manner of its exercise; body authorized.
145. The power limited by the purpose or use of funds to be raised.
146. The construction of buildings a public purpose.
146a. Illustrations of a "public purpose" continued; the support of the poor; water supply.
146b. "Public purposes" continued; light.
147. The construction of internal improvements.
148. Express limitations on power to incur indebtedness.
149. Same subject continued.
150. Retroactive effect of limitations.
151. Construction of statutory and other limitations.
152. Definition of the word "indebtedness" or "debt" as used in limiting laws.
153. Indebtedness must be a legal demand.
154. Debts of territorially co-existing public corporations.
155. Assessment or valuation to be considered.
156. Indebtedness further defined; warrants issued in anticipation of taxes levied.
157. Expenses incurred in excess of current revenue or income.
158. Net debts; deduction of uncollected taxes.
159. Future payments under executory contracts not usually regarded as "debts."
160. Unearned interest not considered a "debt."
161. Deduction of assets to determine net debt.
162. Corporate indebtedness; its payment from a special fund.
163. Its payment through the levy of taxes.
164. Manner of levying taxes.
165. Provision for payment at time debt was incurred.
166. Debt; mode of payment.
167. Time and place of payment.
168. Enforcement of a debt by action.

IV. The Power of Public Corporations to Incur Indebtedness Through the Issue of Negotiable Securities.

§ 169. Power to issue negotiable securities.

170. The power to issue must be expressly given; it cannot be implied.
171. Ratification of void issue of negotiable bonds.
172. The issue of bonds; their purpose.
173. Refunding bonds.
174. Obligations issued for the purpose of funding a bonded indebtedness.
175. The issue of negotiable securities for the construction or improvement of highways.
176. The construction of municipal lighting plants.
177. To secure a water supply.
178. Railway aid securities.
179. Construction of drains and sewers.
180. The construction of bridges.
181. The erection of public buildings.
182. For making local improvements.
183. Internal improvements.
184. The power to issue and the conditions precedent to its exercise.
185. Performance of conditions precedent required of railway companies.
186. Conditions precedent to issue.
187. Petition.
188. The calling of an election by ordinance.
189. The election.
190. Questions not necessary for submission to the electors.
191. The election; time and manner of holding.
192. Voters and their qualifications.
193. Canvass of election returns.
194. Necessary votes.
195. Negotiable securities; delivery.
196. Necessity for registration.
197. Official signatures and seals.
198. Form.
199. Recitals of authority.
200. The ratification of void securities.
201. Negotiable bonds; their validity.
202. As affected by adverse decisions of a state court.
203. Validity of issue in excess of legal authority.
204. Legality as affected by subsequent legislation.
205. Securities of public corporations; their legal character.
206. Validity of negotiable securities. The doctrine of estoppel.
207. The same subject.
208. Estoppel through the payment of interest.
209. The doctrine of recitals.
210. Estoppel not applying to recitals of law.

211. Distinction between power to issue and irregularity in its exercise.
212. The doctrine as applied to bonds containing no recitals of authority.
213. Bona fide holder.
214. Coupons; their legal character.
215. Time and place of payment.
216. Negotiable securities; sale.
217. Their payment.
218. Time of payment.
219. Medium of payment.
220. To whom payable.
221. The payment of interest.
222. The rule as to the payment of void bonds.
223. Payment of securities through provisions for a sinking fund.
224. The duty to levy taxes for the payment of interest or principal of negotiable bonds.
225. Rights of a holder to maintain an action.

V. Warrants and Miscellaneous Evidence of Indebtedness.

§ 226. Warrants; definition; by whom drawn.
227. Fund from which payable.
228. Formal issue.
229. Audit and allowance of claims as preliminary to issuance.
230. Their legal character.
231. Form.
232. Wording.
233. Validity.
234. Interest payable.
235. Actions on warrants.
236. Their payment.
237. Presentation for payment.
238. Payment; the amount.
239. Manner of payment.
240. Time of payment.
241. To whom payable.
242. Miscellaneous forms of indebtedness.
243. The same subject; legal character.
244. Form and phraseology.
245. Mode and time of payment.

VI. The Power to Contract.

§ 246. In general.
247. The implied power to contract.

248. Ultra vires contracts.
249. For want of authority.
250. Because of purpose or result.
251. Contracts protected by constitutional provisions.
252. Contracts ultra vires because of constitutional provisions.
253. The same subject continued.
254. Contracts ultra vires because contravening some exclusive right.
255. Contracts ultra vires because of a beneficial interest resulting to the public officers executing them.
256. Contracts ultra vires because of fraud or bribery.
257. Contracts ultra vires because extending beyond official term.
258. Ultra vires contracts; their enforcement.
259. Availability of the doctrine of estoppel.
260. Contracts; their formal execution.
261. Presumption of legality.
262. Mode of contracting; letting to the lowest bidder.
263. Acceptance of bids.
264. Rejection of bid.
265. Notice.
266. Specifications of services or supplies required.
267. Discretionary power in officers to reject or accept bids.
268. The same subject continued.
269. Discretionary power of officials to award to lowest bidder or otherwise.
270. Change of contract.
271. Parties to the proceedings.
272. Conditions imposed.
273. Contracts; how made; in writing.
274. How made; orally.
275. By whom made.
276. As authorized by legislative bodies.
277. Contracts made by departments.
278. Made by public officials.
279. The ratification of an illegal contract.
280. Ratification of a contract ultra vires.
281. Legislative ratification of ultra vires contracts.
282. Ratification of illegal contracts.
283. Modification of a contract.
284. Avoidance or rescission of contract.
285. Contracts; their construction.
286. Arbitration clauses.
287. Corporate contracts; their performance.
288. A contract; its performance; acceptance of work.
289. Fraud as rendering a contract invalid.
290. The right of the parties to maintain an action based upon a contract.

291. Delay in the performance of a contract.
292. The assignment of a contract.
293. Rights of parties.
294. Payment of contract obligations.
295. Extras.
296. Public contracts; actions.
297. Bond required of contractors.
298. Rights of sureties.
299. Subcontractors.

I. In General.

§ 108. General powers.

A public corporation is an agency of government created by the sovereign when such action seems most conducive to the public good, for the purpose of aiding in the exercise and administration of governmental functions.[1] A corporation, either public or pri-

[1] Barnes v. District of Columbia, 91 U. S. 540. In the opinion of Mr. Justice Hunt is found the following language: "A municipal corporation in the exercise of all of its duties, including those most strictly local or internal, is but a department of the state. The legislature may give it all the powers such a being is capable of receiving, making it a miniature state within its locality. Again; it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the state, and at others those of a municipality; but that, its character and nature remaining at all times the same, it is great or small according as the legislature shall extend or contract the sphere of its action." Tippecanoe County Com'rs v. Lucas, 93 U. S. 108. "Municipal corporations are mere instrumentalities of the state for the convenient administration of government and their powers may be qualified, enlarged, or withdrawn, at the pleasure of the legislature." The court in its opinion by Mr. Justice Field also say in regard to legislative control of the property of public corporations, "Their tenure of property, derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize, —that is, taxation,—is so far subject to the control of the legislature, that the property may be applied to other public uses of the municipality than those originally designated. This follows from the nature of such bodies, and the dependent character of their existence. But property, derived by them from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private

vate, is a creature of limited powers. Such powers as it possesses are to be found in the charter of its creation, which has been held to include not only the act of incorporation, whether a special or general law, but constitutional provisions and also decisions of the highest courts construing and applying these acts and provisions. In this charter, used thus in its broad sense, is to be found the powers which may be legally exercised by the corporation.[2]

corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants." United States v. City of New Orleans, 98 U. S. 381; Stoutenburgh v. Hennick, 129 U. S. 141; Goldthwaite v. City of Montgomery, 50 Ala. 186; Low v. City of Marysville, 5 Cal. 214. Object of creation governmental not commercial. Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229; Harmon v. City of Chicago, 110 Ill. 400. The state as sovereign may resume the exercise of any powers granted to subordinate agencies whenever it is deemed expedient. Herbert v. Benson, 2 La. Ann. 770; Police Jury of Bossier v. Shreveport Corp., 5 La. Ann. 661; Heistand v. City of New Orleans, 14 La. Ann. 330; State v. Garibaldi, 44 La. Ann. 809; Hooper v. Emery, 14 Me. 375; Inhabitants of Camden v. Camden Village Corp., 77 Me. 530; City of St. Louis v. Clemens, 43 Mo. 395; Ewing v. Hoblitzelle, 85 Mo. 64. "Public corporations are the auxiliary of the state in the important business of municipal rule and are called into being at the pleasure of the state, and the same voice which speaks them into existence can speak them out." But see later Missouri cases modifying this decision somewhat. Murnane v. City of St. Louis, 123 Mo. 479, which holds "that the important business of municipal rule is a local and not a state matter." See authorities cited under section 82 with the discussion of the arbitrary right of a state to destroy the corporate existence of any of its subordinate agencies. See, also, Dillon, Mun. Corp. (4th Ed.) note 1, p. 127, and Cooley, Taxation (2d Ed.) p. 678, where Judge Cooley observes, "But in the general framework of our republican governments nothing is more distinct and unquestionable than that they recognize the existence of local self-government and contemplate its permanency. Some state constitutions do this in express terms; others by necessary implication, and probably in no one of the states has the legislature been entrusted with the power which would enable it to abolish the local governments." People v. Common Council of Detroit, 29 Mich. 108, which holds that municipalities have a constitutional right to local self-government.

[2] City of Detroit v. Detroit City R. Co., 56 Fed. 867; City of Mobile v. Dargan, 45 Ala. 310; Low v. City of Marysville, 5 Cal. 214; City of Oakland v. Carpentier, 13 Cal. 540, where it is said, "A corporation owing its existence to the laws is precisely what the law makes it." People v. Henshaw, 76 Cal. 436; Kyle v. Malin, 8 Ind. 34; Field v.

Judge Dillon in his work on municipal corporations[3] classifies the powers possessed as follows: "(1) Those granted in express words;[4] (2) those necessarily or fairly implied in or incident to the powers expressly granted;[5] (3) those essential to the declared

City of Des Moines, 39 Iowa, 575; City of Leavenworth v. Norten, 1 Kan. 432; First Municipality of New Orleans v. General Sinking Fund Com'rs, 1 Rob. (La.) 279; Inhabitants of Camden v. Camden Village Corp., 77 Me. 530; Cooper v. Alden, Har. (Mich.) 72; Hitchcock v. City of St. Louis, 49 Mo. 484; Kansas City v. Lorber, 64 Mo. App. 604; People v. Bagley, 85 Cal. 343; Borough of Greensburg v. Young, 53 Pa. 280; Appeal of Whelen, 108 Pa. 162; Gabel v. City of Houston, 29 Tex. 335; Williams v. Davidson, 43 Tex. 1. See, also, authorities cited under §§ 4-7.

[3] Dillon, Mun. Corp. (4th Ed.) § 89. See, also, the following cases among many others giving the same classification or one substantially similar. Freeport Water Co. v. City of Freeport, 180 U. S. 587; affirming 186 Ill. 179; Town of New Decatur v. Berry, 90 Ala. 432; Reis v. Graff, 51 Cal. 86; Phillips v. City of Denver, 19 Colo. 179; City of New London v. Brainard, 22 Conn. 552; Huesing v. City of Rock Island, 128 Ill. 465; Champer v. City of Green Castle, 138 Ind. 339; Hanger v. City of Des Moines, 52 Iowa, 193; Henke v. McCord, 55 Iowa, 378; Cook v. Dendinger, 38 La. Ann. 261; State v. Robertson, 45 La. Ann. 954; Lowell v. City of Boston, 111 Mass. 454; State v. Murphy, 134 Mo. 548; Davenport v. Kleinschmidt, 6 Mont. 502; City of New York v. Dry Dock, E. B. & B. R. Co., 133 N. Y. 104; Smith v. City of Newbern, 70 N. C. 14; State v. Webber, 107 N. C. 962; City of Corvallis v. Carlile, 10 Or. 139; City of Portland v. Schmidt, 13 Or. 17; Sharpless v. City of Philadelphia, 21 Pa. 147; Williams v. Davidson, 43 Tex. 33; City of Brenham v. Brenham Water Co., 67 Tex. 542; Village of St. Johnsbury v. Thompson, 59 Vt. 300; Kirkham v. Russell, 76 Va. 956; Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545; Clarksburg Elec. Light Co. v. City of Clarksburg, 47 W. Va. 739; Bell v. City of Platteville, 71 Wis. 139.

[4] Board of Liquidation of City Debt v. Louisville & N. R. Co., 109 U. S. 221; Low v. City of Marysville, 5 Cal. 214. Dailey v. City of New Haven, 60 Conn. 314, where the court say: "It is a rule of great public utility and courts should recognize and enforce it as a safeguard against the tendency of municipalities to embark in enterprises not germane to the objects for which they are incorporated." Crofut v. City of Danbury, 65 Conn. 294; Kyle v. Malin, 8 Ind. 34; Town of Kirkwood v. Meramec Highlands Co., 160 Mo. 111.

[5] In re Lee Tong, 18 Fed. 253, the court speaking through Judge Deady says: "Apart from the few faculties considered incident to its existence, such as the capacity to sue and be sued, and have a common seal, a municipal corporation has no power to do any act except such as are essential to the plain purpose of its creation, or are authorized by

offices and purposes of the corporation, not simply convenient but indispensable.'"[6]

This classification and statement has been approved by many courts. The exercise of the governmental powers thus conferred upon public corporations is not optional. They are political subordinate divisions of the state organized as a part of its machinery of administration. Their duties are wholly of a public nature and their creation a matter of public convenience or governmental necessity. In order that they may better carry out the purposes for which they are created certain powers are conferred on them, and whether they will assume and exercise these powers or perform the duties imposed are matters with which they have no concern. The exercise of public powers is held involuntary.[7]

the express provisions of its charter, or a clear or necessary implication therefrom. Under this rule, before it can be concluded that the power to punish persons for keeping gambling houses and gaming is included in the power to suppress the same, it must clearly appear from the language of the grant, read by the light of the circumstances of the case, that such was the intention of the legislature. If there is a reasonable doubt about the implication of the power, it must be resolved against its exercise." Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; Ex parte Burnett, 30 Ala. 461; Douglass v. City of Placerville, 18 Cal. 643; City of New London v. Brainard, 22 Conn. 552. Dailey v. City of New Haven, 60 Conn. 314, where the court say: "Even towns which under our peculiar political history and policy * * * possessed because of their independent character, large original powers were held to have no original or inherent powers whatever but only such as are either expressly granted by the legislative power of the state or are necessary to the performance of their duties as territorial and municipal corporations." Sherlock v. Village of Winnetka, 68 Ill. 530; City of Mt. Pleasant v. Breeze, 11 Iowa, 399; Johnston v. City of Louisville, 74 Ky. (11 Bush) 527; City of Charleston v. State, 2 Speers (S. C.) 719; Miller v. Burch, 32 Tex. 208.

[6] Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; McFarlain v. Town of Jennings, 106 La. 541, 31 So. 62; Town of Kirkwood v. Meramec Highlands Co., 160 Mo. 111. Power to create a monopoly not an implied one. See cases cited under last preceding note.

[7] Granger v. Pulaski County, 26 Ark. 37: "Their functions are wholly of a public nature, and their creation a matter of public convenience and governmental necessity, and in order that they may the better subserve the public interest, certain corporate powers are conferred on them. Whether they will assume their corporate powers and perform the duties and obligations imposed, are questions over which they have no choice, but their assumption is wholly involuntary." See, also, the following cases: Town of Waltham

They have the full power to pass rules and regulations for the carrying out of the duties entrusted to them, and usually granted to corporations of similar character.[8] A late author on general law,[9] in discussing the powers exercised by a public corporation, states: "A municipal corporation ordinarily possesses several distinct classes of power. First, those strictly political or governmental, pertaining to the police and governments, in which they are the mere agents of the state.[10] A second class, such as the public are always interested in, namely, schools, hospitals and the like.[11] A third class, only quasi public in their nature, such, for instance, as gasworks, waterworks for fire protection, electric lighting plants, and the like. Courts of different states do not agree in classifying these functions as public or private, but most American cities possess them.[12] A fourth class, private property."[13]

The author would suggest as a better classification of powers to be exercised by municipal corporations proper, those possessed in their capacity, first, as agents of the government; second, as municipal corporations proper; third, as private corporations, and in case of public corporations other than municipal corporations proper, first—those possessed as agents of the government, and second, as private corporations.

The powers exercised by all public corporations, as suggested, must be found in the charter of the corporation, this charter being based upon either a public or special act,[14] limited and controlled

v. Kemper, 55 Ill. 346; White v. County of Bond, 58 Ill. 297; Hill v. City of Boston, 122 Mass. 344; Brabham v. Hinds County Sup'rs, 54 Miss. 363. See, also, cases cited § 110, post.

[8] Reddick v. People, 82 Ill. App. 85. See authorities cited under § 109, post.

[9] Andrews' American Law, p. 502.

[10] White v. County of Bond, 58 Ill. 297; Hill v. City of Boston, 122 Mass. 344; Bigelow v. Inhabitants of Randolph, 80 Mass. (14 Gray) 541; Eastman v. Meredith, 36 N. H. 284; Moffitt v. City of Asheville, 103 N. C. 237.

[11] Hearns v. Waterbury Hospital, 66 Conn. 98; Speight v. People, 87 Ill. 595; Benton v. Trustees City Hospital of Boston, 140 Mass. 13.

[12] City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1; Elmore v. Drainage Com'rs, 135 Ill. 269; Hill v. City of Boston, 122 Mass. 344; Springfield F. & M. Ins. Co. v. Village of Keeseville, 148 N. Y. 46.

[13] Safety Insulated Wire & Cable Co. v. City of Baltimore, 66 Fed. 140; People v. Hurlbut, 24 Mich. 44; Hill v. City of Boston, 122 Mass. 344.

[14] Trustees of Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518;

by constitutional provisions and construed by judicial decisions.[15] Some cases also hold that powers enjoyed and exercised without interruption or objection for many years may be legally exercised by such corporations through the doctrine of prescription, but the weight of authority is against any increase or enlargement of the powers of a public corporation through the application of this doctrine and even in those states where occasional cases are found favoring the acquirement of a power by usage, the courts hold that the usage should be general and reasonable. The tendency is to a restriction and limitation of the powers capable of being legally exercised by public corporations.[16] In England, the cases generally hold that public corporations may legally exercise powers by virtue of long established custom or usage from which an original grant of power by legal authority will be presumed.[17]

Thomson v. Lee County, 70 U. S. (3 Wall.) 327; City of Mobile v. Moog, 53 Ala. 561. "Sovereignty resides only in the entire state. In the municipal or other local communities thereof, or in their magistracies, there is no such thing as an inherent and independent authority or right to govern, by which the communities themselves or any of the members thereof must be legally bound. Submission is due to the obligations which such bodies undertake to impose only so far as the state, in the exercise of its sovereign powers for the general good, has delegated authority to create them." Town of Petersburg v. Mappin, 14 Ill. 193; Stewart v. Adams, 50 Kan. 560; McManning v. Farrar, 46 Mo. 376; People v. Mitchell, 35 N. Y. 551. See, also, §§ 22-31.

[15] Madden v. Lancaster County, 65 Fed. 188; Robert J. Boyd Pav. & Contr. Co. v. Ward, 85 Fed. 27; Kansas City v. Scarritt, 127 Mo. 642.

[16] In Attorney General v. Bank of Newbern, 21 N. C. (1 Dev. & B. Eq.) 216, the court say: "Their acts contemporaneously, and continued consistently through a period of eighteen years, are such strong proof of the sense in which the act was understood by those who passed it, as to make their construction almost as authoritative, as if the words admitted of no other." Butler v. City of Charlestown, 73 Mass. (7 Gray) 12. "The first suggestion to be made on this point is, that in cities where the corporation acts only through officers whose powers are limited and defined by law, the court would be slow to sanction any usage enlarging those powers." Benoit v. Inhabitants of Conway, 92 Mass. (10 Allen) 528; Willard v. Inhabitants of Newburyport, 29 Mass. (12 Pick.) 227; Frazier v. Warfield, 13 Md. 279; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Demarest v. Inhabitants of New Barbadoes, 40 N. J. Law, 604; City of Camden v. Varney, 63 N. J. Law, 325; Wetmore v. Story, 22 Barb. (N. Y.) 414.

[17] Attorney General v. Bank of Newbern, 21 N. C. (1 Dev. & B. Eq.) 216; Chad v. Tilsed, 5 Moore, 185; Clark v. Denton, 1 Barn. & Adol. 92; Rex v. Grout, 1 Barn. & Adol. 104; Rex v. Salway, 4 Man. & R. 314;

The application of the American rule does not, however, prevent the courts from establishing the meaning of an ambiguous grant of power by following the custom or usage of the corporation or its inhabitants in its exercise. This is especially true where the manner in which a power is to be exercised is the question at issue.[18]

§ 109. Implied.

Public corporations, by the weight of authority, possess not

Id., 9 Barn. & C. 424; Rex v. Goldsmith, 4 Barn. & Adol. 835; Attorney General v. Foster, 10 Ves. 335; Rex v. Mashiter, 6 Adol. & E. 153.

[18] Van Hostrup v. City of Madison, 68 U. S. (1 Wall.) 291, and Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384, hold that a municipality will be estopped from denying the construction already given by it to an ambiguous charter provision where such construction has been accepted by third parties in good faith and where a different one will result in a serious injury to them. See also as illustrating this same proposition the case of St. Louis Brewing Ass'n v. City of St. Louis, 140 Mo. 419, where the court said: "If any doubts could exist as to the proper construction of this ordinance, they are put at rest by the evident construction the city itself placed upon it which appears from the fact that no amendment was deemed necessary."

Frazier v. Warfield, 13 Md. 279. "Doubtful words in a general statute may be expounded with reference to a general usage and when a statute is applicable to a particular place only, such words may be construed by usage at that place."

Smith v. Inhabitants of Cheshire, 79 Mass. (13 Gray) 319; Kimball v. Brawner, 47 Mo. 398; Sherwin v. Bugbee, 16 Vt. 439. "In construing statutes applicable to public corporations, courts will attach no slight weight to the uniform practice under it if this practice has been continued for a considerable period of time." But see Wetmore v. Story, 22 Barb. (N. Y.) 414; Hood v. City of Lynn, 83 Mass. (1 Allen) 103, where the court said in considering an illegal appropriation of money claimed to be valid on the ground of custom, "An unlawful expenditure of money of a town cannot be rendered valid by usage, however long continued. Abuses of power and violations of right derive no sanction from time or custom. A casual or occasional exercise of a power by one of a few towns will not constitute usage. It must not only be general, reasonable and of long continuance, but, what is more important it must also be a custom necessary to the exercise of some corporate power, or the enjoyment of some corporate right, or which contributes essentially to the necessities and convenience of the inhabitants. The usage relied on in the present case, if established, would not satisfy either of these last named requisites, which are necessary to give it validity."

only those powers granted in express words but also those necessarily or fairly incident to the powers expressly granted and those implied because essential to the declared offices and purposes of the corporation. It is comparatively easy to give the classification of powers or to state a general rule of application which will control the courts in passing upon the legality of an act done by a public corporation under authority of some power which it is claimed to possess. Among the implied powers legally exercised by public corporations are those which may be termed usual municipal powers.[19] The courts recognize the fact that public corporations are organized not only as governmental agencies but also for the purpose of enabling the people of a particular locality to govern themselves in respect to their local matters. In Minnesota such corporations, it is declared, "shall have the general powers possessed by municipal corporations at common law."[20] And a Michigan case decided that municipal organizations in Michigan were of "common-law origin and having no less than common-law franchises."[21] In a discussion of the doctrine

[19] City of Ottawa v. Carey, 108 U. S. 110; Baumgartner v. Hasty, 100 Ind. 575; Mayo v. Dover & Foxcroft Village Fire Co., 96 Me. 539.

Aurora Water Co. v. City of Aurora, 129 Mo. 540. "There are many implied powers which attach themselves to municipal corporations, inherent powers which belong to them because they are municipal corporations just as certain powers are inherent in courts (and their public agencies) because of the very nature and attributes of their organization."

Skyes v. City of Columbus, 55 Miss. 115; Le Couteulx v. City of Buffalo, 33 N. Y. 333; City of Williamsport v. Com., 90 Pa. 498.

Butler v. City of Milwaukee, 15 Wis. 493. "Implications of authority in bodies corporate, more especially those created for municipal purposes, should be clear and undoubted, and the party claiming through them should be able to point them out with certainty and precision. The fact that he cannot, is conclusive that they do not exist. Mere general arguments drawn from the convenience of possessing a power under certain circumstances in case of emergency—conclusions that, if possessed, it might be beneficially exercised,—are very dangerous sources of corporate authority. It was with such that the counsel was obliged to present this case. Implications spring from the necessities of some power actually conferred, and not from notions of what would be convenient or expedient under particular circumstances. Hence this case differs materially from that of Miller v. City of Milwaukee, 14 Wis. 642."

[20] Laws Minn. 1899, p. 51.

[21] People v. Hurlbut, 24 Mich. 44. See, also, Butler v. City of Milwaukee, 15 Wis. 493.

of implied municipal powers, it is also well to remember that a grant of power carries with it all the necessary incidents to make that grant effectual.[22]

To enact ordinances. Among the implied powers falling as the occasion may require either under one or the other of the classes above given is that to enact ordinances. The power or right of a corporation, private or public, to adopt such by-laws as it may deem proper for its own internal government in harmony with its charter, the laws and the constitution of the state and the general law of the land is not seriously questioned.[23] The application of this principle is restricted, of course, by the grade or character of the corporation, the purpose for which it is organized and the limitations first suggested in this paragraph.[24]

Public offices. Another implied power possessed by municipal corporations is that of creating or instituting certain public offices and officials where such are necessary to the proper performance of the functions or duties imposed or required by law of the corporation.[25]

[22] McCulloch v. State of Maryland, 4 Wheat. (U. S.) 316; People v. City & County of San Francisco Sup'rs, 27 Cal. 655; Agnew v. Brall, 124 Ill. 312; City of Anderson v. O'Conner, 98 Ind. 168; Grimes v. Hamilton County, 37 Iowa, 290; Walnut Tp. v. Rankin, 70 Iowa, 65; McFarlain v. Town of Jennings, 106 La. 541; Prout v. Inhabitants of Pittsfield Fire Dist., 154 Mass. 450; Ex parte Marmaduke, 91 Mo. 228; City of St. Louis v. Shoenbusch, 95 Mo. 618; Sheidley v. Lynch, 95 Mo. 487; State v. Walbridge, 119 Mo. 383.

State v. Missouri, K. & T. R. Co., 164 Mo. 208. "Where an express power is given, all the power necessary to carry it into effect is implied. That which is implied is as much a part of the statute as if written therein. The statute provides for an election, and requires a two-thirds majority of the qualified voters to ratify the contract. Such a contract necessarily involves the creation of an indebtedness. The city could not get water without paying for it, and the legislature could not have intended it to do otherwise." Peterson v. City of New York, 17 N. Y. 449; Ketchum v. City of Buffalo, 21 Barb. 294; affirmed 14 N. Y. 356; Shanklin v. Madison County Sup'rs, 21 Ohio St. 575; Linn v. Borough of Chambersburg, 160 Pa. 511.

[23] Lambert v. Thornton, 1 Ld. Raym. 91; City of Mobile v. Yuille, 3 Ala. 137; Chamberlain v. City of Evansville, 77 Ind. 542; A Coal-Float v. City of Jeffersonville, 112 Ind. 15; Cross v. Town of Morristown, 33 N. J. Law, 57; City of Nashville v. Linck, 80 Tenn. (12 Lea) 499.

[24] State v. Hammond, 40 Minn. 43; Littlefield v. State, 42 Neb. 223.

[25] Lowry v. City of Lexington, 113 Ky. 763, 68 S. W. 1109; Collopy v.

To acquire and hold property. A public corporation has also the implied power, unless restricted by law, to acquire and hold such property whether real, personal or mixed as may be necessary or convenient to enable it to either exercise powers directly granted or to perform properly the functions of government for which it was created.[26] This power to acquire property has been considered sufficient to authorize the purchase of property beyond the jurisdiction of the corporation where this was necessary for the proper government of a municipality.[27] In regard to the implied power of public corporations to dispose of property either by transfer, donation or dedication, to mortgage or pledge the same, see the chapter relating to public property, its acquirement and disposal.

The police power. A public corporation unquestionably has the implied right to exercise the police power and to accomplish this purpose, to pass and enforce such police and sanitary regulations and ordinances as may be necessary and as such public corporations may deem expedient. The right to properly exercise the police power has been invoked as the basis of an implied power to supply the inhabitants of a municipal corporation proper with water and light. Of the soundness of this proposition, especially in regard to the latter, there is grave question.[28]

Miscellaneous implied powers. Public corporations and especially municipal corporations proper possess, in addition to the implied powers suggested above, the right to make and use a common seal and alter it at pleasure; the power to sue and be

Cloherty, 95 Ky. 330; Boehm v. City of Baltimore, 61 Md. 259; State v. May, 106 Mo. 488.

[26] De Witt v. City of San Francisco, 2 Cal. 289; Sheidley v. Lynch, 95 Mo. 487; People v. Lowber, 28 Barb. (N. Y.) 65; Le Couteulx v. City of Buffalo, 33 N. Y. 333; In re City of Buffalo, 68 N. Y. 167. See, also, Von Schmidt v. Widber, 105 Cal. 151, and pertinent authorities cited in the chapter relating to public property, its acquirement, control and disposal.

[27] City of Champaign v. Harmon, 98 Ill. 491; Newman v. Ashe, 68 Tenn. (9 Baxt.) 380. But see Thompson v. Moran, 44 Mich. 602.

[28] Rae v. City of Flint, 51 Mich. 526; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; Saleno v. City of Neosho, 127 Mo. 627; Atlantic City Waterworks Co. v. Atlantic City, 39 N. J. Eq. (12 Stew.) 367; Sayre Borough v. Phillips, 148 Pa. 482. See, also, post, § 115 et seq. upon the police power and its exercise—also those sections discussing municipal water and light supply.

sued; complain and defend in any court; acquire a name and by that name to have perpetual succession and to exercise such powers as are recognized necessary to the existence of corporate life of the character and kind possessed by public corporations. The express action of the state in respect to any of the powers noted will, of course, control the corporation in the exercise of such power. In the absence of direct affirmative action, the statement above in regard to implied powers is undoubtedly true.[29]

§ 110. Discretionary and imperative powers.

The classification as given by Judge Dillon needs no further explanation. There is found however upon an examination of the authorities, another division of powers not co-ordinate or co-extensive with the one given, but based upon the idea that a public corporation may possess powers granted to it by the sovereign the exercise of which is optional;[30] there also may be other powers granted to it the exercise of which is not a matter of choice. We have, then, imperative powers or those whose exercise is obligatory upon the public corporation and the performance of which can be compelled by proper process;[31] and discretionary powers or those to be exercised or not within the sound discretion of the officers controlling public affairs.

[29] Girard v. City of Philadelphia, 74 U. S. (7 Wall.) 1; City of Gainesville v. Caldwell, 81 Ga. 76; Johnson v. City of Indianapolis, 16 Ind. 227; Neely v. Town Council of Yorkville, 10 S. C. (10 Rich.) 141; Richards v. Town of Clarksburg, 30 W. Va. 491.

[30] City of Joliet v. Verley, 35 Ill. 58. A municipality cannot be compelled by the courts to open streets notwithstanding the obligation resting upon it to minister to the convenience of the people within it. Sinking Fund Com'rs v. Northern Bank, 58 Ky. (1 Metc.) 174; Reed v. City of Louisville, 22 Ky. L. R. 1636, 61 S. W. 11; St. Joseph Board of Public Schools v. Patten, 62 Mo. 444. The legislature of a state cannot be compelled to make laws.

[31] Mason v. Fearson, 9 How. (U. S.) 248; Vason v. City of Augusta, 38 Ga. 542; City of Ottawa v. People, 48 Ill. 233. In this case it was held that mandamus would lie to compel town authorities to maintain certain bridges where the act granting the original authority provided "that said bridges when constructed shall be maintained, repaired, and opened to the passage of boats." Watts v. Police Jury of Carroll, 11 La. Ann. 141. Here the levy of a tax was compelled by mandamus. Inhabitants of Veazie v. Inhabitants of China, 50 Me. 518; Inhabitants of Milford v. Inhabitants of Orono, 50 Me. 529; City of New York v. Furze, 3 Hill (N. Y.) 612; Malcom v. Rogers, 5 Cow. (N. Y.) 188; Hemmer v. Hustace,

Their exercise. Powers conferred on public corporations to be exercised for the public good, involving the performance of governmental duties, are imperative in their nature.[32] They become a duty and their performance an obligation. The language used in conferring a power does not determine its character. Words of permission in a charter, it is held, if they tend to promote the public benefit, are obligatory. And it is also true that where the law imposes a duty and supplies the agencies for performing it, it is to be considered as imperative in character.[33] The imperative powers granted or imposed upon public corporations cannot be abridged, surrendered or destroyed by any act of the corporation itself.[34] And the converse of this rule, that a

51 Hun (N. Y.) 457; Phelps v. Hawley, 52 N. Y. 23.

[32] Goodrich v. City of Chicago, 20 Ill. 445; District Tp. of Dubuque v. City of Dubuque, 7 Iowa, 262; Middle Bridge Proprietors v. Brooks, 13 Me. 391; City of Baltimore v. Marriott, 9 Md. 160; Anne Arundel County Com'rs v. Duckett, 20 Md. 468; Blake v. Portsmouth & C. R. Co., 39 N. H. 435; Kennelly v. Jersey City, 57 N. J. Law, 293; Arnold v. City of Pawtucket, 21 R. I. 15.

[33] Rex v. Town of Hastings, 5 Barn. & Ald. 692, note. In Hurford v. City of Omaha, 4 Neb. 336, the court say: "It sometimes becomes a very grave question in the construction of statutes whether particular provisions are to be regarded as mandatory or directory. It is, however, a familiar principle that statutes relating merely to matters of convenience or to the orderly and prompt conduct of business and not to the essence of the thing to be done, are generally considered as directory only but this doctrine has been carried so far in some cases that it seems impossible to reconcile all the cases in which the question has been considered and if equal force were given to each case found in the books it would be a fruitless effort to attempt to fix any settled discriminate point between a mandatory and a directory statute."

People v. Otsego County Sup'rs, 51 N. Y. 401; Phelps v. Hawley, 52 N. Y. 23. "Where persons or the public have an interest in having the act done by a public body, 'may' in such a statute means 'must.'" Malcom v. Rogers, 5 Cow. (N. Y.) 188; Kelley v. City of Milwaukee, 18 Wis. 83.

[34] City of New York v. Second Ave. R. Co., 32 N. Y. 261. See, also, Dillon, Mun. Corp. (4th Ed.) cases cited, note 3, p. 156, and McQuillin Mun. Ord. § 84; Goszler v. Corporation of Georgetown, 6 Wheat. (U. S.) 593; Clark v. City of Washington, 12 Wheat. (U. S.) 40; Continental Const. Co. v. City of Altoona, 92 Fed. 822; City Council of Montgomery v. Capital City Water Co., 92 Ala. 361; City of Oakland v. Carpentier, 13 Cal. 540; Carlyle Water, L. & P. Co. v. City of Carlyle, 31 Ill. App. 325; Illinois Cent. Hospital for Insane v. City of Jacksonville, 61 Ill. App. 199; City of Valparaiso v. Gardner, 97 Ind. 1; New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188; State

public corporation cannot by any act of its own increase its powers, is also true. This is especially true of powers granted involving the right of legislation. On the other hand, those duties or powers conferred upon a public corporation which are not made obligatory in their performance or exercise, either by the language of the statute conferring the power or by the character or nature of the act to be done, may be considered as discretionary and optional so far as their performance or exercise by the corporation.[35] The legislature cannot compel the performance, by a public corporation, of a discretionary power. A corporate act if done by the exercise of a prohibited power cannot be validated by its subsequent recognition.[36] The exercise of discretionary powers,[37] as well as the manner of such exercise when not

v. Graves, 19 Md. 351; Gale v. Village of Kalamazoo, 23 Mich. 344; Jefferson City v. Courtmire, 9 Mo. 692; National Waterworks Co. v. City of Kansas, 20 Mo. App. 237; Attorney General v. Lowell, 67 N. H. 198; Louisville City R. Co. v. City of Louisville, 71 Ky. (8 Bush) 415; In re Opening of Albany St., 6 Abb. Pr. (N. Y.) 273; City of New York v. Britton, 12 Abb. Pr. (N. Y.) 367, note.

[35] Goodrich v. City of Chicago, 20 Ill. 445; Merrill v. Shaw, 5 Minn. 148 (Gil. 113); St. Joseph & D. C. R. Co. v. Buchanan County Ct., 39 Mo. 485; State v. City of St. Louis, 158 Mo. 505; Spears v. City of New York, 72 N. Y. 442; Carr v. Northern Liberties, 35 Pa. 324; Grant v. City of Erie, 69 Pa. 420.

Kelley v. City of Milwaukee, 18 Wis. 83. In this case the court said in discussing the difference between imperative and discretionary powers that "in some cases where an authority is conferred in permissive language merely, it is still held to be imperative if third persons have an absolute right to have it exercised. But it is obvious that this principle cannot be applied to discretionary powers. For so soon as it is determined that it is discretionary whether to exercise the authority or not, it follows that there are no persons who have the right to insist on its exercise. To determine whether such a power is discretionary or not, the nature of the power itself and the rights of individuals in respect to its exercise must be looked at."

[36] McPherson v. Foster, 43 Iowa, 48. See, also, Western Jurist, January, 1872, for a full discussion of the subject.

[37] Public corporations generally possess a wide discretion both in regard to the opening of public streets or highways and their improvement, including the construction and establishment of drains, sewers, sidewalks, pavements or crosswalks. Brush v. City of Carbondale, 78 Ill. 74; Fulton v. Cummings, 132 Ind. 453; Certain Inhabitants of Melpomerie St. v. City of New Orleans, 14 La. Ann. 452; Hovey v. Mayo, 43 Me. 322; Methodist Protestant Church v. City of Baltimore, 6 Gill (Md.) 391; Skinker v. Heman,

specified by the grant of authority,[38] is, as indicated by the plain meaning of the words, left to the discretion of the corporation and of its officials having in charge the management or the transaction of the specific act.[39] Courts are not permitted, nor do they assume, the right to exercise any restraining or other influence in regard to the performance or nonperformance of discretionary duties unless questions are involved of bad faith, fraud, corruption or the invasion of private rights.[40] And even under such

64 Mo. App. 441; Seibert v. Tiffany, 8 Mo. App. 33; Farrar v. City of St. Louis, 80 Mo. 379; Wiggin v. City of New York, 9 Paige (N. Y.) 16; People v. Queens County Sup'rs, 131 N. Y. 468; and Teegarden v. City of Racine, 56 Wis. 545. See generally United States v. City of New Orleans, 31 Fed. 537; Danielly v. Cabaniss, 52 Ga. 211; Sheridan v. Colvin, 78 Ill. 237; City of Richmond v. McGirr, 78 Ind. 192; Kitchel v. Union County Com'rs, 123 Ind. 540; Jones v. Pendleton County Ct. (Ky.) 19 S. W. 740; Droz v. Parish of East Baton Rouge, 36 La. Ann. 307; Baker v. City of Boston, 29 Mass. (12 Pick.) 184; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Torrent v. City of Muskegon, 47 Mich. 115; Rotenberry v. Yalobusha County Sup'rs, 67 Miss. 470; Christman v. Phillips, 58 Hun (N. Y.) 282; Schanck v. City of New York, 69 N. Y. 444.

[38] Thompson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; City of Bridgeport v. Housatonuc R. Co., 15 Conn. 475; Dodd v. City of Hartford, 25 Conn. 232; Colton v. Hanchett, 13 Ill. 615; Brush v. City of Carbondale, 78 Ill. 74; Evansville, I. & C. Straight Line R. Co. v. City of Evansville, 15 Ind. 395; Taylor v. McFadden, 84 Iowa, 262; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; City of Baltimore v. Gill, 31 Md. 375; Page v. City of St. Louis, 20 Mo. 136; Lockwood v. City of St. Louis, 24 Mo. 20; Heman v. Schulte, 166 Mo. 409; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109; Poillon v. City of Brooklyn, 101 N. Y. 132; City of Cincinnati v. Gwynne, 10 Ohio, 192; Markle v. Town Council of Akron, 14 Ohio, 586; Kelley v. City of Milwaukee, 18 Wis. 83; Union Pac. R. Co. v. Ryan, 2 Wyo. 408; Id., 113 U. S. 516.

[39] The exercise of a discretionary municipal power should, however, be reasonable both as to its mode and time. Kirkham v. Russell, 76 Va. 956.

[40] City of East St. Louis v. Zebley, 110 U. S. 321. "No court has the right to control that discretion (use of municipal revenues) much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure based upon an inquiry into all branches of the municipal service; to do it for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

Boston Safe-Deposit & T. Co. v. Salem Water Co., 94 Fed. 238; City of Fayetteville v. Carter, 52 Ark.

circumstances, judicial tribunals are slow to act unless the elements above indicated clearly and manifestly appear. The corrective and restraining influence of the courts can also be invoked where public corporations transcend or abuse their power or threaten to do so. But public corporations are ordinarily free to transact their police, administrative and local discretionary duties without restraint or hindrance by the judicial or other branches of the state.[41]

§ 111. Corporate powers; their extent and nature.

However ample the powers of a public corporation may be as granted by the sovereign, and whether express, incidental, imperative, or discretionary, the corporation can never be authorized to interfere with or deprive persons of private, property, or personal rights.[42]

301; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505.

Moses v. Risdon, 46 Iowa, 251. "In the absence of actual fraud, courts cannot interfere with the judgment and discretion of city councils in determining what are and what are not suitable rooms for the purposes of the city and its officers." State v. Board of Public Works of St. Paul, 27 Minn. 442; State v. District Ct. of Ramsey County, 33 Minn. 295; City of St. Louis v. Weber, 44 Mo. 547; City of St. Louis v. Boffinger, 19 Mo. 15; Morse v. Westport, 136 Mo. 276; Cape May & S. L. R. Co. v. City of Cape May, 35 N. J. Eq. (8 Stew.) 419; Babcock v. City of Buffalo, 56 N. Y. 268; Seitzinger v. Borough of Tamaqua, 187 Pa. 539; Place v. City of Providence, 12 R. I. 1.

Courts will assume that municipal corporations exercise their discretionary powers properly, in good faith and with regularity. See, Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; City of St. Joseph v. Farrell, 106 Mo. 437; Aurora Water Co. v. City of Aurora, 129 Mo. 540; New York & H. R. Co. v. City of New York, 1 Hilt. (N. Y.) 562; In re Episcopal School, 75 N. Y. 324, and Rutherford v. Hamilton, 97 Mo. 543.

[41] Garrison v. Chicago, 7 Biss. 480, Fed. Cas. 5,255; State v. Swearingen, 12 Ga. 23. "Municipal corporations are the germs and miniature models of free government; and their internal police and administration should not be interfered with for slight causes; not unless some great right has been withheld or wrong perpetrated." Chambers v. City of St. Louis, 29 Mo. 543; Phelps v. City of Watertown, 61 Barb. (N. Y.) 121. "Courts of equity have no general supervisory power over the government of municipal corporations, or over the acts and proceedings of their governing bodies."

[42] Martin v. Roesch, 57 Ark. 474; State v. Gaines, 46 La. Ann. 431, 15 So. 174; Mitchell v. City of Rock-

§ 112. Their delegation.

The powers possessed by public corporations are usually governmental in their nature and when granted by the legislature cannot be delegated by the corporation to others for their discharge or performance.[43] It must exercise the functions imposed upon it by its charter. The character of these duties and the manner of their performance is usually specified in the original grant of power. This rule does not prevent however the delegation of the performance of ministerial duties. The law recognizes the clear distinction between duties or powers involving the exercise of judgment and discretion and those purely mechanical, clerical or ministerial in their character.[44]

land, 45 Me. 496; Hyde v. City of Newark, 28 N. J. Law (4 Dutch.) 529; People v. Coler, 166 N. Y. 1.

[43] See, also, cases cited § 110, note 41. The principle applied in Dillard v. Webb, 55 Ala. 468, the power to appoint pound keepers conferred by the statute on board of commissioners of public corporation, not capable of delegation. In Smith v. Morse, 2 Cal. 524, it is held that the common council of a municipal corporation has no power to create a new department of the city government to divert the city's revenues and property. City of Oakland v. Carpentier, 13 Cal. 540; Chase v. City Treasurer of City & County of Los Angeles, 122 Cal. 540, 55 Pac. 414; Knight v. City of Eureka, 123 Cal. 192, 55 Pac. 768.

In Gundling v. City of Chicago, 176 Ill. 340, the discretionary power in the issue of a license by the mayor held not to be a delegation of the power of the city council to license the sale of cigarettes. People v. McWethy, 177 Ill. 334, the city council have no authority to delegate its power over the construction of sewers to a committee and the city engineer. Naegle v. City of Centralia, 81 Ill. App. 334, the municipal authority to license cannot be delegated by the board of aldermen to the mayor. Town of Macon v. Patty, 57 Miss. 378, the power to determine the condition of sidewalks as vested in the board of mayor and aldermen cannot be by them delegated to street committeemen. Ayres v. Schmohl, 86 Mo. App. 349, the time within which certain public work should be done is held in this case to be a legislative function incapable of delegation. Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260, a resolution of the city council leaving to the city solicitor the approval of a deed conveying land purchased by the city not a delegation of the council's power to purchase land. Whyte v. City of Nashville, 32 Tenn. (2 Swan) 364. Principle not applied: In Hitchcock v. City of Galveston, 96 U. S. 341, principle not applied to power vested in the city council to order the construction of sidewalks. Covington v. City of East St. Louis, 78 Ill. 548, the general assembly of Illinois, under constitution of 1870, can delegate authority to municipal governments in cities.

[44] Hitchcock v. City of Galveston,

§ 113. Rules of construction.

It is seldom that a rule other than that of strict construction is applied or should be applied to powers, of whatever nature, exercised or attempted to be exercised, by a public corporation. The reason for this salutary principle is that a public corporation is organized not for the personal pecuniary gain or profit of its members, but as an agency of the government, for the exercise of governmental powers and for the better performance of the duties which every good government owes to those within its jurisdiction. The charter of the corporation contains the grant of its powers, and powers, rights and privileges should not be read into this charter by judicial construction or interpretation. As Chief Justice Shaw said:[45] "They can exercise no powers but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. The principle is fairly derived from the nature of corporations, and the mode in which they are organized and in which their affairs must be conducted." Any ambiguity or doubt, if such exist, must be construed or resolved in favor of the public and as against the exercise, usually through irresponsible agents, of the power by the corporation.[46] The strict rule of construction does not apply

96 U. S. 341; Haughawout v. Hubbard, 131 Cal. 675; Gillett v. Logan County Sup'rs, 67 Ill. 256; City of Burlington v. Dennison, 42 N. J. Law, 165; Town of Harrisonburg v. Roller, 97 Va. 582; Dances v. Town of Mannington, 50 W. Va. 322.

[45] Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71. See, also, the following cases: Thomson v. Lee County, 70 U. S. (3 Wall.) 327, where the court holds that a municipal corporation "can exercise no power which is not, in express terms or by fair implication, conferred upon it." Minturn v. Larue, 23 How. (U. S.) 435, where Justice Nelson here said, "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public."

State v. Smith, 67 Conn. 541; Logan v. Pyne, 43 Iowa, 524; Leonard v. City of Canton, 35 Miss. 189; Collins v. Hatch, 18 Ohio, 523; Heeney v. Sprague, 11 R. I. 456.

[46] Ottawa v. Carey, 108 U. S. 110; City of Detroit v. Detroit City R. Co., 56 Fed. 867; City of Ft. Scott v. Eads Brokerage Co. (C. C. A.) 117 Fed. 51; Douglass v. City of Placerville, 18 Cal. 643; Glass v. Ashbury, 49 Cal. 571; Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665; Crofut v. City of Danbury, 65 Conn. 294; Ex parte Sims, 40 Fla. 432, 25 So. 280. Principle applied to authority to impose

as a general rule of law to private corporations, the reason being that they are organized for the personal gain of the members. Property is not acquired through the levy of taxes but by or through the contribution of personal and private funds over which the state has no direct control. If an injury or a loss results to or a debt is laid upon a private corporation through the exercise of a doubtful or ambiguous power, that loss, injury or burden is sustained by private promoters. If, on the other hand, a public corporation exercises an ambiguous or a doubtful power, resulting in an oppressive debt, an injury or loss to public property, or an increase in taxation, it is the community at large, the property interests, that must sustain and bear the loss and burden. Therefore, to repeat, the rule of strict construction applies, and every doubt in the construction of a power granted is against its exercise and in favor of the tax-paying public.

§ 114. Rule of strict construction; how modified.

The rule of strict construction as given in the preceding section is occasionally modified. The courts hold that the rule should not be carried to such an extent as to defeat the very purpose for which the power was granted, if proper to be exercised, and that where it is necessary to adopt a more liberal rule

license taxes. Agnew v. Brall, 124 Ill. 312; Clark v. City of Davenport, 14 Iowa, 494; Logan v. Pyne, 43 Iowa, 524; First Presbyterian Church v. City of Ft. Wayne, 36 Ind. 338; Neumeyer v. Krakel, 23 Ky. L. R. 190, 62 S. W. 518; City of Somerville v. Dickerman, 127 Mass. 272; Bank of Michigan v. Niles, 1 Doug. (Mich.) 401; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159); Leonard v. City of Canton, 35 Miss. 189. Where the court say, "The power of the corporation is merely something added, as to the particular locality, to the general powers of government; or, in other words, it is a special jurisdiction created for specified purposes, and like all such jurisdictions, it must be confined to the subjects specially enumerated." Knapp v. Kansas City, 48 Mo. App. 485; City of Joplin v. Leckie, 78 Mo. App. 8; State v. Moores, 55 Neb. 480; State v. Town of Union, 33 N. J. Law, 350; Meday v. Borough of Rutherford, 65 N. J. Law, 645; Parker v. Baker, 1 Clark Ch. (N. Y.) 223; People v. Ham, 32 Misc. 517, 66 N. Y. Supp. 264; State v. Webber, 107 N. C. 962; Appeal of Whelan, 108 Pa. 162; Carolina Nat. Bank v. State, 60 S. C. 465, 38 S. E. 629; Lesley v. Kite, 192 Pa. 268; Kirkham v. Russell, 76 Va. 956; City of Winchester v. Redmond, 93 Va. 711; Richards v. Clarksburg, 30 W. Va. 491; Quint

of construction of a corporate power to accomplish the result sought by the legislature, it should be done.[47]

II. The Police Power.

§ 115. Definitions.

Government should have for its end the welfare, convenience and advantage of the people, and the advancement of all their material, intellectual and moral interests. One of its important objects, if not the most important, is the protection and preservation of life and limb and the property and good morals of the public.

v. City of Merrill, 105 Wis. 406. The rule also applies to the mode, when prescribed by statute, of the exercise of powers. Zottman v. City and County of San Francisco, 20 Cal. 96.

[47] City of Bridgeport v. Housatonic R. Co., 15 Conn. 475; Smith v. City of Madison, 7 Ind. 86. "The strictness then to be observed in giving construction to municipal charters should be such as to carry into effect every power clearly intended to be conferred on the municipality, and every power necessarily implied, in order to the complete exercise of the powers granted." Kyle v. Malin, 8 Ind. 34; Cochrane v. City of Frostburg, 81 Md. 54. In City of Port Huron v. McCall, 46 Mich. 565, it is held that the reason for the rule of strict construction does not apply where the power granted relates merely to a change in the form of municipal indebtedness. The court in its opinion by Justice Cooley said: "There is a principle of law that municipal powers are to be strictly interpreted and it is a just and wise rule. Municipalities are to take nothing from the general sovereignty except what is expressly granted. But when a power is conferred which in its exercise concerns only the municipality and can wrong or injure no one, there is not the slightest reason for any strict or literal interpretation with a view of narrowing its construction. If the parties concerned have adopted a particular construction not manifestly erroneous and which wrongs no one, and the state is in no manner concerned, the construction ought to stand. That is good sense, and it is the application of correct principles in municipal affairs." State v. Walbridge, 119 Mo. 383. Gregory v. City of New York, 40 N. Y. 273. "The importance of sustaining that board, in all lawful measures, tending to secure or promote the health of the city, should make us cautious in declaring any curtailment of their authority, except upon clear grounds. On the contrary, powers conferred for so greatly needed and most useful purposes, should receive a liberal construction for the advancement of the ends for which they were bestowed." East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166; Ex parte Gregory, 20 Tex. App. 210; Ex parte Garza, 28 Tex. App. 381; Brennan v. City of Weatherford, 53 Tex. 330.

That particular and inherent power of the state which has for its purpose the accomplishment of these results is termed the police power. It includes and comprehends within its exercise all those general laws and internal regulations which are necessary to secure the peace, good order, health and comfort of society.[48] It is that power of the state more than all others which

[48] Gibbons v. Ogden, 9 Wheat. (U. S.) 203. In the Slaughter House Cases, 83 U. S. (16 Wall.) 36, 62, in the opinion written by Mr. Justice Miller, it was said in speaking of the police power: "This is called the police power; and it is declared by Chief Justice Shaw (Com. v. Alger, 61 Mass. [7 Cush.] 84), that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is and must be, from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of social and private life, and the beneficial use of property." Munn v. State of Illinois, 94 U. S. 113.

Boston Beer Co. v. State of Massachusetts, 97 U. S. 25. "If the public safety or the public morals require the discontinuance of any manufacture or traffic the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state. We do not mean to say that property actually in existence and in which the right of the owner has become vested may be taken for the public good without due compensation."

Stone v. State of Mississippi, 101 U. S. 814, 818. "Many attempts have been made in this court and elsewhere to define the police power but never with entire success. It is always easier to determine whether a particular case come within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. Neither can it be denied that lotteries are proper subjects for the proper exercise of this power." Barbier v. Connolly, 113 U. S. 31; In re Morgan, 26 Colo. 415.

New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474. "It may be said to be the right of a state or of a state functionary, to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach on the like power vested in congress by the Federal constitution. Of that power it may well be said that it is known when and where it begins but not when and where it terminates. It is a power in the exercise of which a man's property may be taken from him, where his liberty may be shackled and his person exposed to destruction in cases of great public exigencies."

Com. v. Bearse, 132 Mass. 542; State v. Yopp, 97 N. C. 477. "It

affects most intimately the private and personal interests and relations of each individual. It is to a certain extent an indefin-

is founded very largely on the maxim sic utere tuo ut alienum non laedas and also to some extent, that other maxim of public policy salus populi suprema lex and it is of almost universal application in regulating the interests of society within the jurisdiction of the state. It is too well established to admit of serious question that every person is subject to it in his person and property."

Stehmeyer v. City of Charleston, 53 S. C. 259; Lacey v. Palmer, 93 Va. 159. See, also, Tiedeman, State & Fed. Control of Persons & Property, § 1 et seq., and Lawton v. Steele, 152 U. S. 133. "The extent and limit of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance."

Ex parte Jentzsch, 112 Cal. 468; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 192; Deems v. City of Baltimore, 80 Md. 164; State v. Noyes, 47 Me. 189; Com. v. Alger, 61 Mass. (7 Cush.) 53, 85. In the opinion of Chief Justice Shaw, it was said: "Rights of property like all other social and conventional rights are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the constitution may think necessary and expedient. * * * The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all maner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same. It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise. There are many cases in which such a power is exercised by all well-ordered governments, and where its fitness is so obvious, that all well-regulated minds will regard it as reasonable."

Hale v. Lawrence, 21 N. J. Law (1 Zab.) 714; Id., 23 N. J. Law (3 Zab.) 590; Muhlenbrinck v. Long Branch Com'rs, 42 N. J. Law, 364; City of New York v. Second Ave. R. Co., 32 N. Y. 261; People v. Warden of City Prison, 157 N. Y. 116; State v. Covington, 29 Ohio St. 102.

Thorpe v. Rutland & B. R. Co., 27 Vt. 150. The police power extends "to the protection of the lives, limbs, health, comfort and quiet of all persons and a protection of all property within the state; * * * and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state."

Wisconsin Keeley Institute Co. v. Milwaukee County, 95 Wis. 153, 70 N. W. 68. A law providing for the

able power and the limits of its exercise are never clearly established; no general principle of law can be stated which will even with reasonable accuracy define its application or its exercise. Certain purposes or certain results are to be accomplished by the state; a certain exigency arises affecting the peace, the health, or the comfort of society; and to the legislature directly or as it may lawfully delegate the power is given the large discretion of passing such measures as are necessary to effect the desired result, restricted only by constitutional limitations. What may be necessary and proper to accomplish this result at one time may be unnecessary and improper at another. The exercise of the power belongs properly to the law-making or legislative branch of the sovereign, and it is not within the power of any court to prescribe or say what rules and regulations are needful or necessary to the peace, health, safety and morals of the state. The power belongs to the legislature to be exercised within constitutional limitations.[49]

treatment of habitual drunkards in a private institution at the expense of the county not a legitimate exercise of the police powers of the state.

4 Bl. Comm. 162, where Blackstone defines the police power to be "The due regulation and domestic order of the kingdom, whereby the inhabitants of the state like members of a well governed family are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations."

Cooley, Const. Lim. 829, Judge Cooley in discussing the question states, "The police of a state in a comprehensive sense embraces its whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

[49] Luther v. Borden, 7 How. (U. S.) 1. The state in this case was held to have the power to determine for itself to what extent the military power was necessary to quell an armed insurrection. Hannibal & St. J. R. Co. v. Husen, 95 U. S. 471; Mugler v. State of Kansas, 123 U. S. 623; State of Arkansas v. Kansas & T. Coal Co., 96 Fed. 353; Dorman v. State, 34 Ala. 232; Fife v. State, 31 Ark. 455; State v. Wheeler, 25 Conn. 290; People v. Gillson, 109 N. Y. 389, 17 N. E. 343; Powell v. Com., 114 Pa. 265.

Calder v. Bull, 3 Dall. (U. S.) 386, where Justice Chase in discussing the power of the state legislature says: "I cannot subscribe to the omnipotence of the state legislature, or that it is absolute and

It is our theory of government that, controlled only by constitutional provisions, its three great branches, the executive, judicial and legislative, are co-ordinate and co-equal. It is within

without control, although its authority should not be expressly restrained by the constitution, or fundamental law of the state. The people of the United States erected their constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abusive of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of the legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge of his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments." But see the case of Bertholf v. O'Reilly, 74 N. Y. 509. "The question whether the act un-

the power as well as the discretion of the law-making branch to determine what rules and regulations are best calculated to accomplish the great results comprehended and included within the exercise of the police power. As was said by the court in an Ohio case:[50] "The making of laws is committed to the general

der consideration was a valid exercise of the legislative power is to be determined solely by reference to the constitutional restraints and prohibitions. The legislative power has no other limitation. If an act can stand when brought to the test of the constitution, the question of its validity is at an end and neither the executive nor judicial department of the government can refuse to recognize or enforce it. The theory that laws may be declared void when deemed to be opposed to natural justice and equity, although they do not violate any constitutional provision, has some support in the dicta of learned judges, but has not been approved, so far as we know, by any authoritative adjudication, and is repudiated by numerous authorities."

Lawton v. Steele, 152 U. S. 133. "Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers, is not final or conclusive, but is subject to the supervision of the courts."

[50] Adler v. Whitbeck, 44 Ohio St. 539, 562. But Chief Justice Marshall in Marbury v. Madison, 1 Cranch (U. S.) 177, said: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view, an absurdity too gross to be insisted on. It shall however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if the law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must

assembly; it is the judge of the wisdom and policy of all its enactments, and no court has the right to overrule its judgment, even as to the extent of its own powers, unless it has clearly and beyond doubt exceeded the legislative functions with which it is invested by the constitution. This is so generally recognized as true as to be regarded as axiomatic upon all questions as to the power of a legislature to enact a given law."

The state has the power to select its agent for exercising the police power or the manner in which it itself shall do this. It is clearly constitutional for the sovereign to delegate to a subordinate public agency, a public corporation, the right to exercise this power, and it has been suggested in some cases that the power exists in a municipal corporation proper independent of any express delegation of the same by the state.[51] It follows,

either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules govern the case. This is of the very essence of judicial duty.

"If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

"Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure." And Mr. Justice Harlan in Mugler v. State of Kansas, 123 U. S. 623, wrote: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty —indeed they are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature had transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the constitution."

[51] Keilkopf v. City of Denver, 19 Colo. 325; State v. Tryon, 39 Conn.

as this is a governmental power, no public corporation, not even the state itself, can waive or bargain away the right to exercise it.[52]

183; Morris v. City of Columbus, 102 Ga. 792; City of Spring Valley v. Spring Valley Coal Co., 71 Ill. App. 432; McPherson v. Village of Chebanse, 114 Ill. 46; Walker v. Jameson, 140 Ind. 591; Des Moines Gas Co. v. City of Des Moines, 44 Iowa, 505; Com. v. Milton, 51 Ky. (12 B. Mon.) 212; State v. Parish of Orleans Dist. Judges, 35 La. Ann. 1075; Com. v. Plaisted, 148 Mass. 375; Boehm v. City of Baltimore, 61 Md. 259; People v. Hanrahan, 75 Mich. 611; City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16); State v. Cowan, 29 Mo. 330; Kerney v. Barber Asphalt Pav. Co., 86 Mo. App. 573; Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621; State v. Noyes, 30 N. H. 279; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549; Iler v. Ross, 64 Neb. 710, 90 N. W. 869; Village of Carthage v. Frederick, 122 N. Y. 268; State v. Beacham, 125 N. C. 652; State v. Hill, 126 N. C. 1139; Bliss v. Kraus, 16 Ohio St. 54; Town Council of Summerville v. Pressley, 33 S. C. 56; City of Nashville v. Linck, 80 Tenn. 499; Judy v. Lashley, 50 W. Va. 628, 41 S. E. 197. A city charter in this case held to contain a limitation upon the exercise of the police power. See, also, authorities collected in 36 Century Digest, columns 1744 et seq.

[52] Boyd v. State of Alabama, 94 U. S. 645; Boston Beer Co. v. State of Massachusetts, 97 U. S. 25. "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659. In Stone v. State of Mississippi, 101 U. S. 814, the court said by Mr. Chief Justice Waite, "All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state, but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police.' * * * But the power of governing is a trust committed by the people to the government; no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of the public health and the public morals and the protection of public and private rights. These several agencies can govern according to their discretion if within the scope of their general authority,

§ 116. General limitations upon its exercise.

The police power has for its purpose the accomplishment of certain desired results for the protection of society. The exercise of the power, as has been stated, belongs to the law-making branch of the sovereign, and its application in a particular instance is a matter of discretion. A general limitation upon the exercise of the power by the state is that the regulations or the means adopted for the accomplishment of a lawful purpose must have this for their sole result and aim. They must, as the courts have said, be fit, proper, and reasonable means for exercising the governmental power.[53]

while in power, but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters, the government of which, from the very nature of things must 'vary with varying circumstances.' * * * Certainly the right to suppress them (lotteries) is governmental, to be exercised at all times by those in power, at their discretion. * * * All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the state."

[53] In re Wilshire, 103 Fed. 620; In re Jacobs, 98 N. Y. 98. In its opinion many authorities discussing the nature of the police power and the limits to its exercise are cited and collated, Earl, Judge, in speaking of the particular act under consideration, which attempted to regulate the manufacture of cigars and preparation of tobacco in tenement houses, said: "Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry and cause a score of ills while attempting the removal of one. When a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law, and we must, therefore, pronounce it uncon-

The state cannot, under the guise of the police power, pass laws, rules, or regulations which ostensibly have for their end or purpose the comfort, safety, welfare and protection of society, but which are, as a matter of fact, passed for the purpose of impairing or destroying private rights and private property, or attacking personal interests.[54]

stitutional and void." The court also said in discussing the police power. "The limit of the power cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it. But the power however broad and extensive, is not above the Constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, * * * and so far as it imposes restraints the police power must be exercised in subordination thereto. * * * Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health." See, also, California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29, where the question of the power of a municipal corporation to grant an exclusive privilege for the collection of city garbage was fully discussed and many authorities cited. See quotation from opinion, § 137 post, note 198.

[54] Marbury v. Madison, 1 Cranch (U. S.) 177. See quotation from opinion by Chief Justice Marshall, § 115; Yick Wo v. Hopkins, 118 U. S. 356; Lawton v. Steele, 152 U. S. 133. "The legislature may not under the guise of protecting the public interests arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations." See, also, quotation from Judge Chase in Calder v. Bull, 3 Dall. (U. S.) 386, § 115, note 49; Philadelphia, W. & B. & R. Co. v. Bowers, 4 Houst. (Del.) 506; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191. "The police power of the state is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society."

State v. Judge of Section "A," 39 La. Ann. 132; State v. Noyes, 47 Me. 189. "All laws for the protection of the lives, limbs, health and quiet of persons, and the security of all property within the state fall within this general power of the government."

That a police regulation be valid, the preservation of the peace, comfort and morals of society must not only be its ulterior purpose but its real and substantial one. In some cases it is very difficult to determine when a police regulation passes the dividing line between a proper exercise of the police power and an unwarranted and illegal interference with personal rights.[55]

§ 117. Constitutional limitations.

All constitutions contain provisions having for their purpose the protection of those rights usually enumerated in and included within what may be technically termed a bill of rights. These constitute the principal constitutional limitations upon the power of the state to exercise the police power, and according to the standard set forth in these provisions will be measured police

Com. v. Brooks, 109 Mass. 355; People v. Jackson & M. Plank Road Co., 9 Mich. 285. "Powers, the exercise of which can only be justified on this specific ground and which would otherwise be clearly prohibited by the constitution can be such only as are so clearly necessary to the safety, comfort or well being of society or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers of the constitution could not as men of ordinary prudence and foresight have intended to prohibit their exercise in the particular case."

City of St. Charles v. Nolle, 51 Mo. 122; State v. Fisher, 52 Mo. 174; Bertholf v. O'Reilly, 74 N. Y. 509. "The main guaranty of private rights against unjust legislation is found in that memorable clause in the bill of rights, that no person shall 'be deprived of life, liberty or property, without due process of law.' * * * This guaranty is not construed in any narrow or technical sense. The right to life may be invaded without its destruction. One may be deprived of his liberty in a constitutional sense without putting his person in confinement. Property may be taken without manual interference therewith, or its physical destruction. The right to life includes the right of the individual to his body in its completeness and without dismemberment; the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the state." Colon v. Lisk, 153 N. Y. 188.

[55] 25 Am. St. Rep. 889-890; Soon Hing v. Crowley, 113 U. S. 703; Mugler v. State of Kansas, 123 U. S. 623; State of Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78; Stockton Laundry Case, 26 Fed. 611; Inhabitants of Watertown v. Mayo, 109 Mass. 315; In re Jacobs, 98 N. Y. 98; People v. Gillson, 109 N. Y. 389; State v. Moore, 104 N. C. 714.

regulations. If they clearly violate or infringe upon these fundamental, inherent, inalienable rights guaranteed by the constitution according to republican theories of government, they are clearly unconstitutional.[56] It must be remembered, however, that each individual owes something to society and that he should for its good willingly surrender rights of which he could not be deprived. Every police regulation may unnecessarily diminish rights belonging to the individual, but as long as they accomplish beneficial results they should be considered valid, even where involving a sacrifice on the part of the citizen.

§ 118. The preservation of public health.

The preservation of the public health is conceded by all authorities to be one of the legitimate purposes for the accomplishment of which the police power of the state can be exercised to its fullest extent.[57] The good health of the people of the com-

[56] People v. Turner, 55 Ill. 280, where an act of the legislature creating a reform school and providing for the summary commitment of children who are "destitute of proper parental care and growing up in mendicancy, ignorance, idleness or vice" was held unconstitutional as prescribing a virtual imprisonment without due process of law. See, also, annotations to this case by Justice Redfield, 10 Am. Law Reg. (N. S.) p. 373, where he says: "For if there is living power enough in those abstractions of the state constitutions which have heretofore been regarded as mere 'glittering generalities' to enable the courts to enforce them against the enactments of the legislature and thus declare that all men are not only created free and equal but remain so and may enjoy life and pursue happiness in their own way, provided they do not interfere with the freedom of other men in the pursuit of the same objects; then the opportunity to compel parents to send their children to the common schools by means of 'truant laws' such as we have in the highly advanced commonwealth of Massachusetts, will come to a speedy and most inglorious termination." In re Day, 181 Ill. 73. The act restricting the granting of licenses to lawyers under certain circumstances held unconstitutional. Noel v. People, 187 Ill. 587; Bessette v. People, 193 Ill. 334. See cases collected in note, 33 Cent. Law J. 382.

[57] Richardson v. City of Boston, 24 How. (U. S.) 188; Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 So. 725; Dunham v. City of New Britain, 55 Conn. 378, 11 Atl. 354; State v. Main, 69 Conn. 123,—principle applied to "peach yellows"; Murphy v. City of Wilmington, 6 Houst. (Del.) 108; Inhabitants of Quincy v. Kennard, 151 Mass. 563, 24 N. E. 860; State v. Zimmerman, 86 Minn. 353, 90 N. W. 783; Board of Health of Trenton v. Hutchinson, 39 N. J. Eq. 218; Board of Health of New Jersey v. Diamond Mills Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019.

munity is one of the chief ends or aims of government, and this is true not only because of the great expense which the state necessarily incurs in caring for the indigent sick, one of its duties, but that the state as composed of individuals may maintain the highest degree of efficiency possible in the advancement of its material, moral, and intellectual interests. That a sound body is the best agency for the promotion of general prosperity is a maxim which can be applied to the state as well as to the individual. The statements in this section are such truisms that it is unnecessary to cite authorities.

§ 119. Public agencies for the preservation of health.

The state in its exercise of the police power for the preservation of the public health has the right to select such agency as it deems best fitted for that purpose. The duty is usually entrusted to administrative or executive boards, duly appointed[58] or elected by the people, called boards of health,[59] members of which must have the qualifications required.[60] Sometimes this

See note in 38 L. R. A. 305 and 39 L. R. A. 266.

[58] Dunwoody v. United States, 143 U. S. 578; Municipality of Cape Breton County v. McKay, 18 Can. Sup. Ct. 639; Braman v. City of New London, 74 Conn. 695, 51 Atl. 1082; In re Opinion of Justices to Governor & Council, 136 Mass. 578. See, also, Act of Congress of March 3, 1879 (20 Stat. 484) creating a National Board of Health consisting of seven members to be appointed by the President.

[59] People v. Perry, 79 Cal. 105; Forbes v. Board of Health of Escambia County, 27 Fla. 189; Waller v. Wood, 101 Ind. 138. Board of county commissioners constitutes for the county its board of health. Hengehold v. City of Covington, 108 Ky. 752, 57 S. W. 495; In re Opinion of Justices to Governor & Council, 136 Mass. 578; People v. Scott, 31 Misc. 131, 64 N. Y. Supp. 970; Smith v. Lynch, 29 Ohio St. 261; City of Taunton v. Taylor, 116 Mass. 254.

Davock v. Moore, 105 Mich. 120. "Municipal corporations are of a twofold character, the one public as regards the state at large, in so far as they are its agents in government, the other private, in so far as they are to provide the local necessities and conveniences for the citizens. The legislature under the present act is dealing with the city of Detroit as one of its agencies to protect the public health and prevent the spreading of pestilential contagious or infectious disease. * * * Clearly it is apparent from the whole act that it was the legislative intent to use the city as its agent in government, to prevent the spread of contagious disease."

[60] State v. Kohnke, 106 La. 420, 31 So. 45; In re Opinion of Justices to Governor & Council, 136 Mass. 578; Board of Health of Trenton v. Hutch

power is delegated by the state or the legislature to the municipal authorities for similar action. The state may also give the right to the people residing within certain territory to organize either under special or general laws, districts having for their sole purpose the preservation of the public health within such limits.[61] Such boards of health or sanitary districts are considered public quasi corporations and possess, with the power to exercise them, such powers as belong to corporations of a similar grade or special powers granted by the legislature.[62]

§ 120. Boards of health; their jurisdiction and powers.

The particular agencies, under whatever name, employed by the state for the preservation of the public health, may exercise the powers with which they are clothed only within the district over which they are given jurisdiction,[63] and upon those matters

inson, 39 N. J. Eq. 218; People v. Platt, 117 N. Y. 159; People v. Board of Health of Yonkers, 140 N. Y. 1.

[61] Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554. "It may well be that if in the formation of a sanitary district an incorporated city or town shall be included, in which the authority conferred upon the sanitary board is delegated to the municipality, it will be held that the law under consideration was not intended to apply to such city or town." In re Werner, 129 Cal. 567; Stumpf v. San Luis Obispo County Sup'rs, 131 Cal. 364; Wilson v. Trustees of Sanitary Dist. of Chicago, 133 Ill. 443, 27 N. E. 203; Grace v. Board of Health of Newton, 135 Mass. 490; Boehm v. City of Baltimore, 61 Md. 259; Board of Health of Hamilton Tp. v. Neidt (N. J. Eq.) 19 Atl. 318; Hutchinson v. Board of Health of Trenton, 39 N. J. Eq. 569. A board of health is legally organized if there has been a substantial compliance with the requirements of the law. Kennedy v. Board of Health, 2 Pa. 366; City of Philadelphia v. Provident Life & Trust Co., 132 Pa. 224; Hughson v. City of Rochester, 49 Hun, 45, 1 N. Y. Supp. 725; Coe v. Schultz, 2 Abb. Pr. (N. S.; N. Y.) 193; Board of Health of Kortright v. Cease, 53 Hun, 638, 6 N. Y. Supp. 790; Metropolitan Board of Health v. Heister, 37 N. Y. 661; Gregory v. City of New York, 40 N. Y. 273; People v. Acton, 48 Barb. (N. Y.) 524; Gould v. City of Rochester, 105 N. Y. 46.

[62] Forbes v. Board of Health of Escambia County, 27 Fla. 189, 9 So. 446; Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285; Health Dept. of New York v. Pinckney, 7 Daly (N. Y.) 260; Taylor v. Board of Health of Philadelphia, 31 Pa. 73. See note 24 Am. Law Rev. 559, on boards of health, their objects, functions and powers. See, also, 47 Am. St. Rep. 533-552; 26 L. R. A. 727; 38 L. R. A. 305; Green v. City of Cape May, 41 N. J. Law, 45; City of Burlington v. Dennison, 42 N. J. Law, 165; Courter v. Board of Health of Newark, 54 N. J. Law, 325, and Gould v. City of Rochester, 105 N. Y. 46.

[63] Ward v. Washington, 4 Cranch,

the regulation of which is delegated to them. The care of the public health, it has been held, is an important object, and laws conferring powers upon the agencies for its preservation should receive a liberal construction in order to effect an advancement of the ends and an accomplishment of the purposes for which they are established.[64] These agencies are considered public quasi corporations or municipal corporations; agencies of the state; and as such entitled to its support and protection in the enforcement of their orders and regulations,[65] and with the power

C. C. 232, Fed. Cas. No. 17,163; Cotting v. Kansas City Stock Yards Co., 79 Fed. 679; City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315.

Begein v. City of Anderson, 28 Ind. 79. City authorities have no power to prohibit the establishment of a cemetery outside of city limits, their authority being co-existent with the city limits. Robb v. City of Indianapolis, 38 Ind. 49; Stone v. Heath, 179 Mass. 385; Gould v. City of Rochester, 105 N. Y. 46; reversing 39 Hun, 79; Bell v. City of Rochester, 58 Hun, 602, 11 N. Y. Supp. 305; Polinsky v. People, 73 N. Y. 65; Jarvis v. Pinckney, 3 Hill (S. C.) 123; State v. Franklin, 40 Kan. 410.

[64] Blue v. Beach, 155 Ind. 121, 56 N. E. 89, 80 Am. St. Rep. 195. "If the legislature in the interests of the public health enacts a law and thereby interferes with the personal rights of an individual, * * * it then, under such circumstances becomes the duty of the courts to review such legislation * * * and in such an examination the court will look to the substance of the thing involved and will not be controlled by mere forms."

Wyse v. Police Com'rs of New Jersey, 68 N. J. Law, 127, 52 Atl. 281. "In interpreting these rules we must look at them from the standpoint of the board of commissioners, not as formulating a matter of legal procedure, but as making regulations, general in their character, to promote the health, comfort and convenience of a crowded city. Such a power is held to arise from authority to make police regulations. Weil v. Ricord, 24 N. J. Eq. (9 C. E. Green) 169. We must also have regard to the rule that enactments of this character are given a reasonable construction, and to the further rule that where such enactments are made by a municipal body having jurisdiction over the subject-matter every intendment and presumption will be made in favor of their validity. 17 Am. & Eng. Enc. Law, 264; Harrington Tp. Road Commission v. Haring, 55 N. J. Law, 327; Atlantic City Water Works Co. v. Consumers Water Co., 44 N. J. Eq. (17 Stew.) 427." Gregory v. City of New York, 40 N. Y. 273; Health Dept. of New York v. Knoll, 70 N. Y. 530.

[65] Moore v. New Orleans Waterworks Co., 114 Fed. 380. "The case has been argued as though the drainage commission of New Orleans was vested with full possession of the police power of the state, to the exclusion of all and any rights of the New Orleans Waterworks Company, while the fact is that both the commission and the waterworks com-

of suing and being sued.[66] The performance of their duties may be compelled in a proper proceeding, not being considered entirely discretionary in their character.[67] Powers granted these bodies may be limited by express terms,[68] or the grant of authority may exist in general language, a wide latitude of discretion existing in the latter case.[69]

The true rule was probably stated in the case of City of St.

pany are agencies of the state and city in providing for the public health and safety, and that both are entitled to the support and protection of the police power in executing and performing the functions respectively assigned." People v. Williamson, 135 Cal. 415, 67 Pac. 504; City of Rockland v. Farnsworth, 87 Me. 473; People v. Shurly, 124 Mich. 645; Cartwright v. City of Cohoes, 165 N. Y. 631; Taylor v. Board of Health of Philadelphia, 31 Pa. 73. See, also, 72 Am. Dec. 724.

[66] Henderson County Board of Health v. Ward, 107 Ky. 477, 54 S. W. 725; Inhabitants of Quincy v. Kennard, 151 Mass. 563; McEwen v. Board of Health of Woodbridge Tp., 61 N. J. Law, 468; Board of Health of Asbury Park v. Rosenthal, 67 N. J. Law, 216, 50 Atl. 439; Board of Health of New Rochelle v. Valentine, 57 Hun, 591, 11 N. Y. Supp. 112; Bell v. City of Rochester, 58 Hun, 602, 33 State Rep. 739, 11 N. Y. Supp. 305; Gould v. City of Rochester, 105 N. Y. 46; Brown v. District of Narragansett, 21 R. I. 156, 503; City of Memphis v. Smythe, 104 Tenn. 702; Buckstaff v. City of Oshkosh, 92 Wis. 520. See, also, Parker & W. Pub. Health.

[67] Wartmen v. City of Philadelphia, 33 Pa. 202; Com. v. Bredin, 165 Pa. 224. "Where duties of a public nature are imposed upon municipal corporations, they are liable to indictment for neglecting to properly discharge such duties." See, also, 15 Am. & Eng. Enc. Law (1st Ed.) 1196, 1197.

[68] Wong Wai v. Williamson, 103 Fed. 1. "Measures of this character * * * are constantly upheld by the courts as valid acts of legislation, however inconvenient they may prove to be, and a wide discretion has also been sanctioned in their execution. But when the municipal authority has neglected to provide suitable rules and regulations upon the subject and the officers are left to adopt such methods as they may deem proper for the occasion, their acts are open to judicial review and may be examined in every detail to determine whether individual rights have been respected in accordance with constitutional requirements." State v. Burdge, 95 Wis. 390.

[69] Jew Ho v. Williamson, 103 Fed. 10, and cases cited in the opinion; Ex parte Tuttle, 91 Cal. 589; Ex parte Whitwell, 98 Cal. 73; Austin v. Murray, 33 Mass. (16 Pick.) 121; City of St. Louis v. Weber, 44 Mo. 547; Whidden v. Cheever, 69 N. H. 142, 44 Atl. 908; Pennsylvania R. Co. v. Jersey City, 47 N. J. Law, 286; In re Smith, 146 N. Y. 68; Brown v. Pierce County, 28 Wash. 345, 68 Pac. 872. In this case the qualified health officer of a county held to have power to seize a private building in which to confine a small-pox patient.

Louis v. Weber, cited in the notes, where the court said: "Courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. It is not to be expected that every power will always be exercised with the highest discretion, and when it is plainly granted a clear case should be made to authorize an interference upon the ground of unreasonableness." A certain definite purpose is given them to carry out, and subject only to constitutional provisions and general rules of the law limiting the exercise of the police power, they have the right to use all the reasonable and proper means for accomplishing this.[70] Their discretionary acts are not conclusive, but the measures which they may adopt are subject to review by the courts. It is also necessary to the validity of their acts that they perform them in the manner required by law, and in general their proceedings and rights of appeal are regulated by statute.[71]

Vaccination. Boards of health have the power to order the vaccination of all persons not having been successfully vaccin-

[70] Wong Wai v. Williamson, 103 Fed. 1; State v. Orr, 68 Conn. 101, construing an exclusive contract for the removal of garbage; Duggan v. City of New Orleans, 15 La. Ann. 449; Courter v. Board of Health of Newark, 54 N. J. Law, 325, 23 Atl. 949; Johnston v. Borough of Belmar, 58 N. J. Eq. 354; the right of board of health considered, to control use of water by private consumer; Health Dept. of New York v. Lalor, 38 Hun (N. Y.) 542; Board of Health of New Rochelle v. Valentine, 60 Hun (N. Y.) 579; Underwood v. Green, 26 N. Y. Super. Ct. (3 Rob.) 86; People v. Justices of Ct. of Special Sessions, 7 Hun (N. Y.) 214.

[71] Hurst v. Warner, 102 Mich. 238, 26 L. R. A. 484; Darcantel v. People's Slaughter House & Refrigerating Co., 44 La. Ann. 632; City of Salem v. Eastern R. Co., 98 Mass. 431; City of Taunton v. Taylor, 116 Mass. 254. Orders or directions of such boards should be liberally construed; Pebbles v. City of Boston, 131 Mass. 197; Com. v. Young, 135 Mass. 526; Inhabitants of Quincy v. Kennard, 151 Mass. 563; White v. Kenney, 157 Mass. 12; City of St. Louis v. Schnuckelberg, 7 Mo. App. 536. The action of a board of health in declaring an act a nuisance is not conclusive; Wilson v. Alabama G. S. R. Co., 77 Miss. 714, 28 So. 567; Marshall v. Cadwalader, 36 N. J. Law, 283. The action of a board of health in declaring a certain business a nuisance is void as their powers are executive and advisory only; not legislative or judicial; Courter v. Board of Health of Newark, 54 N. J. Law, 325; Gould v. City of Rochester, 105 N. Y. 46; People v. Board of Health of Yonkers, 140 N. Y. 1; Board of Health of Yonkers v. Copcutt, 140 N. Y. 12; In re Smith, 146 N. Y. 68.

ated within a certain time prior to such order, during the continuance of an epidemic of small-pox;[72] to require the vaccination of children prior to their attendance at public schools;[73] or to require the injection of a serum supposed to be a preventative against contraction of bubonic plague.[74] They are authorized to take such measures as they may deem necessary to prevent the spread of infectious or contagious diseases affecting either persons[75] or domestic animals.[76] The scope of the exercise of their

[72] Morris v. City of Columbus, 102 Ga. 792; City of Ft. Wayne v. Rosenthal, 75 Ind. 156; City of St. Paul v. Peck, 78 Minn. 497; State v. Hay, 126 N. C. 999; Hazen v. Strong, 2 Vt. 427; Salisbury Com'rs v. Powe, 51 N. C. (6 Jones) 134. See, also, Parker & W. Pub. Health, § 123 and cases cited; and 59 Am. Rep. 116, 118; 47 Am. St. Rep. 546, 547.

[73] Abeel v. Clark, 84 Cal. 226; Bissell v. Davison, 65 Conn. 183; Potts v. Breen, 167 Ill. 67; Lawbaugh v. Board of Education of Dist. No. 2, 177 Ill. 572; School Directors v. Breen, 60 Ill. App. 201, holds that for failure to observe rule requiring vaccination a pupil cannot be excluded from school when there is no immediate necessity for vaccination; Cory v. Carter, 48 Ind. 327; Blue v. Beach, 155 Ind. 121; City of Salem v. Eastern R. Co., 98 Mass. 431; State v. Zimmerman, 86 Minn. 353, 90 N. W. 783; In re Rebenack, 62 Mo. App. 8; In re Walters, 84 Hun, 407, 32 N. Y. Supp. 322. See, also, 65 Am. St. Rep. 338; Duffield v. Williamsport School Dist., 162 Pa. 476, 25 L. R. A. 152 with note, and cases cited by counsel; State v. Burdge, 95 Wis. 390. As holding to the contrary see Osborn v. Russell, 64 Kan. 507, 68 Pac. 60.

[74] Wong Wai v. Williamson, 103 Fed. 1, and cases cited in opinion. See, also, McClatchy v. Matthews, 135 Cal. 274, 67 Pac. 134, as to powers of the state board of health in connection with investigation of same disease.

[75] Town of Greensboro v. Ehrenreich, 80 Ala. 579; County of Saguache v. Decker, 10 Colo. 149, 14 Pac. 123; Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 44; Warner v. Stebbins, 111 Iowa, 86; Henderson County Board of Health v. Ward, 107 Ky. 477, 54 S. W. 725; Pinkham v. Dorothy, 55 Me. 135; Seavey v. Preble, 64 Me. 120; Austin v. Murray, 33 Mass. (16 Pick.) 125; Train v. Boston Disinfecting Co., 144 Mass. 523; Elliott v. Kalkaska Sup'rs, 58 Mich. 452; Hurst v. Warner, 102 Mich. 238, 60 N. W. 440; Safford v. Board of Health of Detroit, 110 Mich. 81, 67 N. W. 1094; Aull v. City of Lexington, 18 Mo. 401. The rent of a building for the use of hospital authorized in this case. Eckhardt v. City of Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204. Asiatic cholera. Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1. An ordinance requiring second-hand clothing to be turned over to the city for disinfection at specified prices held a valid exercise of police power.

State v. Speyer, 67 Vt. 502, 48 Am. St. Rep. 832. A prohibition of the maintenance of pig pens within one hundred feet of any dwell-

powers does not include generally a control or regulation of private hospitals within city limits.[77] They also have the authority to incur debts and employ physicians or other agencies in the extermination of contagious or infectious diseases and the execution of the general purposes to accomplish which they were appointed or elected.[78] They may legally adopt rules regulating

ing or well or spring used for drinking held unreasonable and invalid when considered irrespective of locality. In Town of Kosciusko v. Slomberg, 68 Miss. 469, 9 So. 297, a certain ordinance prohibiting the sale of second-hand clothing as a quarantine regulation held to be invalid and an unreasonable restraint of trade. 63 Am. Dec. 391.

[76] Kimmish v. Ball, 129 U. S. 217; Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613; Id., 56 Kan. 694; Mullen v. Western Union Beef Co., 9 Colo. App. 497. State rules regulating domestic animals must take precedence and authority over the unauthorized recommendations of a Federal official. Stevens v. Brown, 58 Ill. 289; Somerville v. Marks, 58 Ill. 371; Yeazel v. Alexander, 58 Ill. 254; Chicago & A. R. Co. v. Gasaway, 71 Ill. 570; Patee v. Adams, 37 Kan. 133; Miller v. Horton, 152 Mass. 540; Husen v. Hannibal & St. J. R. Co., 60 Mo. 226; Grimes v. Eddy, 126 Mo. 168; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. Law, 308.

But see Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465 reversing 60 Mo. 226. This decision, however, was practically modified by the later case of Kimmish v. Ball, supra; Hand v. State, 37 Tex. Cr. App. 310, 39 S. W. 676.

[77] Bessonies v. City of Indianapolis, 71 Ind. 189. "We do not think that the ordinance under consideration can be regarded as a proper exercise or application of the implied police powers of the city, either in its terms or in its object; and certainly it was not authorized by any of the express powers of the city, under the law. We are of the opinion therefore that the legislative bodies of the city of Indianapolis clearly transcended their powers * * * that said ordinance was and is absolutely null and void."

[78] Town of New Decatur v. Berry, 90 Ala. 432. In this case the town of New Decatur had no authority to establish a quarantine, and a contract for services to be rendered in connection with this quarantine held as ultra vires and not enforceable.

Spearman v. City of Texarkana, 58 Ark. 348; Jay County Com'rs v. Fertich, 18 Ind. App. 1, 46 N. E. 699. In discussing the limitations and scope of a board's action the court say: "The purpose of the statute is not to furnish, free of expense, medical treatment and medicines to individual persons afflicted with disease of any character (though under other statutes such aid may be given to the poor) but it is to protect the public health, the health of the people at large, by preventive measures."

City of McPherson v. Nichols, 48 Kan. 430, 29 Pac. 679; Bell County v. Blair, 21 Ky. L. R. 121, 50 S. W. 1104. Here a county was held not liable for the services of a physician rendered in suppression of an epidemic within the city limits, the

the removal of dead bodies,[79] and the manner, time and place of interring them.[80]

board of health of the city having exclusive control.

Barton v. City of New Orleans, 16 La. Ann. 317; State v. City of New Orleans, 37 La. Ann. 894, held that the salaries of sanitary police could not be paid from the regular police appropriation. Schmidt v. Stearns County, 34 Minn. 112; Elliott v. Kalkaska Sup'rs, 58 Mich. 452; Wilkinson v. Long Rapids Tp., 74 Mich. 63; Labrie v. City of Manchester, 59 N. H. 120; Rockaway Tp. v. Freeholders of Morris County, 68 N. J. Law, 16, 52 Atl. 373; Kent v. Village of North Tarrytown, 50 App. Div. 502, 64 N. Y. Supp. 178.

In re Taxpayers & Freeholders of Plattsburgh, 157 N. Y. 78. "The charter of this village, it is true, contains no provision authorizing the trustees to raise money * * * for the purpose of suppressing disease or preserving the public health but the general laws of the state make it their duty to comply with the orders of the local board of health in this respect, and when that board incurs expense in the performance of its duty * * * it becomes the duty of the municipal authorities to comply with the order whether there is any provision to that effect in the charter or not." Town of New Decatur v. Berry, 90 Ala. 432. And see 24 Am. St. Rep. 827; 58 Am. Dec. 169. But see, also, the following cases where it is held no liability was contracted because of limited powers on the part of the board of health or other contracting body or lack of sufficient contract: Town of New Decatur v. Berry, 90 Ala. 432; City of Ft. Wayne v. Rosenthal, 75 Ind. 156; Young v. Blackhawk County, 66 Iowa, 460; Gill v. Appanoose County, 68 Iowa, 20; Pusey v. Meade County Ct., 64 Ky. (1 Bush) 217; Kellogg v. Inhabitants of St. George, 28 Me. 255; Childs v. Inhabitants of Phillips, 45 Me. 408; Rae v. City of Flint, 51 Mich. 526; Wilkinson v. Town of Albany, 28 N. H. (8 Fost.) 9; McIntire v. Town of Pembroke, 53 N. H. 462; People v. Trustees of Village of Penn Yan, 2 App. Div. 29, 37 N. Y. Supp. 535; City of Williamsport v. Richter, 81 Pa. 508.

[79] Graves v. City of Bloomington, 17 Ill. App. 476; Lake Erie & W. R. Co. v. James, 10 Ind. App. 550, 35 N. E. 395, 38 N. E. 192. But see opinion of Lotz, C. J.; Austin v. Murray, 33 Mass. (16 Pick.) 121; Wyse v. Police Com'rs of New Jersey, 68 N. J. Law, 127, 52 Atl. 281.

[80] Young v. Mahoning County Com'rs, 51 Fed. 585; Ex parte Bohen, 115 Cal. 372; Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co., 121 Ill. 199; Bogert v. City of Indianapolis, 13 Ind. 134; City of New Orleans v. Wardens of St. Louis Church, 11 La. Ann. 244; Com. v. Fahey, 59 Mass. (5 Cush.) 408; Com. v. Goodrich, 95 Mass. (13 Allen) 546; Woodlawn Cemetery v. Inhabitants of Everett, 118 Mass. 354; Brick Presbyterian Church Corp. v. City of New York, 5 Cow. (N. Y.) 538; Page v. Symonds, 63 N. H. 17; People v. Pratt, 129 N. Y. 68; Eickelberg v. Board of Health of Newtown, 47 Hun (N. Y.) 371; Wygant v. McLauchlan, 39 Or. 429, 64 Pac. 867; Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. 42; City of Philadelphia v. Westminster Cemetery Co., 162 Pa. 105; City Council of Charleston v. Wentworth St. Bap-

§ 121. Their liability.

Boards of health or health officers may, in the performance of their duties, destroy private property or injuriously affect rights of third parties in excess of their authority. The question of their liability then arises, and this may be either a personal one[81] or their acts may be performed in such manner as to create a liability, by consent of the state, resting upon the public agency they represent.[82] Such boards or agencies are invested with duties of a governmental character, the preservation of the public health, to be exercised for the benefit of the community at large. In the performance of their official duties when properly done and within the limits of their jurisdiction and powers, there can be no liability, either of a personal nature or against them

tist Church, 4 Strob. (S. C.) 306; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330; Pfleger v. Groth, 103 Wis. 104. A cemetery or place of burial is not considered, ordinarily, a nuisance per se but the conditions and circumstances surrounding it may make it such. County of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344; Town of Lake View v. Letz, 44 Ill. 81; Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191; Begein v. City of Anderson, 28 Ind. 79; Barnes v. Hathorn, 54 Me. 124; Monk v. Packard, 71 Me. 309; Grossman v. City of Oakland, 30 Or. 478; Ex parte Wygant, 39 Or. 429; Dunn v. City of Austin, 77 Tex. 139.

See, also, the following cases passing upon the question of the interment of the dead within municipal limits or restricting the location of a cemetery to particular locations: Scovill v. McMahon, 62 Conn. 378; City of Newark v. Watson, 56 N. J. Law, 667; Coates v. City of New York, 7 Cow. (N. Y.) 585; People v. Pratt, 129 N. Y. 68; Wardens of St. Peter's Episcopal Church v. Town of Washington, 109 N. C. 21; Kincaid's Appeal, 66 Pa. 411; Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. 42; City of Austin v. Austin City Cemetery Ass'n, 87 Tex. 330.

[81] Beers v. Board of Health, 35 La. Ann. 1132; Miller v. Horton, 152 Mass. 540; Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488; Webb v. Detroit Board of Health, 116 Mich. 516; Pearson v. Zehr, 138 Ill. 48, 29 N. E. 854, 32 Am. St. Rep. 113; Newark & S. O. H. R. Co. v. Hunt, 50 N. J. Law, 308, 12 Atl. 697.

[82] Mead v. City of New Haven, 40 Conn. 72, 20 Am. Rep. 468; Ogg v. City of Lansing, 35 Iowa, 495; Fowler v. Kansas City, 64 Kan. 566, 68 Pac. 33; Brown v. Inhabitants of Vinalhaven, 65 Me. 402; Barbour v. City of Ellsworth, 67 Me. 294; Gilboy v. City of Detroit, 115 Mich. 121 and cases cited. No liability created even when injury resulted from negligence of city board of health. Maxmilian v. City of New York, 62 N. Y. 160, 16 Am. Rep. 14; Prichard v. Com'rs of Morganton, 126 N. C. 908; City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375.

in their capacity as public agents.[83] They necessarily must be vested with a large discretion in the performance of their duties, and so long as this discretion is exercised in a reasonable manner and in good faith, their acts cannot create liabilities. The presumption that they are acting in good faith and under lawful authority applies. The discretion given to such bodies or officers does not, however, permit them to promulgate regulations or rules in violation of constitutional provisions.[84]

[83] Forbes v. Board of Health of Escambia County, 28 Fla. 26. "These boards are created for public purposes in the exercise of the police power of the state and they have no corporate interest in the exaction of the powers given them. * * * An examination of the authorities and the principles governing such cases leads us to the conclusion that defendant was invested with public functions and the duties it owed were to the public and as such it comes within the sphere of public functionaries exempt from liability in tort unless such remedy should be given by statute." Frazer v. City of Chicago, 186 Ill. 480; Tweedy v. Fremont County, 99 Iowa, 721, 68 N. W. 921; Compagnia Francaise de Navigation a Vapeur v. State Board of Health, 51 La. Ann. 645, 72 Am. St. Rep. 458; affirmed 186 U. S. 380, 22 Sup. Ct. 811; Hall v. Staples, 166 Mass. 399; Danaher v. City of Brooklyn, 51 Hun (N. Y.) 563; City of Dallas v. Allen (Tex. Civ. App.) 40 S. W. 324.

[84] In Smith v. St. Louis & S. W. R. Co., 181 U. S. 248, the court speaking through Justice McKenna said: "It is urged that it does not appear that the action of the live stock sanitary commission was taken on sufficient information. It does not appear that it was not, and the presumption which the law attaches to the acts of public officers must obtain and prevail. The plaintiff in error relies entirely on abstract right which he seems to think cannot depend upon any circumstances or be affected by them. This is a radical mistake. It is the character of the circumstances which gives or takes from a law or regulation of quarantine a legal quality. In some cases the circumstance would have to be shown to sustain the quarantine, as was said in Kimmish v. Ball, 129 U. S. 217. But the presumptions of the law are proof, and such presumptions exist in the pending case arising from the provisions of and the duties enjoined by the statute, and sanction the action of the sanitary commission and the government of the state. If they could have been they should have been met and overcome." Wong Wai v. Williamson, 103 Fed. 1; Jew Ho v. Williamson, 103 Fed. 10; Raymond v. Fish, 51 Conn. 80; Forbes v. Board of Health of Escambia County, 28 Fla. 26.

Love v. City of Atlanta, 95 Ga. 129, where the court say: "In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it, within its limits, the duty

Their discretionary measures, or findings of fact, the basis of these discretionary measures, when clearly within constitutional

of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation, but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or nonliability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty." Wyatt v. City of Rome, 105 Ga. 312; Ogg v. City of Lansing, 35 Iowa, 495; Rudolphe v. City of New Orleans, 11 La. Ann. 242; Mitchell v. City of Rockland, 52 Me. 118; Seavey v. Preble, 64 Me. 120; Barbour v. City of Ellsworth, 67 Me. 294.

Bryant v. City of St. Paul, 33 Minn. 289. "The duty is imposed by the legislature upon the board of health under the police power to be exercised for the benefit of the public generally; it is one in which the city corporation has no particular interest and from which it derives no special benefit in its corporate capacity. And we think it clear that, as respects an agency thus created for the public service, the city should not be held liable for the manner in which such service is performed by the board. It is bound to discharge its official duty not by virtue of its responsibility to the municipality, but for the general welfare of the community, and no action will lie against the city for the acts of the board unless given by statute. The duties of such officers are not of that class of municipal or corporate duties with which the corporation is charged in consideration of charter privileges, but are police or governmental functions, which could be discharged equally well through agents appointed by the state, though usually associated with and appointed by the municipal body. The nature of the duties as public are the same in either case." Citing Ogg v. City of Lansing, 35 Iowa, 495; Fisher v. City of Boston, 104 Mass. 87; Tindley v. City of Salem, 137 Mass. 171; Condict v. Jersey City, 46 N. J. Law, 157; Maxmilian v. City of New York, 62 N. Y. 160; Smith v. City of Rochester, 76 N. Y. 506; City of Richmond v. Long's Adm'rs, 17 Grat. (Va.) 375; Welsh v. Village of Rutland, 56 Vt. 228; and Hayes v. City of Oshkosh, 33 Wis. 314.

Bamber v. City of Rochester, 26 Hun (N. Y.) 587; City of Richmond v. Long, 17 Grat. (Va.) 375; Lowe v. Conroy (Wis.) 97 N. W. 942; Williams, Mun. Liab. Tort, §§ 189 et seq.; Jones, Neg. Mun. Corp. § 30 and cases cited. But see Haag v. Vanderburg County Com'rs, 60 Ind. 511; Dooley v. Kansas City, 82 Mo. 444; Lockwood v. Bartlett, 54 Hun (N. Y.) 636, and Aaron v. Broilles, 64 Tex. 316.

limitations, though not conclusive, will not ordinarily be reviewed by the courts.[85]

§ 122. Quarantines and quarantine regulations.

One of the most effectual means for preventing the spread of contagious or infectious diseases during an epidemic is the establishment of a quarantine,[86] and in addition to the rules and regulations enforced by the state for the preservation of the public health through any of its permanent agencies, it may establish, during the emergency, a board of quarantine having special charge or control of the suppression of the epidemic; or special and extraordinary powers may be given to ordinary and existing agencies.[87] Rules and regulations may be adopted not only for the purpose of preventing the spread of diseases afflicting persons[88] but as affecting and detrimental to the public health, also for the suppression and prevention of their spread among domestic animals.[89] The public authorities have the

[85] Jew Ho v. Williamson, 103 Fed. 10; Blue v. Beach, 155 Ind. 121.

[86] See note 25 Am. Law Rev. 45. In Metcalf v. City of St. Louis, 11 Mo. 102, a quarantine law was attacked as unconstitutional. The court said: "The same division of the powers of government as is found in the Constitution of this state is to be found likewise in the Constitutions of the several states of this Confederacy; the same power given to the municipal authority of St. Louis is to be found in the laws of most of the states given to the municipal authorities created by the laws of such states; and similar ordinances to the one under consideration have been adopted and when occasion required enforced by the municipal authorities under the power conferred by their charter; and we know of no single instance in which any court has held that it was not a legitimate exercise of power."

[87] Ferrari v. Board of Health of Escambia County, 24 Fla. 390, 5 So. 1; Forbes v. Board of Health of Escambia County, 28 Fla. 26; Lynde v. City of Rockland, 66 Me. 309.

[88] Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health, 186 U. S. 380, 22 Sup. Ct. 811; Milne v. Davidson, 5 Mart. (N. S.; La.) 409, 16 Am. Dec. 189; City of Anderson v. O'Conner, 98 Ind. 168; Warner v. Stebbins, 111 Iowa, 86, 82 N. W. 457; Haverty v. Bass, 66 Me. 71; Harrison v. City of Baltimore, 1 Gill (Md.) 264; Train v. Boston Disinfecting Co., 144 Mass. 523; People v. Brady, 90 Mich. 459; Highland v. Schulte, 123 Mich. 360; City of St. Louis v. Boffinger, 19 Mo. 13; Lawton v. Steele, 119 N. Y. 226; In re Smith, 146 N. Y. 68. Health officers not authorized to quarantine persons refusing to be vaccinated.

[89] Field v. Clark, 143 U. S. 649; Haller v. Sheridan, 27 Ind. 494. Hydrophobia.

Walker v. Towle, 156 Ind. 639. An ordinance held valid requiring

power to prevent the passing or repassing of quarantine lines or limits;[90] the right to establish and maintain hospitals or pest houses in which sick persons may be confined,[91] and the right to remove to such places persons afflicted.[92] They also have the right to destroy or disinfect property inoculated or supposed to be with the germs of the disease[93] without creating a liability or

the mayor to issue a proclamation compelling all owners of dogs to muzzle them when an epidemic of hydrophobia is reasonably to be apprehended.

Warner v. Stebbins, 111 Iowa, 86; City of Hagerstown v. Witmer, 86 Md. 293; Hubbard v. Preston, 90 Mich. 221; St. Louis S. W. R. Co. v. Smith, 20 Tex. Civ. App. 451; 28 Am. Law Rev. 621; 30 Am. St. Rep. 426; 97 Am. Dec. 82; 2 Tiedeman, State & Fed. Control of Persons & Prop. p. 829.

[90] Wilson v. Alabama G. S. R. Co., 77 Miss. 714. "But regard must also be had to the liberty of the citizen and both principles must be given reciprocal play. The public health must be vigilantly cared for but with due caution that no order intended to secure it shall be so sweeping and arbitrary as to interfere unreasonably with the citizen's right of return to his home neither he nor it having been exposed to infection." Courter v. Board of Health of Newark, 54 N. J. Law, 325; People v. Roff, 3 Parker Cr. R. (N. Y.) 216; Young v. Flower, 3 Misc. 34, 22 N. Y. Supp. 332; Salisbury Com'rs v. Powe, 51 N. C. (6 Jones) 134; State v. Butts, 3 S. D. 577, 54 N. W. 603.

[91] City of Chicago v. Peck, 196 Ill. 260, 63 N. E. 711; City of Anderson v. O'Conner, 98 Ind. 168: "In the exercise of its power and in the performance of its duty the appellant rented the house described in the complaint. * * * It is certain the appellant rented the house for a pest house. The act thus done was not only within the corporate power of the appellant but it was within its duty under the law." Staples v. Plymouth County, 62 Iowa, 364; City of Baltimore v. Fairfield Imp. Co., 87 Md. 352. The placing of a woman afflicted with leprosy in a private house is not the establishment of a hospital for the treatment of infectious diseases as authorized by the statutes. Aull v. City of Lexington, 18 Mo. 401; Boom v. City of Utica, 2 Barb. (N. Y.) 104; City of Richmond v. Henrico County Sup'rs, 83 Va. 204.

[92] Minneapolis, St. P. & S. S. M. R. Co. v. Milner, 57 Fed. 276; Hengehold v. City of Covington, 108 Ky. 752, 57 S. W. 495; Mitchell v. City of Rockland, 41 Me. 363; Haverty v. Bass, 66 Me. 71; Lynde v. City of Rockland, 66 Me. 309; Harrison v. City of Baltimore, 1 Gill (Md.) 264; Spring v. Inhabitants of Hyde Park, 137 Mass. 554; Aaron v. Broiles, 64 Tex. 316; Tiedeman, State & Fed. Control of Persons & Prop. § 44.

[93] In Town of Greensboro v. Ehrenreich, 80 Ala. 579, it was held that a city could not within a proper exercise of its police power prohibit dealing in second-hand garments or bedding not having been used by persons having infectious diseases. Ex parte O'Donovan, 24 Fla. 281; Belcher v. Farrar, 90 Mass. (8 Allen) 325; Train v. Boston Disinfecting Co., 144 Mass. 523, 59 Am.

right of compensation except as given by statute.[94] Quarantine measures relating to the suppression and prevention of contagious and infectious diseases having penalties attached for their violation are usually considered penal statutes and therefore construed strictly.[95]

§ 123. Police power respecting the regulation of occupations.

The state directly or through its subordinate agencies may in the proper exercise of the police power exercise supervision over and a regulation of the manner of carrying on the occupations of those within its jurisdiction.[96] This regulation may consist

Rep. 113. "The board of health is invested by the legislature with the power to make regulations necessary for the health and safety of the inhabitants, extending to all persons, goods and effects arriving in vessels. * * * This is a reasonable regulation, made under the police power of the state, which the board is executing. Nor, legislation having provided that all expenses incurred on account of goods under quarantine laws shall be paid by the owner, is it competent for the owner as a defense to this claim to show that the goods did not require disinfection, and could not have transmitted disease, if they were of the class concerning which the regulation had been made."

Hurst v. Warner, 102 Mich. 238, 47 Am. St. Rep. 525; Webb v. Detroit Board of Health, 116 Mich. 516; Newark & S. O. H. C. R. Co. v. Hunt, 50 N. J. Law, 308, 12 Atl. 697. Destruction of glandered horses authorized; Polinsky v. People, 73 N. Y. 65; Health Dept. of New York v. Knoll, 70 N. Y. 530; Town Council of Summerville v. Pressley, 33 S. C. 56, 11 S. E. 545.

[94] Webb v. Detroit Board of Health, 116 Mich. 516, 72 Am. St. Rep. 541; Farnsworth v. Kalkaska's Sup'rs, 56 Mich. 640, 23 N. W. 465; Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488, 73 N. W. 817.

[95] Pierce v. Dillingham, 96 Ill. App. 300.

[96] Butchers' Union S. H. & L. S. Landing Co. v. Crescent City L. S. L. & Slaughter-House Co., 111 U. S. 746; Yick Wo v. Hopkins, 118 U. S. 356. In this case where a Chinese laundry ordinance passed by the city of San Francisco was held unconstitutional, Mr. Justice Matthews said: "For the very idea that one man may be compelled to hold his life or the means of living, or any material right essential to the enjoyment of life at the mere will of another, seems to be intolerable to any country where freedom prevails, as being the essence of slavery itself." Ferguson v. City of Selma, 43 Ala. 398; Barton v. City of New Orleans, 16 La. Ann. 317; Belcher v. Farrar, 90 Mass. (8 Allen) 325; Wilkinson v. Town of Albany, 28 N. H. 9; Hutton v. City of Camden, 39 N. J. Law, 122, 23 Am. Rep. 203; Weil v. Ricord, 24 N. J. Eq. (9 C. E. Green) 169; Bertholf v. O'Reilly, 74 N. Y. 509; People v. Marx, 99 N. Y. 377.

In re Jacobs, 98 N. Y. 98. "So, too, one may be deprived of his lib-

either in ordinances or orders prohibiting the carrying on of certain occupations within certain limits, for example laundries and slaughtering houses,[97] or the prohibition altogether of certain

erty, and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection." Salisbury Com'rs v. Powe, 51 N. C. (6 Jones) 134; 1 Tiedeman, State & Fed. Control of Persons & Prop. § 120 with authorities cited. Horr. & Bemis, Mun. Ord. §§ 211 et seq.

[97] The power as applied to the control of markets. City of New Orleans v. Graffina, 52 La. Ann. 1082. Regulations respecting *laundries* held *invalid.* Yick Wo v. Hopkins, 118 U. S. 356; In re Laundry Ordinance Case, 7 Sawy. 526, 13 Fed. 229. The city council of San Francisco passed an ordinance that no laundry should be carried on in any block save by the consent of twelve citizens and taxpayers in the block in which the proposed laundry was to be located. Justice Field in speaking for the court against the validity of this ordinance on the ground of unreasonableness said: "A party might not even be able to obtain a license to carry on business on his own land, provided he should possess an entire block, and it should not be occupied by others who could give the recommendation exacted. * * * It may be doubted whether such a restriction could be authorized by any legislative body under our form of government." In re Sam Kee, 31 Fed. 680; City of Shreveport v. Robinson, 51 La. Ann. 1314.

Regulations respecting *laundries* held *valid.* Soon Hing v. Crowley, 113 U. S. 703; Ex parte Moynier, 65 Cal. 33; In re Hang Kie, 69 Cal. 149; City of New Orleans v. Kee, 107 La. 762, 31 So. 1014.

The powers exercised as to *slaughter houses:* Butchers' Union Slaughter House & L. S. Landing Co. v. Crescent City Live Stock Landing & S. H. Co., 111 U. S. 746; Barthet v. City of New Orleans, 24 Fed. 563; Cocker v. Du Village Du Coteau Landing, 16 Rap. Jud. Que. C. S. 72; Boyd v. City Council of Montgomery, 117 Ala. 677; Ex parte Shrader, 33 Cal. 279; Ex parte Heilbron, 65 Cal 609; Tugman v. City of Chicago, 78 Ill. 405; Huesing v. City of Rock Island, 128 Ill. 465; Harmison v. Lewistown, 153 Ill. 313; Rund v. Town of Fowler, 142 Ind. 214; Beiling v. City of Evansville, 144 Ind. 644; Beckham v. Brown, 19 Ky. L. R. 519, 40 S. W. 684; Berthin v. Cres-

trades and occupations.[98] These regulations may also require the possession of certain qualifications or a minimum knowledge

cent City Live-Stock Landing & S. H. Co., 28 La. Ann. 210; Sawyer v State Board of Health, 125 Mass. 182; City of Cambridge v. Trelegan, 181 Mass. 565, 64 N. E. 204; Wreford v. People, 14 Mich. 41; City of St. Paul v. Smith, 25 Minn. 372. Ordinance does not apply to the killing and dressing of a single animal. City of St. Paul v. Byrnes, 38 Minn. 176; City of St. Louis v. Howard, 119 Mo. 41; Cronin v. People, 82 N. Y. 318; City of Portland v. Meyer, 32 Or. 368; City of Spokane v. Robison, 6 Wash. 547; City of Milwaukee v. Gross, 21 Wis. 241; Hahn v. Thornberry, 70 Ky. (7 Bush) 406; Pfingst v. Senn, 94 Ky. 556, 23 S. W. 358. The principle applied in the following cases to the occupations designated:

Brick kilns: Ward v. Washington Corp., 4 Cranch, C. C. 232, 29 Fed. Cas. No. 17,163; State v. St. Louis Board of Health, 16 Mo. App. 8; Kirchgraber v. Loyd, 59 Mo. App. 59; Huckenstine's Appeal, 70 Pa. 102.

Distilleries: Smith v. McConathy, 11 Mo. 517.

Lime kilns; not ordinarily a nuisance: State v. Mott, 61 Md. 297; Reynolds v. Schultz, 34 How. Pr. (N. Y.) 147; Slight v. Gutzlaff, 35 Wis. 675.

Manufactories or establishments with noisome odors: Liebig Mfg. Co. v. Wales (Del.) 34 Atl. 902; First Municipality of New Orleans v. Blineau, 3 La. Ann. 688; Inhabitants of Winthrop v. Farrar, 93 Mass. (11 Allen) 398; Zylstra v. City of Charleston, 1 Bay (S. C.) 382; Brantree Board of Health v. Boyton, 52 Law T. (N. S.). 99.

Rendering and fertilizing establishments: Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U. S. 659; State v. Luce, 9 Houst. (Del.) 396; City of Athens v. Georgia R. Co., 72 Ga. 800; City of Taunton v. Taylor, 116 Mass. 254; Sawyer v. State Board of Health, 125 Mass. 182; Board of Health of Hamilton Tp. v. Neidt (N. J. Eq.) 19 Atl. 318; Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. (8 C. E. Green) 251; Garrett v. State, 49 N. J. Law, 94; Board of Health of North Brunswick Tp. v. Lederer, 52 N. J. Eq. 675; Weil v. Schultz, 33 How. Pr. (N. Y.) 7; Schuster v. Metropolitan Board of Health, 49 Barb. (N. Y.) 450.

Tanneries: May v. People, 1 Colo. App. 157; Lippman v. City of South Bend, 84 Ind. 276; Kennedy v. Phelps, 10 La. Ann. 227; Weil v. Ricord, 24 N. J. Eq. (9 C. E. Green) 169; State v. Cadwalader, 36 N. J. Law, 283.

Miscellaneous: Town of Arkadelphia v. Clark, 52 Ark. 23; Green v. City of Savannah, 6 Ga. 1. Rice growing. City of St. Louis v. Frein, 9 Mo. App. 590. Quarry. City of Kansas v. McAleer, 31 Mo. App. 433; Town Council of Somerville v. Pressley, 33 S. C. 56. Rice growing. Town of Davis v. Davis, 40 W. Va. 464.

[98] O'Dell v. City of Atlanta, 97 Ga. 670, 25 S. E. 173; Com. v. Reid, 175 Mass. 325,—pool selling; State v. Schoenig, 72 Minn. 528; State v. Beattie, 16 Mo. App. 131,—livery stable; State v. Fisher, 52 Mo. 174, —rendering establishment; City of St. Louis v. Fischer, 167 Mo. 654,—dairy; New York Sanitary Utiliza-

of certain branches of study or trades by those desiring to pursue a certain calling, occupation or profession. These, so long as they are uniform in their application, reasonable and pertinent, will be considered valid.[99] The state may also require the se-

tion Co. v. Dept. of Health of New York, 61 App. Div. 106, 70 N. Y. Supp. 510. An act prohibiting the carrying on of the business of rendering held unconstitutional as not a proper exercise of the police power.

[99] *Barbers:* Fillmore v. Van Horn, 129 Mich. 52, 88 N. W. 69; State v. Zeno, 79 Minn. 80, 81 N. W. 748; Ex parte Lucas, 160 Mo. 218.

Dentists: Gosnell v. State, 52 Ark. 228; Patrick v. Perryman, 52 Ill. App. 514; People v. Illinois State Board of Dental Examiners, 110 Ill. 180; Illinois State Board of Dental Examiners v. People, 123 Ill. 227; Ferner v. State, 151 Ind. 247; State v. Creditor, 44 Kan. 565; Knowles v. State, 87 Md. 204; Williams v. State Board of Dental Examiners, 93 Tenn. 619.

Intelligence offices and labor agencies: Keim v. City of Chicago, 46 Ill. App. 445; State v. Von Sachs, 45 La. Ann. 1416. An ordinance requiring a bond of a labor agency held unconstitutional.

Lawyers: Cummings v. State of Missouri, 71 U. S. (4 Wall.) 277; Ex parte Garland, 71 U. S. (4 Wall.) 333; In re Lockwood, 154 U. S. 116; In re Dorsey, 7 Port. (Ala.) 293; Cohen v. Wright, 22 Cal. 293; Ex parte Yale, 24 Cal. 241; In re Thomas, 16 Colo. 441; Ex parte Law, 35 Ga. 285; In re Bradwell, 55 Ill. 535; Bradwell v. State of Illinois, 83 U. S. (16 Wall.) 130. In the opinion of Judge Bradley, page 141, the following is found: "It is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. * * * In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislature to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the state; and in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and

curing of a license from the proper authorities before certain

shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." In re Leach, 134 Ind. 665; State v. Start, 7 Iowa, 499; In re Mills, 1 Mich. 392; State v. Watkins, 3 Mo. 480; Austin v. State, 10 Mo. 591; Ricker's Petition, 66 N. H. 207; Ex parte Fisher, 6 Leigh (Va.) 619; Presby v. Klickitat County, 5 Wash. 329; Cooley, Torts, pp. 289 et seq.

Livery stable keepers: Phillips v. City of Denver, 19 Colo. 179. But such a regulation must be reasonable. Coker v. Birge, 10 Ga. 336; Howland v. City of Chicago, 108 Ill. 496; City of Chicago v. Stratton, 162 Ill. 494; reversing 58 Ill. App. 539; Shiras v. Olinger, 50 Iowa, 571; Williams v. Garignes, 30 La. Ann. 1094, defining a livery stable; Hastings v. Aiken, 67 Mass. (1 Gray) 163; City of Newton v. Joyce, 166 Mass. 83; State v. Beattie, 16 Mo. App. 131; City of St. Louis v. Russell, 116 Mo. 248; Kirkman v. Handy, 30 Tenn. (11 Humph.) 406.

Plumbers: United States v. Ross, 5 App. D. C. 241; State v. Gardner, 58 Ohio St. 599; People v. Warden of City Prison, 81 Hun, 434, 30 N. Y. Supp. 1095, affirmed 144 N. Y. 529; State v. Benzenberg, 101 Wis. 172.

Physicians and surgeons: Richardson v. State, 47 Ark. 562; Love v. Sheffelin, 7 Fla. 40; Great Western R. Co. v. Bacon, 30 Ill. 347; Eastman v. People, 71 Ill. App. 236. A statutory provision will be valid requiring a license for practice in osteopathy but the discrimination against a particular school of medicine is unconstitutional. See, Driscoll v. Com., 93 Ky. 393. France v. State, 57 Ohio St. 1; People v. Arendt, 60 Ill. App. 89; Harbaugh v. City of Monmouth, 74 Ill. 367; Williams v. People, 121 Ill. 84; Eastman v. State, 109 Ind. 278; Orr v. Meek, 111 Ind. 40; State v. Webster, 150 Ind. 607; Massie v. Mann, 17 Iowa, 131; Robinson v. Hamilton, 60 Iowa, 134; Iowa Eclectic Medical College Ass'n v. Schrader, 87 Iowa, 659; State v. Bair, 112 Iowa, 466; Hargan v. Purdy, 93 Ky. 424; Allopathic State Board of Medical Examiners v. Fowler, 50 La. Ann. 1358, 24 So. 809; Hewitt v. Charier, 33 Mass. (16 Pick.) 353; Com. v. Roswell, 173 Mass. 119; Wheeler v. Sawyer (Me.) 15 Atl. 67. A "Christian Scientist" may practice upon securing a certificate of good moral character as required by statute. People v. Phippin, 70 Mich. 6; State v. State Medical Examining Board, 32 Minn. 324; State v. Hathaway, 115 Mo. 36; Dee v. State, 68 Miss. 601; Craig v. Board of Medical Examiners, 12 Mont. 203; Dogge v. State, 17 Neb. 140; Gee Wo v. State, 36 Neb. 241; State v. Buswell, 40 Neb. 158. Nebraska statutes relative to the practice of medicine include persons healing by "Christian Science." In re Roe Chung, 9 N. M. 130, 49 Pac. 952; Ex parte Spinney, 10 Nev. 323; White v. Carroll, 42 N. Y. 161; People v. Fulda, 52 Hun (N. Y.) 65; State v. Van Doran, 109 N. C. 864; State v. Call, 121 N. C. 643; Wert v. Clutter, 37 Ohio St. 347; France v. State, 57 Ohio St. 1; State v. Coleman, 64 Ohio St. 377; State v. Randolph, 23 Or. 74; Paquin v. State Board of Health, 19 R. I. 365.

State Board of Health v. Roy, 22

trades or occupations can be followed.[100] The power also includes the imposition of license fees to defray expenses connected

R. I. 538. The authority given the state board of health to revoke a certificate to practice medicine for grossly unprofessional conduct is constitutional, not conferring judicial powers on the board in violation of the constitution. Antle v. State, 6 Tex. App. 202; People v. Hasbrouck, 11 Utah, 291, 39 Pac. 918; State v. Carey, 4 Wash. 424; State v. Dent, 25 W. Va. 1; State v. Currens, 111 Wis. 431, 87 N. W. 561, citing many cases.

Pharmacists and druggists: People v. Moorman, 86 Mich. 434; State v. Forcier, 65 N. H. 42; Suffolk County v. Shaw, 21 App. Div. 146, 47 N. Y. Supp. 349; Mon Luck v. Sears, 29 Or. 421; State v. Heinemann, 80 Wis. 253.

Steam engineers: Louisville & N. R. Co. v. Baldwin, 85 Ala. 619; State v. McMahon, 65 Minn. 453.

Miscellaneous: Merrill v. Cahill, 8 Mich. 55. Millers and mill owners. City of St. Paul v. Traeger, 25 Minn. 248; City of St. Louis v. Meyrose Lamp Mfg. Co., 139 Mo. 560, 41 S. W. 244. The court here said: "Such ordinances merely prescribe regulations for the orderly conduct of a very necessary * * * business in the large centers of population." City of St. Louis v. Knox, 74 Mo. 79; City of St. Louis v. Weitzel, 130 Mo. 600; White v. Kent, 11 Ohio St. 550. Auction sales. See, also, generally, §§ 132, and those, post, relating to license fees and the granting of licenses.

[100] State v. Orr, 68 Conn. 101; Noel v. People, 187 Ill. 587,—pharmacists; Bessette v. People, 193 Ill. 334,—horse-shoeing; City of Chicago v. Netcher, 183 Ill. 104, 55 N. E. 707. The court here discuss the restrictions thrown about the police power, and say in part: "In order to sustain legislative interference with the business of the citizen by virtue of the police power it is necessary that the act should have some reasonable relation to the subjects included in the power. If it is claimed that the statute or ordinance is referable to the police power the court must be able to see that it tends in some degree towards the prevention of offenses or the preservation of the public health, morals, safety or welfare." An ordinance prohibiting the sale of meat and other articles in a place where dry goods and other specified merchandise is sold was therefore held void on the ground of an invasion of private rights under the guise of the police power. Wilkie v. City of Chicago, 188 Ill. 444, 58 N. E. 1004,—plumbers; Com. v. Hubley, 172 Mass. 58, 51 N. E. 448; City of Grand Rapids v. De Vries, 123 Mich. 570; State v. McMahon, 69 Minn. 265, 72 N. W. 79; State v. Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134; State v. Ashbrook, 154 Mo. 375,—an act classifying dealers in merchandise held unconstitutional; City of Buffalo v. Schleifer, 2 Misc. 216, 21 N. Y. Supp. 913; Dunham v. Trustees of Rochester, 5 Cow. (N. Y.) 462,—requiring license of hucksters; Rosenbaum v. City of Newbern, 118 N. C. 83. In State v. Hill, 126 N. C. 1139, a city ordinance relating to scavenger work, in the absence of a showing that it was reasonable, necessary and just, was held unconstitutional. In Borough of Shamokin v. Flannigan, 156 Pa. 43, an or-

necessarily with supervision having for its object the preservation of the public health.[101]

The requirement that the license necessary shall only be issued by certain officers after investigation, has been held not an improper delegation of the power.[102] There exist as limitations upon all regulations or attempted regulations by the state, constitutional provisions protecting personal rights and property. These regulations are also subject to the general principles of law that they should be uniform, certain and impartial in their application.[103] Guaranties limiting the exercise of the police power in respect to the matters suggested in this, as well as succeeding sections, are to be found in those general constitutional provisions relative to life, liberty and the pursuit of happiness and the special provisions pertaining to personal liberty and security including express or implied prohibitions of imprisonment for debt; religious liberty and freedom of conscience; the right to acquire, hold and dispose of property and to contract; freedom of speech; the right of assembly and petition; the destruc-

dinance requiring the securing of a license for selling goods from house to house not applying to residents of a borough held a discriminating trade regulation and void; and in Brownback v. Borough of North Wales, 194 Pa. 609, an ordinance to the same effect but making no such discrimination was sustained as a valid exercise of the police power. See, also, as holding with Borough of Shamokin v. Flannigan, supra, City of Saginaw v. McKnight, 106 Mich. 32, 63 N. W. 985, and Clements v. Town of Casper, 4 Wyo. 494, 35 Pac. 472. See, also, generally §§ 398 to 407, post, relating to license fees.

[101] City of Fayetteville v. Carter, 52 Ark. 301; City of Hot Springs v. Curry, 64 Ark. 152; Atkins v. Phillips, 26 Fla. 281, 8 So. 429; Mestayer v. Corrige, 38 La. Ann. 707; Ex parte Canto, 21 Tex. App. 61; Horr. & Bemis, Mun. Ord., § 128.

[102] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; Overshiner v. State, 156 Ind. 187. In People v. Hurlbut, 24 Mich. 44, the court said in speaking of this point: "The legislature in prescribing new rules has necessarily a large discretion as to whether the agencies for putting them in force shall be named by themselves or delegated." Com. v. Baldwin, 14 Phila. (Pa.) 93; Com. v. Vrooman, 164 Pa. 306; State v. Hagood, 30 S. C. 519.

[103] Tugman v. City of Chicago, 78 Ill. 405; Lasher v. People, 183 Ill. 226, 55 N. E. 663. Regulations are not invalid if based upon a classification resting on a reasonable ground of difference. State v. Mahner, 43 La. Ann. 496; followed in State v. Dulaney, 43 La. Ann. 500; State v. Garibaldi, 44 La. Ann. 809; State v. Sarradat, 46 La. Ann. 700; State v. Kuntz, 47 La. Ann. 106; Town of Crowley v. West, 52 La. Ann. 526.

tion or impairment of vested or property rights; the taking of private property without payment of just compensation or the taking of life, liberty or property without due process of law.[104] The determination of the validity of all the regulations considered in this section is a judicial question, not legislative.[105]

§ 124. Inspection of foods.

The state, or the state through any of its properly delegated agents, in the proper exercise of the police power looking to the preservation of the public health, can pass laws, rules and regulations providing for the inspection of foods,[106] places of food sup-

[104] Slaughter House Cases, 83 U. S. (16 Wall.) 36; Boyd v. United States, 116 U. S. 616; State v. Williams, 68 Conn. 131; Beebe v. State, 6 Ind. 501. See Tiedeman, State & Fed. Control of Persons & Prop.; Horr. & Bemis, Mun. Ord., §§ 83 et seq., and 211 et seq.; McQuillin, Mun. Ord. §§ 29 et seq.; 10 Century Digest, column 1467 et seq. See, also, authorities cited under §§ 115-117, ante.

[105] Price v. People, 193 Ill. 114, citing Town of Lake View v. Rose Hill Cemetery Co., 70 Ill. 191, Ritchie v. People, 155 Ill. 98, and Booth v. People, 186 Ill. 43.

[106] State v. Campbell, 64 N. H. 402, 13 Atl. 585; Guillotte v. City of New Orleans, 12 La. Ann. 432; Gray v. City of Wilmington (Md.) 43 Atl. 94; City of Buffalo v. Collins Baking Co., 39 App. Div. 432, 57 N. Y. Supp. 347. Ordinance regulating weight of bakers' bread held void as being an unreasonable limitation on right to engage in a lawful trade. See, also, City of Rochester v. West, 29 App. Div. (N. Y.) 125; Ford v. Standard Oil Co., 32 App. Div. (N. Y.) 596. But see People v. Wagner, 86 Mich. 594, holding an ordinance valid regulating "the weight and quantity of bread, the size of the loaf and the inspection thereof." See the following cases especially relating to the inspection, sale and adulteration of milk: Johnson v. Simonton, 43 Cal. 242; State v. Schlenker, 112 Iowa, 642; State v. Fourcade, 45 La. Ann. 717; State v. Stone, 46 La. Ann. 147; Deems v. City of Baltimore, 80 Md. 164; Com. v. Flannelly, 81 Mass. (15 Gray) 195; Com. v. Waite, 93 Mass. (11 Allen) 264; Com. v. Smith, 103 Mass. 444; Id., 141 Mass. 135; Com. v. Wetherbee, 153 Mass. 159; State v. Nelson, 66 Minn. 166; Littlefield v. State, 42 Neb. 223; State v. Campbell, 64 N. H. 402; Polinsky v. People, 73 N. Y. 65; People v. Cipperly, 101 N. Y. 634; People v. West, 106 N. Y. 293; Com. v. Weiss, 139 Pa. 247; State v. Groves, 15 R. I. 208.

Cases passing upon laws relating to the inspection and sale of oleomargarine or other substitutes for butter. Powell v. Pennsylvania, 127 U. S. 678, sustaining Pennsylvania Oleomargarine Act of May 21, 1885; United States v. Eaton, 144 U. S. 677; State of Ohio v. Thomas, 173 U. S. 276; Capital City Dairy Co. v. State of Ohio, 183 U. S. 238; affirming 62 Ohio St. 350; United States v. Ford, 50 Fed. 467; Armour Packing Co. v. Snyder, 84 Fed. 136; Wil-

ply,[107] drugs and other articles intended for use or consumption; regulating their sale,[108] and confiscating and destroying such ar-

kins v. United States, 96 Fed. 837; Cook v. State, 110 Ala. 40; State v. Snow, 81 Iowa, 642; Pierce v. State, 63 Md. 592; Com. v. Farren, 91 Mass. (9 Allen) 489; Com. v. Carter, 132 Mass. 12; Com. v. Huntley, 156 Mass. 236; Com. v. Kelly, 163 Mass. 169; State v. Bassett, 50 Minn. 5; Kansas City v. Cook, 38 Mo. App. 660; State v. Addington, 77 Mo. 110; State v. Marshall, 64 N. H. 549; In re Powell, 10 N. J. Law J. 25; Shivers v. Newton, 45 N. J. Law, 469; Waterbury v. Newton, 50 N. J. Law, 534; Dibble v. Hathaway, 11 Hun (N. Y.) 571; People v. McGann, 34 Hun (N. Y.) 358; People v. Kerin, 39 Hun (N. Y.) 631; People v. Mahaney, 41 Hun (N. Y.) 26; People v. Arensberg, 105 N. Y. 123; Palmer v. State, 39 Ohio St. 236; State v. Dunbar, 13 Or. 591; Com. v. Miller, 131 Pa. 118; Com. v. Shirley, 152 Pa. 170; State v. Smyth, 14 R. I. 100.

Unwholesome foods. In re Ware, 53 Fed. 783,—baking powder containing alum; Schmidt v. State, 78 Ind. 41,—diseased meats; Com. v. Raymond, 97 Mass. 567,—veal less than 4 weeks old; State v. Snyder, 44 Mo. App. 429; People v. Parker, 38 N. Y. 85,—unwholesome meat; People v. Girard, 73 Hun (N. Y.) 457—adulterated vinegar; State v. Smith, 10 N. C. (3 Hawks) 378; State v. Norton, 24 N. C. (2 Ired.) 40; Weller v. State, 53 Ohio St. 77. Statutes or ordinances which provide regulations for the inspection and sale of provisions must not only comply with general constitutional provisions in order to be valid, but must also be so worded and have only such operation as to prevent their being unconstitutional because of an interference with or regulating interstate commerce. See the following cases among many others upon this proposition: State of Minnesota v. Barber, 136 U. S. 313; Brimmer v. Rebman, 138 U. S. 78; Swift v. Sutphin, 39 Fed. 630; In re Barber, 39 Fed. 641; State v. Klein, 126 Ind. 68; Hoffman v. Harvey, 128 Ind. 600.

[107] Monroe v. City of Lawrence, 44 Kan. 607; State v. Nelson, 66 Minn. 166, 68 N. W. 1066,—tuberculosis in dairy herds. An ordinance provided that all milk sold in the city of Minneapolis should come only from dairy herds that had been inspected and subjected satisfactorily to a certain test. The objection was made that the provision was unconstitutional as being extra-territorial. The court said: "The provisions of the ordinance in that regard go only so far as it is reasonably necessary to prevent the milk of diseased cows being sold within the city. * * * The ordinance has no extra-territorial operation. The only subject upon which it operates is the sale of milk within the city."

[108] In re Ah Lung, 45 Fed. 684; City of Jacksonville v. Ledwith, 26 Fla. 163, 7 So. 885; Frost v. City of Chicago, 178 Ill. 250; City of Chicago v. Netcher, 183 Ill. 104. An ordinance prohibiting the sale of provisions in the same place of business where dry goods, clothing or drugs are sold, held unconstitutional.

Isenhour v. State, 157 Ind. 517; State v. Schlenker, 112 Iowa, 642. 84 N. W. 698. The legislative def-

ticles if found unwholesome or unfit. The limitations upon the exercise of the power in this particular are much the same as those against the exercise of the power in other respects. Such regulations must operate uniformly and not discriminate as between individuals or localities;[109] must be reasonable, have for their real purpose the accomplishment of a lawful result, and come within the constitutional provisions protecting personal and property rights. Before articles condemned as unwholesome can be destroyed or confiscated it has been held by some courts that there must be some proceeding provided at which the party whose property is affected can appear upon notice and have an opportunity to defend the findings or charges made.[110]

§ 125. Regulations as to the construction and use of buildings.

Another valid exercise of the police power by the state is the adoption of rules and regulations in regard to the construction

inition of adulterated milk as the "addition of water or any other substance or thing" to milk "is hereby declared an adulteration" held not an unconstitutional invasion of the province of the judiciary.

State v. Stone, 46 La. Ann. 147; Dickhaut v. State, 85 Md. 451; State v. Davidson, 50 La. Ann. 1297, 24 So. 324; City of New Orleans v. Lozes, 51 La. Ann. 1172; Deems v. City of Baltimore, 80 Md. 164, 30 Atl. 648; Stevens v. State, 89 Md. 669, 43 Atl. 919; People v. Wagner, 86 Mich. 594, ordinance regulating weight of loaves of bread held valid; People v. Rotter, 131 Mich. 250, 91 N. W. 167, and cases cited,—oleomargarine; Porter v. City of Water Valley, 70 Miss. 560, 12 So. 828; State v. Bockstruck, 136 Mo. 335,—oleomargarine; City of Kansas v. Cook, 38 Mo. App. 660; State v. Marshall, 64 N. H. 549, 15 Atl. 210,—oleomargarine; Bush v. Seabury, 8 Johns. (N. Y.) 327; Paige v. Fazackerly, 36 Barb. (N. Y.) 392; State v. Pendergrass, 106 N. C. 664; Ex parte Canto, 21 Tex. App. 61; Teague v. State, 25 Tex. App. 577, 8 S. W. 667; 57 Am. Rep. 742, 754 and 1 Am. St. Rep. 645, 650.

[109] Tugman v. City of Chicago, 78 Ill. 405; Pierce v. City of Aurora, 81 Ill. App. 670,—holding an ordinance void for an unreasonable discrimination; City of Cairo v. Feuchter, 159 Ill. 155; Zanone v. Mound City, 103 Ill. 552; State v. Schlemmer, 42 La. Ann. 1166.

[110] Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783. "An order authorizing the health commissioner to condemn and cause to be destroyed fluid or substance intended for food or drink whenever satisfied that its consumption might be injurious to public health, does not authorize the condemnation of such substance, except under extraordinary circumstances, without a trial before a regularly organized tribunal, in a proceeding to which the person whose rights are to be affected is a party, and in which the burden of proving the charges is upon the complain-

and occupation of buildings.[111] These regulations have for their direct purpose not only the protection of life, limb and property, but also the preservation of the public health. The use to which certain buildings can be put may result in a condition exceedingly deleterious to the health and safety not only of the occupants of the buildings themselves but of persons in the immediate vicinity,[112] and the state in such case has the unquestioned right of regulation. Through the cupidity or negligence of property owners, buildings may become unsafe for use, and the proper exercise of the police power by the state includes the passing of regulations remedying such condition.[113] It also includes the

ant, and in which full opportunity is given the adverse party to make his defense."

[111] Easton Com'rs v. Covey, 74 Md. 262, 22 Atl. 266. It is a discretionary power on the part of commissioners having the construction of buildings in charge to refuse a desired permit. The court say: "We think it very clear that under a general power to pass such ordinances as the commissioners may deem necessary and beneficial to the town the commissioners may pass any ordinance which they may judge necessary and beneficial, and it will be valid provided it be reasonable and consonant with the general powers and purposes of the corporation and not inconsistent with the laws and policy of the state."

Sprigg v. Town of Garrett Park, 89 Md. 406, 43 Atl. 813; City of Salem v. Maynes, 123 Mass. 372, holds that such an ordinance applied to one who had already constructed cellar for contemplated building, but see State v. Tenant, 110 N. C. 609. See City of Hudson v. Thorne, 7 Paige (N. Y.) 261, for limitations upon right to prohibit erection of wooden buildings. City of Troy v. Winters, 2 Hun (N. Y.) 63; Hawke v. Brown, 28 App. Div. 37, 50 N. Y Supp. 1032; Signell v. Wallace, 38 Misc. 656, 72 N. Y. Supp. 348, construing New York Laws of 1901, c. 334, known as the tenement house act as amended by Laws of 1901, c. 555; followed and further construed in City of New York v. Herdje, 68 App. Div. 370, 74 N. Y. Supp. 104.

State v. Tenant, 110 N. C. 609. An ordinance prohibiting the erection of a building without permit after a contractor had commenced the construction of a building, as to such building is void.

City of Philadelphia v. Wall, 184 Pa. 557; City of Sioux Falls v. Kirby, 6 S. D. 62, 60 N. W. 156. The legality of an ordinance requiring permit from building inspector considered, with citation of many cases sustaining the position taken. See McQuillin Mun. Ord. §§ 470, 471 with many cases cited; Horr. & Bemis, Mun. Ord. §§ 222-223, and Parker & W. Pub. Health, cc. 19, 20.

[112] Inhabitants of Brookline v. Hatch, 167 Mass. 380; People v. Bennett, 83 Mich. 457; Com. v. Charity Hospital of Pittsburg, 198 Pa. 270. See, also, 18 Am. Rep. 407.

[113] Woodruff v. Bowen, 136 Ind. 431, 34 N. E. 1113; Town of Portsmouth v. Snell, 8 N. H. 338.

right to control or regulate in the first instance, having as a purpose the protection of life, health, and property, either the dimensions,[114] the manner,[115] or the place of construction.[116] This right to regulate the construction of buildings extends to repairs[117] as well as alterations or additions[118] and ornaments or

[114] Attorney General v. Williams, 178 Mass. 330, 59 N. E. 812. See, also, Id., 174 Mass. 476, 55 N. E. 77; People v. D'Oench, 111 N. Y. 359; City of Cleveland v. Lenze, 27 Ohio St. 383.

[115] See cases collected in 43 Alb. Law J. 349, note by W. S. Gordon; Hall v. Nixon, L. R. 10 Q. B. 152; United States v. Cole, 7 Mackey (D. C.) 504, and cases cited in opinion; McCulloch v. Ayer, 96 Fed. 178,—fire escapes; Ex parte White, 67 Cal. 102; Diamond State Iron Co. v. Giles, 7 Houst. (Del.) 11 Atl. 189; Arms v. Ayer, 192 Ill. 601,—fire escape regulation held valid; Ward v. City of Murphysboro, 77 Ill. App. 549; Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; Hubbard v. City of Paterson, 45 N. J. Law, 310; Morford v. Board of Health of Asbury Park, 61 N. J. Law, 386, 39 Atl. 706, construing powers of boards of health as to manner of construction of buildings; Stewart v. Com., 10 Watts (Pa.) 307; Barter v. Com., 3 Pen. & W. (Pa.) 253; Kneedler v. Borough of Norristown, 100 Pa. 368. But in this case it was held that a borough did not have the authority to forbid under penalty the erection of wooden buildings within certain limits. Smith v. Milwaukee Builders' & Traders' Exch., 91 Wis. 360. See, also, McQuillin Mun. Ord. § 471, with many cases cited.

[116] Phillips v. City of Denver, 19 Colo. 179, 34 Pac. 902. An ordinance prohibiting the construction of a livery stable in any block in which a school building is situated or adjacent without other conditions held unreasonable and void.

Village of Louisville v. Webster, 108 Ill. 414; City of Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac. 795; City of Monroe v. Hoffman, 29 La. Ann. 651. The power to prohibit the erection of a building composed of combustible materials in densely built part of town an inherent power in municipal corporations. But State v. Schuchardt, 42 La. Ann. 49, 7 So. 67, holds that a municipal corporation in the absence of legislative authority has no such control over the construction of buildings. See, also, Pratt v. Borough of Litchfield, 62 Conn. 112; Easton Com'rs v. Covey, 74 Md. 262, 22 Atl. 266; City of Baltimore v. Radecke, 49 Md. 228; Hume v. City of New York, 74 N. Y. 264; City of Buffalo v. Chadeayne, 134 N. Y. 165; Livingston v. Wolf, 136 Pa. 519, 20 Am. St. Rep. 936; Corporation of Knoxville v. Bird, 80 Tenn. (12 Lea) 121, 47 Am. Rep. 326; Beall v. City of Seattle, 28 Wash. 593, 69 Pac. 12.

[117] Borough of Stamford v. Studwell, 60 Conn. 85, 21 Atl. 101; First Nat. Bank of Mt. Vernon v. Sarlls, 129 Ind. 201,—validity of repair ordinance determined; City of Newton v. Belger, 143 Mass. 598,—building ordinance held invalid in this case; Donohue v. Kendall, 50 N. Y. Super. Ct. (18 J. & S.) 386; Quigley v. H. W. Johns Mfg. Co., 26 App. Div. 434,

appurtenances.[119] The exercise of the power in this respect goes further and includes the right of inspection of buildings used for certain purposes or by certain classes of people. The right to exercise the power also carries with it the right to enforce orders or regulations of the state or municipal authorities looking to the demolition or the purification of unwholesome, unsafe or infected premises,[120] and the enforcement of ordinances having for their purpose the exercise of rights enumerated in this and other sections. It has been held that in the exercise of the power pos-

50 N. Y. Supp. 98,—permit not necessary for minor repairs; Brennan v. Lachat, 14 Daly (N. Y.) 197; Willy v. Mulledy, 78 N. Y. 310; Douglass v. Com., 2 Rawle (Pa.) 262. See article by W. S. Gordon in 43 Alb. Law J. 349.

[118] City Council of Montgomery v. Louisville & N. R. Co., 84 Ala. 127; Tuttle v. State, 4 Conn. 68; Greene v. Damrell, 175 Mass. 394; Fire Dept. of New York v. Wendell, 13 Daly (N. Y.) 430; City of Philadelphia v. Coulston, 13 Phila. (Pa.) 182; Appeal of Brice, 89 Pa. 85; Carroll v. City of Lynchburg, 84 Va. 803.

[119] State v. Clarke, 69 Conn. 371,—awning; Attorney General v. Williams, 174 Mass. 476, and same case again in 178 Mass. 330, 59 N. E. 812; City of New York v. Wood, 15 Daly, 341, 6 N. Y. Supp. 657; Bowers v. Coulston, 11 Phila. (Pa.) 182.

[120] Dupree v. City of Brunswick, 82 Ga. 727; O'Rourke v. City of New Orleans, 106 La. 313; City of St. Paul v. Clark, 84 Minn. 138, 86 N. W. 893; Egan v. Health Dept. of City of New York, 9 App. Div. 431, 41 N. Y. Supp. 352; Health Dept. of City of New York v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641. The court here held the fact that buildings were unfit for habitation did not necessarily involve the conclusion that they could not be made so. "If they ceased to be in such a condition as to breed pestilence and spread disease and were rendered innoxious the owner of them had a right to have them remain upon the premises even though he might not be permitted to use them as a tenement house. There are many other uses to which he might lawfully put them, and the undoubted power of the public to refuse him permission to rent them to be used for human habitation did not necessarily involve the right to destroy them if they were not fit for that purpose."

Golden v. Health Dept. of City of New York, 21 App. Div. 420, 47 N. Y. Supp. 623, where the owner's remedy is discussed. Smith v. Irish, 37 App. Div. 220, 55 N. Y. Supp. 837. See, also, People v. Board of Health of City of Yonkers, 140 N. Y. 1; Health Dept. of City of New York v. Trinity Church, 145 N. Y. 32; Board of Health of City of Yonkers v. Copcutt, 140 N. Y. 12, 35 N. E. 443. But see Earp v. Lee, 71 Ill. 193; Bushnell v. Robeson, 62 Iowa, 540; Brightman v. Inhabitants of Bristol, 65 Me. 426; Brown v. Perkins, 78 Mass. (12 Gray) 89; Welch v. Stowell, 2 Doug. (Mich.) 332; Clark v. City of Syracuse, 13 Barb. (N. Y.) 32, and Miller v. Burch, 32 Tex. 208.

sessed, the state or the municipal authorities can pass rules, regulations, ordinances or laws capable of enforcement through the imposition of penalties for their violation,[121] consisting either of a fine or imprisonment, or both.[122]

The limits of this work will not warrant the consideration in detail of such ordinances or laws and the extent to which penalties can be imposed. An examination of the cases cited in the notes may partially determine this, and the subject has been very fully treated in a recent work.[123]

§ 126. Regulation and abatement of nuisances.

The state in the valid exercise of the police power may adopt, subject to constitutional and other restrictions and limitations suggested in the preceding sections, such measures as within the discretion of the proper officials, acting in good faith, may be necessary to abate nuisances detrimental in their character to the public health or peace or the safety of either life or property. Regulations concerning the height of fences, bill-boards,[124] the storing of chemicals, inflammable materials, oils, explosives,[125] the carrying of concealed weapons[126] or the discharge

[121] State v. Bright, 38 La. Ann. 4; State v. Zurich, 49 La. Ann. 447.

[122] City of New Orleans v. Danneman, 51 La. Ann. 1093; following State v. Zurich, 49 La. Ann. 447.

[123] Tiedeman, State & Fed. Control of Persons & Prop. See, also, McQuillin, Mun. Ord. §§ 470 & 471, and Parker & W. Pub. Health, cc. 19-21.

[124] Brown v. Spilman, 155 U. S. 665; In re Wilshire, 103 Fed. 620, and cases cited in opinion. The court states that the ordinance regulating bill boards perhaps did border on the unreasonable, but emphasizes the rule that courts will not interfere unless the ordinance is positively and clearly unreasonable: "I entertain a good deal of doubt in respect to the reasonableness of the maximum limitation placed upon the structures in question * * * but the fact that this doubt exists is sufficient reason for the court to decline to adjudge the ordinance invalid." Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 Pac. 192; Crawford v. City of Topeka, 51 Kan. 756, 33 Pac. 476; City of Rochester v. West, 164 N. Y. 510; American Baptist Pub. Soc. v. Wistar, 11 Phila. (Pa.) 212.

[125] Harley v. Heyl, 2 Cal. 477; Wright v. Chicago & N. W. R. Co., 7 Ill. App. 438; Clark v. City of South Bend, 85 Ind. 276; City of Richmond v. Dudley, 129 Ind. 112; Foote v. Fire Dept. of New York, 5 Hill (N. Y.) 99; City Council of Charleston v. Elford, 1 McMul. (S. C.) 234.

[126] Ex parte Cheney, 90 Cal. 617; City Council of Abbeville v. Leopard, 61 S. C. 99.

of fire-arms,[127] getting on or off cars in motion by persons other than employes,[128] requiring flagmen or safety gates at railroad crossings[129] and regulating the speed of trains,[130] are familiar

[127] City of Cottonwood Falls v. Smith, 36 Kan. 401.

[128] Bearden v. City of Madison, 73 Ga. 184; Wice v. Chicago & N. W. R. Co., 193 Ill. 351. Such an ordinance held invalid as unreasonable and void. "It is not meant that the right of passengers to get on or off a moving train between stations cannot be regulated or denied by law or by rules and regulations of the common carrier, but only that it cannot be done by an ordinance of the character and in the terms of the one involved in this case."

Mills v. Missouri, K. & T. R. Co., 94 Tex. 242, 59 S. W. 874. In holding the ordinance unreasonable the court said: "Not only would it be an attempt to regulate the exercise of the right of the passenger to take passage and of the carrier to receive him, but a practical denial of it, assuming that the circumstances existed to give the passenger the right to get upon the train while moving."

[129] Atlantic, S. R. & G. R. Co. v. State, 42 Fla. 358, 29 So. 319; Western & A. R. Co. v. Young, 81 Ga. 397; Pennsylvania Co. v. Stegemeier, 118 Ind. 305; Textor v. Baltimore & O. R. Co., 59 Md. 63; People v. River Raisin & L. E. R. Co., 12 Mich. 389; City of Red Wing v. Chicago, M. & St. P. R. Co., 72 Minn. 240; Dickson v. Missouri Pac. R. Co., 104 Mo. 491; Delaware, L. & W. R. Co. v. East Orange Tp., 41 N. J. Law, 127; Inhabitants of Palmyra Tp. v. Pennsylvania R. Co., 62 N. J. Eq. 601, 50 Atl. 369; Jersey City v. Central R. Co., 40 N. J. Eq. 420.

In Village of Ravenna v. Pennsylvania Co., 45 Ohio St. 118, it is held that the power of a municipal corporation to compel the keeping of a watchman at railroad crossings does not exist independent of express statute.

[130] Richmond, F. & P. R. Co. v. City of Richmond, 96 U. S. 521; Western & A. R. Co. v. Young, 81 Ga. 397; Chicago, B. & Q. R. Co. v. Haggerty, 67 Ill. 113; City of Lake View v. Tate, 130 Ill. 247; Whitson v. City of Franklin, 34 Ind. 392; Cleveland, C., C. & I. R. Co. v. Harrington, 131 Ind. 426; Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555; State v. Miller, 41 La. Ann. 53. The power to limit speed of railroad trains by ordinance cannot be implied. People v. Little, 86 Mich. 126.

Knobloch v. Chicago, M. & St. P. R. Co., 31 Minn. 402. "To justify the courts in declaring a city ordinance, limiting the rate of speed of railroad trains and engines within the city, void, as in restraint of trade, its unreasonableness or want of necessity as a police regulation must be clear, manifest, undoubted, so as to be an abuse of discretion on the part of the council." Robertson v. Wabash, St. L. & P. R. Co., 84 Mo. 119; Grube v. Missouri Pac. R. Co., 98 Mo. 330, 11 S. W. 736; Bluedorn v. Missouri Pac. R. Co., 108 Mo. 439; Gratiot v. Missouri Pac. R. Co., 116 Mo. 450; Prewitt v. Missouri, K. & T. R. Co., 134 Mo. 615; Jackson v. Kansas City, F. S. & M. R. Co., 157 Mo. 621; Donnaher v. State, 16 Miss. (8 Smedes & M.) 649; Buffalo & N. F. R. Co. v. City of

illustrations of a valid exercise of the police power, each having for their purpose the prevention of a nuisance or an act detrimental to the public health, safety or welfare. The power also exists to abate as a nuisance projections on buildings,[131] to require bicycles used after dark to be provided with lights, or otherwise regulate them,[132] to forbid by ordinance their use upon sidewalks,[133] to prohibit the blasting of rock or keeping of explosives without written consent or under other express regulations,[134] and to regulate the speed of vehicles in streets and high-

Buffalo, 5 Hill (N. Y.) 209; Boggero v. Southern R. Co., 64 S. C. 104; see, also, 7 Am. & Eng. R. Cas. 406, and cases cited.

The right to pass such ordinances is based solely upon the proper exercise of the police power and if the conditions are such in a particular case as will make an ordinance unreasonable, having in view the protection of life and limb, it will be held invalid. See as discussing this principle the following cases: Meyers v. Chicago, R. I. & P. R. Co., 57 Iowa, 555; Burg v. Chicago, R. I. & P. R. Co., 90 Iowa, 106; White v. St. Louis & S. F. R. Co., 44 Mo. App. 540; Zumault v. Kansas City & I. Air Line, 71 Mo. App. 670.

The question has been raised that granting the validity of such ordinances when applied to the public streets and places of public corporations, still they will be invalid if applied to the private property of the railway company. See Merz v. Missouri Pac. R. Co., 88 Mo. 672, Grube v. Missouri Pac. R. Co., 98 Mo. 330, and Pennsylvania Co. v. James, 81½ Pa. 194, holding that such ordinances will apply to unin-closed private property or switch yards.

[131] Grove v. City of Ft. Wayne, 45 Ind. 429; Clift v. State, 6 Ind. App. 195, 33 N. E. 211; Bybee v. State, 94 Ind. 443; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354; Jones v. Housatonic R. Co., 107 Mass. 261; Reimer's Appeal, 100 Pa. 182.

[132] Mercer v. Corbin, 117 Ind. 450; City of Des Moines v. Keller, 116 Iowa, 648, 88 N. W. 827; Richardson v. Inhabitants of Danvers, 176 Mass. 413. A bicycle is more properly a machine than a carriage. State v. Missouri Pac. R. Co., 71 Mo. App. 385. "A bicycle belongs to the genus vehicle or carriage." Massinger v. City of Millville, 63 N. J. Law, 123, 43 Atl. 443; Fuller v. Redding, 13 App. Div. 61, 43 N. Y. Supp. 96. See, also, Wheeler v. City of Boone, 108 Iowa, 235, 44 L. R. A. 821.

[133] Mercer v. Corbin, 117 Ind. 450; Holland v. Bartch, 120 Ind. 46; Town of Whiting v. Doob, 152 Ind. 157; Swift v. City of Topeka, 43 Kan. 671; Myers v. Hinds, 110 Mich. 300; Thompson v. Dodge, 58 Minn. 555; Com. v. Forrest, 170 Pa. 40; State v. Collins, 16 R. I. 371.

[134] Hazard Powder Co. v. Volger, 58 Fed. 152; Kinney v. Koopman, 116 Ala. 310; Williams v. City Council of Augusta, 4 Ga. 509; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322; City of Richmond v. Dudley, 129 Ind. 112; James' Adm'r v. Trustees of Harrodsburg, 85 Ky. 191; Com. v. Parks, 155 Mass. 531, 30 N. E. 174; Cameron v. Kenyon-Connell

ways.[135] But in this connection, bicycles, tricycles and automobiles are ordinarily considered vehicles and entitled to the use of that part of the street or highway set aside for them.[136]

It seems to be the rule in connection with the enforcement of such regulations that the municipal authorities have no power to offer rewards for the detection of those violating them,[137] though cases will be found to the contrary.[138]

The power of the public authorities to organize and maintain fire departments has for its basis the exercise of the police power in the protection of property.[139] Many rules and regulations, dif-

Commercial Co., 22 Mont. 312; McAndrews v. Collerd, 42 N. J. Law, 189; Foote v. Fire Dept. of New York, 5 Hill (N. Y.) 99; Hill v. Board of Aldermen of Charlotte, 72 N. C. 55; Wier's Appeal, 74 Pa. 230; Davenport v. Richmond City, 81 Va. 636; Wilson v. Phoenix Power Mfg. Co., 40 W. Va. 413. See, also, 5 Am. St. Rep. 538.

[135] Nealis v. Hayward, 48 Ind. 19. In Kansas City v. McDonald, 60 Kan. 481, it is held that such an ordinance does not apply to fire departments when driving to a fire. Com. v. Worcester, 20 Mass. (3 Pick.) 462; Com. v. Roy, 140 Mass. 432; People v. Little, 86 Mich. 125, 48 N. W. 693, holding such an ordinance applies to an ambulance equally with other vehicles; City Council v. Dunn, 1 McCord (S. C.) 333.

[136] City of Emporia v. Wagoner, 6 Kan. App. 659; Swift v. City of Topeka, 43 Kan. 671; Taylor v. Union Traction Co., 184 Pa. 465. But see State v. Yopp, 97 N. C. 477, where the use of particular highways is held to be a matter of discretion.

[137] Crofut v. City of Danbury, 65 Conn. 294; Murphy v. City of Jacksonville, 18 Fla. 318; Hawk v. Marion County, 48 Iowa, 472; Hanger v. City of Des Moines, 52 Iowa, 193; Lee v. Trustees of Flemingsburg, 37 Ky. (7 Dana) 28; Patton v. Stephens, 77 Ky. (14 Bush.) 324; Gale v. Inhabitants of South Berwick, 51 Me. 174; Loveland v. City of Detroit, 41 Mich. 367.

[138] Crawshaw v. City of Roxbury, 73 Mass. (7 Gray) 374; Borough of York v. Forscht, 23 Pa. 391. See, also, Shuey v. United States, 92 U. S. 73.

[139] People v. Newman, 96 Cal. 605; State v. Denny, 118 Ind. 382; State v. Fox, 158 Ind. 126; City of Lexington v. Thompson, 113 Ky. 540, 68 S. W. 477; Redell v. Moores, 63 Neb. 219. In State v. Moores, 55 Neb. 480, 76 N. W. 175, the right to maintain fire departments was held as vesting in the people of municipalities to be exercised by them without legislative interference. The court said: "The right of local self government in cities and towns * * * existed in this state at the time the present constitution was framed, and was not surrendered upon the adoption of that instrument but is vested in the people of the respective municipalities, and the legislature is powerless to take it away."

Green v. City of Cape May, 41 N. J. Law, 45. The authority conferred by a city charter to pass ordinances

fering in their character in different sections, have for their purpose the establishment of fire limits and prohibit within such limits the construction of buildings except of certain materials.[140]

§ 127. The protection of public morals.

The good morals of the community should be an especial care of the public authorities, and all regulations or laws passed by the proper authorities, looking to this end come within a valid exercise of the police power.[141] The usual limitations as to the exercise of the power apply. It might be said in connection with rules looking to the preservation of public morals that it is espe-

for the suppression of fires includes the power to purchase engines and apparatus for use by a fire department. Leonard v. Long Island City, 65 Hun (N. Y.) 621.

[140] City Council of Montgomery v. Louisville & N. R. Co., 84 Ala. 127, 4 So. 626; Canepa v. City of Birmingham, 92 Ala. 358, 9 So. 180; McKibbin v. Town of Ft. Smith, 35 Ark. 352; McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433; Hine v. City of New Haven, 40 Conn. 478; Ford v. Thralkill, 84 Ga. 169; King v. Davenport, 98 Ill. 305; Village of Louisville v. Webster, 108 Ill. 414; City of Marion v. Robertson, 84 Ill. App. 113; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333; Eichenlaub v. City of St. Joseph, 113 Mo. 395; Lemmon v. Town of Guthrie Center, 113 Iowa, 36, 84 N. W. 986; State v. O'Neil, 49 La. Ann. 1171; Brady v. Northwestern Ins. Co., 11 Mich. 425; Alexander v. Town Council of Greenville, 54 Miss. 659; State v. City of Kearney, 25 Neb. 262; Fire Dept. of New York v. Gilmour, 149 N. Y. 453, 52 Am. St. Rep. 748; Brunner v. Downs, 63 Hun, 626, 17 N. Y. Supp. 633; Gunning System v. City of Buffalo, 62 App. Div. 497, 71 N. Y. Supp. 155; Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684, and cases cited; State v. Johnson, 114 N. C. 846, 19 S. E. 599; Hubbard v. Town of Medford, 20 Or. 315, 25 Pac. 640; Kneedler v. Borough of Norristown, 100 Pa. 368; Respublica v. Duquet, 2 Yeates (Pa.) 493; Douglass v. Com., 2 Rawle (Pa.) 262; Pye v. Peterson, 45 Tex. 312. A municipal corporation does not have the power to establish fire limits without an express grant in charter. City of Eureka v. Wilson, 15 Utah, 67, 48 Pac. 150; Carroll v. City of Lynchburg, 84 Va. 803; City of Olympia v. Mann, 1 Wash. St. 389; Baxter v. City of Seattle, 3 Wash. St. 352; City of Charleston v. Reed, 27 W. Va. 681. See, also, authorities cited, Parker & W. Pub. Health, cc. 19 & 20.

[141] Ex parte Newman, 9 Cal. 510; City of Mt. Sterling v. Holly, 22 Ky. L. R. 358, 57 S. W. 491; State v. Hart, 34 Me. 36; State v. Cainan, 94 N. C. 880; State v. Earnhardt, 107 N. C. 789; Smith v. Elliott, 9 Pa. 345; In re Snell, 58 Vt. 207, and 48 Am. Rep. 274-278. In Maine and Rhode Island there are statutory provisions declaring those things which are immoral to be nuisances per se.

cially difficult in all cases to determine or to distinguish between a proper and an improper exercise of the power. Whether a certain act or series of acts is detrimental to the public morals may be a matter of opinion, and the mere fact that the law in a particular instance characterizes them as such and therefore invalid does not necessarily give to them that character. It is under this particular branch of the exercise of the police power that what may be termed sumptuary laws have been repeatedly passed by public corporations. The baneful effects of acts prohibited by these laws are not always clearly perceived. An individual is entitled to certain personal opinions that as a matter of right he is to determine for himself. Clearly therefore police regulations directed to the prevention or suppression of certain acts or opinions must in order to be valid have clearly established the facts showing or tending to show their unlawful or detrimental character.[142] It is true that the exercise of the police power when once vested in a public corporation or body is a discretionary power within certain limits, to be exercised or not and in the manner determined by the discretion of those to whom it is entrusted; but it is none the less true that this discretionary power is subject to constitutional limitations. Personal rights guaranteed by the constitution cannot arbitrarily be taken away from an individual through the mere discretionary determination of certain officials that the exercise of those rights are detrimental to public morals.[143]

[142] Buell v. State, 45 Ark. 336; Paralee v. Town of Camden, 49 Ark. 165; McAlister v. Clark, 33 Conn. 91; City of Chariton v. Barber, 54 Iowa, 360; City of Grand Rapids v. Bateman, 93 Mich. 135; State v. Webber, 107 N. C. 962; Milliken v. City Council of Weatherford, 54 Tex. 388; State v. Webber, 107 N. C. 962, 22 Am. St. Rep. 920 and 51 Am. Rep. 467, 475; Tiedeman, State & Fed. Control of Persons & Prop. c. 7.

[143] Poyer v. Village of Des Plaines, 18 Ill. App. 225. An ordinance declaring "all public picnics and open-air dances within its limits" to be nuisances, held void. City of Chariton v. Barber, 54 Iowa, 360; State v. Wister, 62 Mo. 592; Ely v. Niagara County Sup'rs, 36 N. Y. 297; People v. Erwin, 4 Denio (N. Y.) 129; City of Chariton v. Barber, 54 Iowa, 360, 37 Am. Rep. 209, also 5 Am. St. Rep. 494. In Nuendorff v. Duryea, 52 How. Pr. (N. Y.) 267, it was held competent for the legislature to determine and declare what regulations and diversions were harmless and innocent and what amusements operate injuriously on others or exert a baneful influence upon the community, thus coming within a valid exercise of the police power. It was also held in this case that if the legis-

§ 128. Regulations controlling or suppressing gambling.

Regulations or ordinances of public authorities having for their purpose the suppression or control of gambling come within a legitimate exercise of the police power, as having for their ultimate end the preservation of the good morals and peace of the community and the suppression of vice and crime,[144] gambling being usually considered, independent of statutory provisions, such an immoral, baneful and vicious act and propensity as to justify its regulation or even suppression. This control may go to the extent either of totally suppressing and prohibiting the act[145] or it may seek to accomplish its purpose by regulating and

lature came to the conclusion that certain pastimes or amusements were hurtful or injurious to others or disturbed the peace of the public, the courts would not ordinarily, even assuming they had the power, pass in review the judgment and discretion exercised by the law-making power.

[144] McLaughlin v. Stephens, 2 Cranch, C. C. 148; Fed. Cas. No. 8,874; United States v. Holly, 3 Cranch, C. C. 656, Fed. Cas. No. 15,381; Carrier v. Brannan, 3 Cal. 328; Ex parte Chin Yan, 60 Cal. 78; Ex parte Tuttle, 91 Cal. 589; State v. Carpenter, 60 Conn. 97; State v. Flint, 63 Conn. 248; Bagwell v. Town of Lawrenceville, 94 Ga. 654,—"Blind Tiger;" Odell v. City of Atlanta, 97 Ga. 670,—betting on horse races; Bobel v. People, 173 Ill. 19.

Frost v. People, 193 Ill. 635. The destruction of gambling apparatus held constitutional and not depriving persons of their property without due process of law. But see Lowry v. Rainwater, 70 Mo. 152, 21 Alb. Law J. 72; Smith v. City of Madison, 7 Ind. 86; Board of Police Com'rs v. Wagner, 93 Md. 182, 48 Atl. 455; Fisher v. McGirr, 67 Mass. (1 Gray) 1; Hibbard v. People, 4 Mich. 126; Jackson v. People, 9 Mich. 111; State v. Woodman, 26 Mont. 348, 67 Pac. 1118; Jefferson City v. Courtmire, 9 Mo. 693.

Lowry v. Rainwater, 70 Mo. 152, 21 Alb. Law J. 72. A statute in Missouri authorized the police of St. Louis to seize gambling paraphernalia and destroy it at once. This was declared unconstitutional as depriving one of property without due process of law. State v. Metcalf, 65 Mo. App. 681; Town of Canton v. Dawson, 71 Mo. App. 235; State v. Hall, 32 N. J. Law, 158; Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121; Updike v. Campbell, 4 E. D. Smith (N. Y.) 570; People v. Sargeant, 8 Cow. (N. Y.) 139; Ah Hoy v. Spencer, 23 Or. 89.

Daly v. State, 81 Tenn. (13 Lea) 228. Tennessee Acts 1883, c. 138, regulating the selling of pools, etc., held unconstitutional. Lincoln v. Smith, 27 Vt. 354; State v. Newman, 96 Wis. 258, 71 N. W. 438. See, also, Lowry v. Rainwater, 70 Mo. 152; 35 Am. St. Rep. 420; 33 Am. Dec. 134 et seq.

[145] Portis v. State, 27 Ark. 362; Odell v. City of Atlanta, 97 Ga. 670; City of Mt. Pleasant v. Breeze, 11 Iowa, 399; City of Owensboro v.

controlling the manner,[146] time[147] and place[148] in which it shall be carried on. Ordinances adopted by municipal corporations which in effect license gambling are null and void if in contravention of statutory provisions.[149]

§ 129. The police power; further illustrations of its exercise.

Some further concrete illustrations of a valid exercise of the police power may perhaps best define and explain its scope. The suppression of disorderly houses;[150] making it unlawful for any

Sparks, 99 Ky. 351, 36 S. W. 4. The right of municipal corporations to pass ordinances prohibiting and suppressing gambling houses not considered authority to prohibit all gambling. State v. Shaw, 39 Minn. 153; State v. Grimes, 49 Minn. 443, 52 N. W. 42; Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121; followed in Updike v. Campbell, 4 E. D. Smith (N. Y.) 570.

[146] McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516; Rice v. State, 3 Kan. 141; City of De Soto v. Brown, 44 Mo. App. 148; City of Plattsburg v. Trimble, 46 Mo. App. 459,—regulating the use of billiard tables by minors.

[147] Shafer v. Mumma, 17 Md. 331; City of St. Louis v. Bentz, 11 Mo. 61; State v. Cowan, 29 Mo. 330; City of Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202; Byers v. Com., 42 Pa. 89.

[148] Ex parte Tuttle, 91 Cal. 589; City of Chicago v. Brownell, 41 Ill. App. 70; State v. O'Leary, 155 Ind. 526, 58 N. E. 703, and cases cited in the opinion; City of Greenville v. Kemmis, 58 S. C. 427.

[149] State v. Lindsay, 34 Ark. 372; In re Ah You, 88 Cal. 99; Ex parte Solomon, 91 Cal. 440; Ex parte Tuttle, 91 Cal. 589; City of Chicago v. Brownell, 41 Ill. App. 70.

[150] Buell v. State, 45 Ark. 336. Under the power given by the Code, "to repress and restrain disorderly houses," a city has authority by ordinance to make it an offense to visit such houses.

Paralee v. Camden, 49 Ark. 165, 4 S. W. 654. The mere presence within the town limits of one who had previously lived there as a prostitute cannot be made a crime. City of Chariton v. Barber, 54 Iowa, 360; State v. Botkin, 71 Iowa, 87; Municipality No. 1 v. Wilson, 5 La. Ann. 747; City of Shreveport v. Roos, 35 La. Ann. 1010; People v. Hanrahan, 75 Mich. 611; State v. Clarke, 54 Mo. 17: "It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who, no doubt, designed to promote morality and it is altogether unwarranted to suppose that the object of the law or the ordinance is for any purpose but to promote the morals and health of the citizens. Whether the ordinance in question is calculated to promote the object is a question with which the courts have no concern." Perry v. State, 37 Neb. 623; People v. Miller, 38 Hun (N. Y.) 82; State v. Webber, 107 N. C. 962; State v. Williams, 11 S. C. 288; Childress

person to have lottery tickets in his possession, or prohibiting their sale;[151] the passage and enforcement of laws requiring the proper observance of Sundays;[152] or regulating the conduct of those appearing on the streets.[153] An ordinance making it an offense to associate or converse with thieves, burglars, gamblers, prostitutes, pickpockets, etc., has been held unconstitutional being an invasion of the rights of personal liberty,[154] nor can the mere

v. City of Nashville, 35 Tenn. (3 Sneed) 347; Ex parte Wilson, 14 Tex. App. 592. Contra, Ogden City v. McLaughlin, 5 Utah, 387; Ogden v. City of Madison, 111 Wis. 413.

[151] Nicholls v. Georgetown Corp., 4 Cranch, C. C. 576, Fed. Cas. No. 10,228; Ex parte Solomon, 91 Cal. 440: "Possession of lottery tickets" ordinance unreasonable and void and in conflict with general laws of the state. Ex parte McKenna, 126 Cal. 429; Ex parte McClain, 134 Cal. 110; Bueno v. State, 40 Fla. 160; Davenport v. City of Ottawa, 54 Kan. 711; State v. Dobard, 45 La. Ann. 1412; City of New Orleans v. Collins, 52 La. Ann. 973; People v. Dycker, 72 App. Div. 308, 76 N. Y. Supp. 111.

Ex parte Kameta, 36 Or. 251. A city ordinance making it unlawful for any person to have in his possession any lottery ticket, unless it be shown that such possession is innocent, or for a lawful purpose, is void, since it puts on defendant the burden of proving his innocence.

[152] Theisen v. McDavid, 34 Fla. 440; Rothschild v. City of Darien, 69 Ga. 503; McPherson v. Village of Chebanse, 114 Ill. 46; affirming 15 Ill. App. 311; City of St. Louis v. Cafferata, 24 Mo. 94; City of Nashville v. Linck, 80 Tenn. (12 Lea) 499; McDowell v. Murfreesboro, 103 Tenn. 726; Ex parte Abram, 34 Tex. Cr. R. 10. But see City of Canton v. Nist, 9 Ohio St. 439.

[153] Braddy v. City of Milledgeville, 74 Ga. 516; Hechinger v. City of Maysville, 22 Ky. L. R. 486, 57 S. W. 619; City of Grand Rapids v. Bateman, 93 Mich. 135; Village of Vicksburg v. Briggs, 102 Mich. 551; In re Bushey, 105 Mich. 64; State v. Bruckhauser, 26 Minn. 301.

State v. Hammond, 40 Minn. 43. Ordinance invalid because in excess of charter powers.

Roderick v. Whitson, 51 Hun (N. Y.) 620. Salvation army. An ordinance prohibiting any person to go about or remain in any of the streets or on the sidewalks of village beating any drum or tambourine or making any noise with any instrument for any purpose whatever, held valid, but see State v. Dering, 84 Wis. 585.

State v. Cainan, 94 N. C. 880; State v. Hunter, 106 N. C. 796; Walsh v. City of Union, 13 Or. 589. A provision in a city charter empowering the city to punish any person or persons who should make any noise or disturbance in any street of the city does not authorize the city to take jurisdiction of and punish the crime of assault with a dangerous weapon.

[154] City of St. Louis v. Fitz, 53 Mo. 582; City of St. Louis v. Roche, 128 Mo. 541; Ex parte Smith, 135 Mo. 223; Cady v. Barnesville, 4 Ohio Dec. 396.

presence of such persons within corporate limits be punished by statute or ordinance.[155] The closing of business places on Sunday,[156] the punishment of individuals following certain occupations,[157] have each been held a valid exercise of the police power,

[155] Buell v. State, 45 Ark. 336; Paralee v. Camden, 49 Ark. 165.

[156] City of Denver v. Bach, 26 Colo. 530. Sunday ordinance held void. McPherson v. Village of Chebanse, 114 Ill. 46; Kansas City v. Grubel, 57 Kan. 436.

City of Shreveport v. Levy, 26 La. Ann. 671. "Before the constitution, Jews and Gentiles are equal; by the law they must be treated alike, hence a municipal corporation cannot by an ordinance give to one sect a privilege which it denies to another, as by providing that persons who close up their places of business on Saturday may open their places on Sunday."

People v. Bellet, 99 Mich. 151. Act No. 148, Laws Mich. 1893, unlawful for barbers to follow their trade on Sunday. State v. Petit, 74 Minn. 376; State v. Zeno, 79 Minn. 80. Gen. St. Minn. 1894, § 6513,—barbers prohibited from keeping their shops open on Sunday. City of St. Louis v. Cafferata, 24 Mo. 94; People v. Havnor, 149 N. Y. 195; Ex parte Northrup, 41 Or. 489, 69 Pac. 445. Sess. Laws Or. 1901, p. 17, prohibiting a barber from following his occupation on Sunday, held not class legislation. City Council of Charleston v. Benjamin, 2 Strob. (S. C.) 508; Craddock v. State, 18 Tex. App. 567; Flood v. State, 19 Tex. App. 584; Ex parte Sundstrom, 25 Tex. App. 133; Gabel v. City of Houston, 29 Tex. 336; State v. Nichols, 28 Wash. 628, 69 Pac. 372. Such ordinances must not be inconsistent with the constitution and laws of the state. City of Canton v. Nist, 9 Ohio St. 439; Baxter's Petition, 12 R. I. 13; Flood v. State, 19 Tex. App. 584; Bohmy v. State, 21 Tex. App. 597.

[157] Rogers v. People, 9 Colo. 450; McAlister v. Clark, 33 Conn. 91; Braddy v. City of Milledgeville, 74 Ga. 516; Robb v. City of Indianapolis, 38 Ind. 49; City of Charlton v. Barber, 54 Iowa, 360; State v. Botkin, 71 Iowa, 87.

State v. Babcock, 112 Iowa, 250. The court in this case held the ordinance invalid, there being a possibility that the penalty imposed for its violation might be larger than that authorized by statute.

Dunn v. Com., 105 Ky. 834; City of New Orleans v. Costello, 14 La. Ann. 37; City of Shreveport v. Roos, 35 La. Ann. 1010; L'Hote v. City of New Orleans, 51 La. Ann. 93; People v. Hanrahan, 75 Mich. 611; State v. Oleson, 26 Minn. 507. Ordinance does not supersede the provisions of the general statutes on the same subject.

City of St. Louis v. Mellville, 3 Mo. App. 597; State v. Clarke, 54 Mo. 17; Givens v. Van Studdiford, 86 Mo. 149.

Ex parte Roberts, 166 Mo. 207. A law prohibiting a person from making or mending burglars' tools held not in contravention of the Bill of Rights, § 30.

Perry v. State, 37 Neb. 623; People v. Miller, 38 Hun (N. Y.) 82; State v. Webber, 107 N. C. 962. Ordinance in this case held invalid; Wong v. City of Astoria, 13 Or. 538; City of San Antonio v. Schneider (Tex. Civ. App.) 37 S. W.

having for their purpose the care and protection of the public morals. An ordinance making it unlawful for any woman to go in and out of a building where a saloon was kept for the sale of liquor, or to frequent, loaf, or stand around such building within fifty feet thereof, was held void in Kentucky as being an unreasonable interference with individual liberty.[158] In some cases it is held that municipal authorities have no power to pass ordinances protecting the public morals except when clearly granted by the legislature,[159] and it is self-evident that municipal corporations have no power to pass ordinances which shall regulate or attempt to regulate the conduct of those outside municipal limits.[160] It is also true that the power to regulate or control does not include the right to suppress.[161]

§ 130. The exercise of the police power in regulating the sale and consumption of intoxicating liquors.

It is clearly within the legitimate province of the state, in the exercise of its police power, to prohibit or control those individual acts that constitute a vice either on account of their character, the extent or the manner of their exercise. The use of intoxicating liquors if carried to an excess becomes a vice, and all authorities are agreed that as such, or considered independently, it leads to poverty, disease and crime. The state as a part of its governmental duties must protect and support the indigent and unfortunate, eradicate and control disease and punish crime. It

767,—particular charter power construed; Ogden City v. McLaughlin, 5 Utah, 387.

[158] Gastineau v. Com., 22 Ky. L. R. 157, 56 S. W. 705.

[159] Goetler v. State, 45 Ark. 454. Municipal corporations have power under the statute to suppress gambling devices but none to license them or impose a license fee upon a ten-pin alley. City of Owensboro v. Sparks, 99 Ky. 351; State v. Horne, 115 N. C. 739. An ordinance forbidding the use of profane language in town was held invalid, the power to pass not granted by the legislature.

[160] Ward v. Washington, 4 Cranch, C. C. 232, Fed. Cas. No. 17,163; Lenox v. Georgetown, 1 Cranch, C. C. 608, Fed. Cas. No. 8,245; City of South Pasadena v. Los Angeles Terminal R. Co., 109 Cal. 315; Begein v. City of Anderson, 28 Ind. 79; Robb v. City of Indianapolis, 38 Ind. 49; State v. Franklin, 40 Kan. 410; City of New Orleans v. Anderson, 9 La. Ann. 323; Jarvis v. Pinckney, 3 Hill (S. C.) 123; Gass v. Greenville Corp., 36 Tenn. (4 Sneed) 62. See, also, cases cited in § 120, note 63.

[161] State v. Owen, 50 La. Ann. 1181; State v. Pamperin, 42 Minn. 320.

may do this either by dealing with the tangible results of certain causes, or it may, through the control and regulation of their cause, accomplish the same thing more effectually and with less expense. Clearly, therefore, the state may prohibit absolutely[162]

[162] Bartemeyer v. State of Iowa, 85 U. S. (18 Wall.) 129, 133. "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent state legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property."

Mugler v. State of Kansas, 123 U. S. 623. "A prohibition simply upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community cannot in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes nor restrict his right to dispose of it but is only a declaration by the state that its use by anyone for certain forbidden purposes is prejudicial to the public interests."

Tanner v. Village of Alliance, 29 Fed. 196; Sheppard v. Dowling, 127 Ala. 1. Individuals not deprived of their rights in the "pursuit of happiness" by the passage of a dispensary law. State v. Davis, 130 Ala. 148; Ex parte Smith, 38 Cal. 702. Ordinance prohibiting noisy amusements and to prevent immorality valid.

Ex parte Campbell, 74 Cal. 20; State v. Wheeler, 25 Conn. 290; Perdue v. Ellis, 18 Ga. 586; Turner v. City of Forsyth, 78 Ga. 683; Hill v. City of Dalton, 72 Ga. 314; Bagwell v. Town of Lawrenceville, 94 Ga. 654; Jones v. People, 14 Ill. 196; Neifing v. Town of Pontiac, 56 Ill. 172; Harbaugh v. City of Monmouth, 74 Ill. 367; Gunnarssohn v. City of Sterling, 92 Ill. 569; Town of Toledo v. Edens, 59 Iowa, 352; State v. Mugler, 29 Kan. 252; Koester v. State, 36 Kan. 27; City of Wilson v. Herink, 64 Kan. 607, 68 Pac. 72; Preston v. Drew, 33 Me. 559; State v. Gurney, 37 Me. 156; Warren v. City of Charleston, 68 Mass. (2 Gray) 98; State v. Johnson, 86 Minn. 121, 90 N. W. 161; State v. Searcy, 20 Mo. 489; State v. Noyes, 30 N. H. 279; Metropolitan Board of Excise v. Barrie, 34 N. Y. 657.

Bertholf v. O'Reilly, 74 N. Y. 509. In the opinion by Judge Andrews the court say: "The right of the state to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The state may prescribe the persons by whom and the conditions under which the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic and individuals against injuries committed by intoxicated persons under the influence of or resulting from their intoxication." "The right to life, liberty and property is not absolute or uncontrolla-

or it may license or limit[103] the sale of intoxicating liquors; or it may prohibit their sale on certain occasions,[104] within certain

ble. The qualification in the bill of rights implies that there may be a deprivation of those rights by due process of law, and governments could not be maintained, in the absence of the power somewhere to regulate the relations of individuals to the state and to each other. Life, liberty or property may be forfeited for crime. Private property may be taken for public use, on condition of compensation, or by taxation, or it may be transferred by judicial process, for the satisfaction of private contracts or as a compensation for private wrongs and injuries. The purpose of the act in question, as indicated by its title, is the suppression of 'intemperance, pauperism and crime.' It cannot be denied that these are public purposes within the legitimate scope of legislation, nor can it be doubted by any observing and intelligent person that the use of intoxicating liquors is the fruitful source of many of the evils which afflict society. Pauperism, vice and crime are the usual concomitants of the unrestrained indulgence of the appetite for strong drink. Impoverishment of families, the imposition of public burdens, insecurity of life and property are consequent upon the prevalence of the great evil of intemperance. If the legislature was impotent to deal with the traffic in intoxicating liquors or powerless to restrain or regulate it in the interest of the community at large, because legislation on the subject might, to some extent, interfere with the use of property or the prosecution of private business, the legislature would be shorn of one of its most usual and important functions. But, as we have said, the right of the Legislature to regulate the traffic is shown by the uniform practice of the government."

Burckholter v. Village of McConnellsville, 20 Ohio St. 308; State v. Paul, 5 R. I. 185; Ex parte Kennedy, 23 Tex. App. 77, 3 S. W. 114. See note 20 L. R. A. 645 defining and distinguishing different liquors or drinks. See, also, 7 L. R. A. 183, 295; 9 L. R. A. 780.

[103] Town of Marion v. Chandler, 6 Ala. 899; Ex parte Marshall, 64 Ala. 266; Ex parte Sikes, 102 Ala. 173; Yahn v. Merritt, 117 Ala. 485. But the statute in this case held unconstitutional because title contains two subjects. Ex parte Wolters, 65 Cal. 269; Ex parte McNally, 73 Cal. 632; Ex parte Christensen, 85 Cal. 208; Ex parte Mansfield, 106 Cal. 400; County of Los Angeles v. Eikenberry, 131 Cal. 461; Paton v. People, 1 Colo. 77; Town of Valverde v. Shattuck, 19 Colo. 104; Perdue v. Ellis, 18 Ga. 586; Town of Douglasville v. Johns, 62 Ga. 423; Mathis v. State, 93 Ga. 38; City of Burlington v. Kellar, 18 Iowa, 59; City of Keokuk v. Dressell, 47 Iowa, 597; U. S. Distilling Co. v. City of Chicago, 112 Ill. 19. License fee not a tax. Dennehy v. City of Chicago, 120 Ill. 627. Amount of license fee cannot be questioned for unreasonableness. People v. Cregier, 138 Ill. 401; City of Lawrenceburg v. Wuest, 16 Ind. 337; Lutz v. City of Crawfordsville, 109 Ind. 466; City of Frankfort v. Aughe, 114 Ind. 77; Wagner v. Town of Garrett, 118 Ind. 114; Linkenhelt v. Town of Garrett, 118 Ind. 599; Moore v. City of Indianapolis, 120 Ind. 483; Franklin v. Westfall, 27 Kan. 614; In re Jahn, 55 Kan. 694. Ginger ale. State v.

hours,[165] without certain places,[166] and the quantities in which they can be sold.[167] It may go further and prohibit the sale to

Harper, 42 La. Ann. 312; State v. Riley, 49 La. Ann. 1617; Kitson v. City of Ann Arbor, 26 Mich. 325; Wolf v. City of Lansing, 53 Mich. 367; Sherlock v. Stuart, 96 Mich. 193; In re Wilson, 32 Minn. 145; State v. Priester, 43 Minn. 373; Kansas City v. Hallett, 59 Mo. App. 160; Kansas City v. Flanders, 71 Mo. 281; City of Kansas v. Zahner, 73 Mo. App. 396; State v. Mumford, 73 Mo. 647; Hershoff v. Treasurer of City of Beverly, 45 N. J. Law, 288; State v. Clark, 28 N. H. (8 Fost.) 176; State v. Hardy, 7 Neb. 377; State v. Bennett, 19 Neb. 191; State v. Stevens, 114 N. C. 873; In re Schneider, 11 Or. 288; Durach's Appeal, 62 Pa. 491; City of Seattle v. Chin Let, 19 Wash. 38; State of Dering, 84 Wis. 585; Rock County v. City of Edgerton, 90 Wis. 288.

Cider being to some extent intoxicating, a license may be imposed upon its sale. Town of Pikeville v. Huffman, 112 Ky. 360, 65 S. W. 794. See, also, Monroe v. City of Lawrence, 44 Kan. 607, sustaining the validity of an ordinance regulating the sale of cider. See Tiedeman, State & Fed. Control of Persons & Prop. pp. 478-504, and 9 L. R. A. 780.

[164] *Election Day:* Newman v. State, 101 Ga. 534; Iowa City v. McInnerny, 114 Iowa, 586; State v. Kidd, 74 Ind. 554; Qualter v. State, 120 Ind. 92; State v. Hirsch, 125 Ind. 207; Com. v. Murphy, 95 Ky. 38; State v. Ludwig, 21 Minn. 202; Schuck v. State, 50 Ohio St. 493; Kane v. Com., 89 Pa. 522; Wooster v. State, 65 Tenn. (6 Baxt.) 533; Haines v. State, 7 Tex. App. 30; Janks v. State, 29 Tex. App. 233.

Sunday: In re McAllister, 51 Fed. 282; Moore v. Bahr, 82 Fed. 19; Dorman v. State, 34 Ala. 216; McCuen v. State, 19 Ark. 636; Ex parte Peacock, 25 Fla. 478; Karwisch v. City of Atlanta, 44 Ga. 204; Hood v. Von Glahn, 88 Ga. 405; Thomasson v. State, 15 Ind. 449; State v. Christman, 67 Ind. 328; Minden Corp. v. Silverstein, 36 La. Ann. 912; Kurtz v. People, 33 Mich. 279; State v. Ludwig, 21 Minn. 202; State v. Harris, 50 Minn. 128; State v. Francis, 95 Mo. 44; Sanders v. State, 34 Neb. 872; City of Piqua v. Zimmerlin, 35 Ohio St. 507; Palmer v. State, 2 Or. 66; Hudson v. Geary, 4 R. I. 485; McNeill v. State, 92 Tenn. 719; Gabel v. City of Houston, 29 Tex. 336; Thon v. Com., 31 Grat. (Va.) 887.

Christmas: Reithmiller v. People, 44 Mich. 282.

Centennial Day: People v. Ackerman, 80 Mich. 588.

Labor Day: Com. v. Francis, 152 Mass. 508.

Fourth of July: People v. Whipple, 108 Mich. 587.

Miscellaneous days: Ex parte Newman, 9 Cal. 502; Thomasson v. State, 15 Ind. 449; State v. Atkinson, 139 Ind. 426; People v. Hobson, 48 Mich. 27; Merchants' Nat. Bank v. Jaffray, 36 Neb. 218; Richardson v. Goddard, 23 How. (U. S.) 41; City of Canton v. Nist, 9 Ohio St. 439; City of Portland v. Schmidt, 13 Or. 17; Hiller v. English, 4 Strob. (S. C.) 486. See, also, 19 L. R. A. 317.

[165] State v. Welch, 36 Conn. 215; State v. Brady, 41 Conn. 588; State v. Hellman, 56 Conn. 190; Baldwin v. City of Chicago, 68 Ill. 418; Hedderich v. State, 101 Ind. 564; Decker v. Sargeant, 125 Ind. 404; Davis v. Fasig, 128 Ind. 271; City of Clinton v. Grusendorf, 80 Iowa, 117; State

certain classes of society needing especially the protection of the state, namely, habitual drunkards and minors,[168] or it may select those to whom shall be granted the privilege of selling and regulate the manner of sale.[169]

v. Freeman, 38 N. H. 426; State v. Thomas, 118 N. C. 1221, but such an ordinance cannot forbid one who sells liquor to occupy his own premises between certain hours. State v. Inhabitants of Borough of Washington, 44 N. J. Law, 605; Ward v. City of Greenville, 67 Tenn. (8 Baxt.) 228. Held unreasonable to close saloons between six P. M. and six A. M. Smith v. City of Knoxville, 40 Tenn. (3 Head) 245; Maxwell v. Corporation of Jonesboro, 58 Tenn. (11 Heisk.) 257; Village of Platteville v. Bell, 43 Wis. 488.

[166] State v. Davis, 130 Ala. 148; Town of Valverde v. Shattuck, 19 Colo. 104; Hart v. State, 88 Ga. 635; People v. Cregier, 138 Ill. 401; Laugel v. City of Bushnell, 96 Ill. App. 618,—selling hop ale within corporate limits of city declared nuisance. Shea v. City of Muncie, 148 Ind. 14; Rowland v. City of Greencastle, 157 Ind. 591.

City of Topeka v. Raynor, 61 Kan. 10. An ordinance of the city of Topeka to the effect that "all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage are common nuisances," was held constitutional and not repugnant to Kansas Bill of Rights, § 1, declaring that "all men are possessed of equal and inalienable natural rights, among which are life, liberty and the pursuit of happiness." In re Wilson, 32 Minn. 145; State v. Schweickardt, 109 Mo. 496.

The application of the principle would certainly sustain laws prohibiting the sale of intoxicating liquors in the neighborhood of educational, charitable, or curative institutions. Dorman v. State, 34 Ala. 216; Trammell v. Bradley, 37 Ark. 374; Ex parte McClain, 61 Cal. 436; Bronson v. Village of Oberlin, 41 Ohio St. 476; Heck v. State, 44 Ohio St. 536. Prohibiting sale within prescribed distance from state fair grounds.

[167] Harris v. Town of Livingston, 28 Ala. 577; Dennehy v. City of Chicago, 120 Ill. 627; Gunnarssohn v. City of Sterling, 92 Ill. 569; Tipton v. People, 156 Ill. 241; In re Jahn, 55 Kan. 694; State v. Brackett, 41 Minn. 33; State v. Priester, 43 Minn. 373; Brittain v. Bethany, 31 Miss. 331; Fagan v. State, 47 N. J. Law, 175; State v. Pratt, 52 N. J. Law, 306; Kizer v. Randleman, 50 N. C. (5 Jones) 428; State v. Drake, 86 Tex. 329. But see Adams v. City of Albany, 29 Ga. 56.

[168] Sprayberry v. City of Atlanta, 87 Ga. 120; State v. Shinn, 63 Kan. 638,—habitual drunkard defined; State v. Yewell, 63 Md. 120; State v. Ferguson, 33 N. H. 424; State v. Austin, 114 N. C. 855. Ordinance prohibiting unmarried minor, except when acting as agent for parent or guardian, from entering a bar room,—valid. Woods v. Town of Prineville, 19 Or. 108; Com. v. Zelt, 138 Pa. 615; Com. v. Silvermen, 138 Pa. 642; Peacock v. Limburger (Tex. Civ. App.) 67 S. W. 518. (1902) Students. See, also, notes 4 L. R. A. 495; 7 L. R. A. 295; 9 L. R. A. 814; and 12 L. R. A. 433.

Such prohibitions or regulations under license statutes to be valid, however, must not regulate interstate commerce; infringe upon or interfere with other rights granted exclusively to the Federal government.[170] The use of blinds, screens, shades, curtains or other devices may be prohibited.[171]

Without the power of enforcing these rules and regulations they would be of little use or efficacy. The state directly or indirectly, this being true of all its laws or regulations, may impose a punishment, either fine or imprisonment, or both,[172] for

[169] Foster v. Police Com'rs of San Francisco, 102 Cal. 483; In re Werner, 129 Cal. 567; Towns v. City of Tallahassee, 11 Fla. 130; Whitten v. City of Covington, 43 Ga. 421; City of Carthage v. Carlton, 99 Ill. App. 338; City of Rochester v. Upman, 19 Minn. 108 (Gil. 78). Such a regulation held to include druggists.

City of Hoboken v. Goodman, 68 N. J. Law, 217, 51 Atl. 1092. The sale of intoxicating liquors at retail held not a privilege of immunity of citizenship protected by the United States constitution. Harrington v. Trustees of Rochester, 10 Wend. (N. Y.) 547; City Council of Charleston v. Feckman, 3 Rich. Law (S. C.) 385; Provo City v. Shurtliff, 4 Utah, 15.

It is a valid police regulation in connection with the sale of intoxicating drinks that women shall not be employed for that purpose. Ex parte Hayes, 98 Cal. 555; Foster v. Police Com'rs of San Francisco, 102 Cal. 483; Adams v. Cronin, 29 Colo. 488, 69 Pac. 590; State v. Reynolds, 14 Mont. 383; City of Hoboken v. Goodman, 68 N. J. Law, 217, 51 Atl. 1902; Walter v. Com., 88 Pa. 137; City of Hoboken v. Greiner, 68 N. J. Law, 592, 53 Atl. 693.

It is a fair police regulation to prohibit any keeper of a house of public entertainment where intoxicating drinks are sold, from permitting the assembling of females there for the purpose of enticing customers.

Adams v. Cronin, 29 Colo. 488, 69 Pac. 590. Ordinance valid prohibiting physicians from giving prescriptions for the procurement of liquor to be used as a beverage. Town of Carthage v. Buckner, 4 Ill. App. 317. See, also, notes on the sale of liquors by Clubs in 2 L. R. A. 494, 6 L. R. A. 128, and 12 L. R. A. 412.

[170] Bowman v. Chicago & N. W. R. Co., 125 U. S. 465; Leisy v. Hardin, 135 U. S. 100; In re Rahrer, 140 U. S. 545; Rhodes v. State of Iowa, 170 U. S. 412; In re Langford, 57 Fed. 570; In re Spickler, 43 Fed. 653; Jervey v. The Carolina, 66 Fed. 1013; Ex parte Edgerton, 59 Fed. 115; Ex parte Jervey, 66 Fed. 957; Bluthenthal v. Southern R. Co., 84 Fed. 920. See also Prentice & E. Commerce Clause of Fed. Const.; Wilson Act Aug. 8, 1890 (26 Stat. 313); and State v. Rhodes, 90 Iowa, 496.

[171] Champer v. City of Greencastle, 138 Ind. 339; Ritchie v. Zalesky, 98 Iowa, 589; Com. v. Costello, 133 Mass. 192; Com. v. Moore, 145 Mass. 244; Com. v. Sawtelle, 150 Mass. 320; People v. Kennedy, 105 Mich. 75; Shultz v. Cambridge, 38 Ohio St. 659. See, also, 24 L. R. A. 768.

[172] Menken v. City of Atlanta, 78 Ga. 668; Bagley v. State, 103 Ga.

the violation of its positive commands, and if in its wisdom it deems expedient, in order to secure the better observance of these positive laws or regulations, it may make those who violate such laws liable civilly for the legitimate and proximate consequences of such violation.[173]

388. A special statute in this case prohibiting the sale of intoxicating liquors within the limits of a certain city was held invalid as contrary to that clause of the constitution forbidding the passage of a special law covered by the provisions of an existing general law.

Caldwell v. State, 101 Ga. 557, holds as in the case just cited, the general local option liquor law not having been repealed at the time of the passage of these special acts. See, also, O'Brien v. State, 109 Ga. 51; Embry v. State, 109 Ga. 61; Griffin v. Eaves, 114 Ga. 65; Harris v. State, 114 Ga. 436; In re Bollig, 31 Ill. 88; Block v. Town of Jacksonville, 36 Ill. 301; State v. Gurlock, 14 Iowa, 444. The City of Ottumwa held as not having the exclusive power of punishing the illegal sale of liquors. Town of Bloomfield v. Trimble, 54 Iowa, 399; Dunn v. Inhabitants of Framingham, 132 Mass. 436; Village of Fairmont v. Meyer, 83 Minn. 456; City of Warrensburg v. McHugh, 122 Mo. 649; Village of Green City v. Holsinger, 76 Mo. App. 567; Howe v. Treasurer of Plainfield, 37 N. J. Law, 145; McMullen v. City Council of Charleston, 1 Bay (S. C.) 46; City of Seattle v. Pearson, 15 Wash. 575; Town of Moundsville v. Fountain, 27 W. Va. 182; Jelly v. Dils, 27 W. Va. 267; Town of Marion v. Chandler. 6 Ala. 899; Franklin v. Westfall. 27 Kan. 614; State v. Grimes, 83 Minn. 460; State v. Harris, 50 Minn. 128. Illegal sales of intoxicating liquors punishable under the general law may also be made punishable by ordinance.

[173] Mulcahey v. Givens, 115 Ind. 286; Wall v. State, 10 Ind. App. 530; Boos v. State, 11 Ind. App. 257; State v. Cooper, 114 Ind. 12; Neuerberg v. Gaulter, 4 Ill. App. 348; Neu v. McKechnie, 95 N. Y. 632; Mead v. Stratton, 87 N. Y. 493; Davis v. Standish, 26 Hun (N. Y.) 608.

The statute makes no distinction between cases in which the loss of the means of support is the direct result of the intoxication and those in which it is the remote result thereof; it only requires that it should be established that the loss of the means of support is the result of such intoxication. Beers v. Walhizer, 43 Hun (N. Y.) 254. *Contra*, Bradford v. Boley, 167 Pa. 506. There is also a well established line of cases based in some states upon express statutory provisions holding that one injured by the wrongful act of a drunken person may have a right of recovery in an action for damages against the dealer in liquor causing the intoxication. See Freese v. Tripp, 70 Ill. 496; King v. Haley, 86 Ill. 106; Roth v. Eppy, 80 Ill. 283; Wilkerson v. Rust, 57 Ind. 172; Church v. Higham, 44 Iowa, 482; Ganssly v. Perkins, 30 Mich. 492; Brooks v. Cook, 44 Mich. 617; Bodge v. Hughes, 53 N. H. 614; Bedore v. Newton, 54 N. H. 117; Reinhardt v. Fritzsche, 69 Hun (N. Y.) 565; Bertholf v. O'Reilly, 74 N. Y. 515; Quinlan v. Welch, 141 N. Y. 158;

§ 131. The police power; miscellaneous illustrations of its valid exercise.

There will be found, upon an examination of the authorities given in the notes, many ordinances and regulations controlling the conduct of those within the jurisdiction of the law-making power, having for their ultimate object the protection of either the property, members or good morals of society.[174]

§ 132. The exercise of the police power continued; the exaction of license fees.

The state through the exercise of its police power has the right to control and regulate the conduct of the citizens and the use of their property so long as such regulation and control has for its purpose and aim the protection and care of life and property. As members of society the citizens of the state or community

Baker v. Beckwith, 29 Ohio St. 314; Northern Pac. R. Co. v. Whalen, 149 U. S. 157; affirming 3 Wash. T. 452; State v. Ludington, 33 Wis. 107.

[174] State of Arkansas v. Kansas & T. Coal Co., 96 Fed. 353. The state in this case held as not having the power to prohibit persons belonging to the "low and lawless type of humanity" from coming into the state. Steiner v. Ray, 84 Ala. 93. The sale and inspection of commercial fertilizers authorized. Palmer v. Way, 6 Colo. 106. An ordinance requiring owners of lots to construct sidewalks in front of them, upheld as a valid police regulation. Platte & D. Canal & Milling Co. v. Lee, 2 Colo. App. 184. Ordinance requiring re-construction of a ditch by boxing or fluming held invalid as an impairment of vested rights. Wettengel v. City of Denver, 20 Colo. 552. Distribution of hand bills prohibited. See, also, City of Philadelphia v. Brabender, 17 Pa. Super. Ct. 331, 201 Pa. 574, citing City of Philadelphia v. Philadelphia & R. R. Co., 58 Pa. 253, and distinguishing People v. Armstrong, 73 Mich. 288.

Griggs v. City of Macon, 103 Ga. 602. Municipality held to have the power to regulate the keeping of dogs within its limits.

City of Cairo v. Coleman, 53 Ill. App. 680. The power to inspect and regulate the sale of "brick, lumber, fire-wood * * *" does not authorize the inspection of articles of merchandise in stationery stores.

Town of Rosedale v. Hanner, 157 Ind. 390. An ordinance forbidding gates to swing outward held reasonable. In Lehigh Coal & Iron Co. v. Capehart, 49 Minn. 539; Sylvester Coal Co. v. City of St. Louis, 130 Mo. 323, and City of St. Charles v. Elsner, 155 Mo. 671, the official weighing and inspection of coal was authorized. In State v. Read, 12 R. I. 137, a law prohibiting the sale of any merchandise within one mile of the place where a religious society is holding an out-door meeting, unless the society consents to the sale, held valid as a police regulation.

owe to their neighbors, and to all who may be interested or affected, the use of their property and the exercise of what might be considered, otherwise, as natural and inalienable rights, in such a manner as not to injure or interfere with either their rights or their property.

The state has the power as a means to an end, namely, the better exercise of the police power, to impose a fee or license upon property used in a certain manner or upon certain callings or occupations. Ordinarily the state has no right under this power to impose license fees for purposes of revenue without regard to the question of the regulation, control, or use of such property or occupation. The imposition of license fees, having for their purpose the better regulation and control of such occupations, or the use of certain property, is valid as coming within the proper exercise of the police power, when they are imposed not for the purpose of obtaining a revenue but for the ostensible one.

As concrete illustrations of the valid imposition of license fees, we find, upon an examination of the authorities, that ordinances or regulations have been held valid licensing vehicles;[175] those

[175] Washington Elec. Vehicle Transp. Co. v. District of Columbia, 19 App. D. C. 462,—automobiles not included.

Johnson v. City of Macon, 114 Ga. 426; Gartside v. City of East St. Louis, 43 Ill. 47; City of Collinsville v. Cole, 78 Ill. 114; Cary v. Borough of North Plainfield, 49 N. J. Law, 110; and Borough of North Plainfield v. Cary, 50 N. J. Law, 176, hold that a vehicle temporarily engaged in a business not subject to the license. Scudder v. Hinshaw, 134 Ind. 56; Tomlinson v. City of Indianapolis, 144 Ind. 142; Veneman v. Jones, 118 Ind. 41. Ordinance designating place where omnibuses and hacks should stand, valid. Snyder v. City of North Lawrence, 8 Kan. 82; City of Henderson v. Marshall (Ky.) 58 S. W. 518. Not applied to wagons used by coal dealer filling orders to customers. Bowser v. Thompson, 103 Ky. 331; Com. v. Page, 155 Mass. 227; State v. Robinson, 42 Minn. 107; City of Helena v. Gray, 7 Mont. 486. Ordinance providing where hacks should stand. Knox City v. Thompson, 19 Mo. App. 523. An ordinance imposing a license fee of twenty-five cents for each wagon run for hire, and an additional license tax for each six months is, as a matter of law, an ordinance for revenue purposes.

City of St. Louis v. Grone, 46 Mo. 574. Vehicles used exclusively for private purposes not subject to license tax.

Town of Cameron v. Stephenson, 69 Mo. 372. A municipality has no power to impose a license tax upon wagons of outside residents engaged in hauling in and out of the city.

City of St. Louis v. Woodruff, 71 Mo. 92. Public sprinkling cart not subject to the license tax. Kansas City v. Smith, 93 Mo. App. 217; City

engaged in certain occupations;[176] hackmen, draymen, expressmen, and others engaged in carrying passengers, baggage or freight;[177] regulating or restraining the soliciting of trade for boats, carriages, or railroads;[178] the use of bicycles; and securing permits by a water company before opening a street for the purpose either of making connections or repairing leaks.[179] If the charge for such license or permit is greater than necessary to

of St. Louis v. Weitzel, 130 Mo. 600; City of Cape May v. Cape May Transp. Co., 64 N. J. Law, 80, 44 Atl. 948; Borough of Belmar v. Barkalow, 67 N. J. Law, 504; City of New York v. Reesing, 77 App. Div. 417, 79 N. Y. Supp. 331; City of Memphis v. American Exp. Co., 102 Tenn. 336. An ordinance taxing wagon tires of different widths according to a certain schedule held not a valid exercise of the police power. "It is a law taxing privileges rather than a police regulation to prevent use of narrow tires."

[176] W. W. Cargill Co. v. State of Minnesota, 180 U. S. 452; Irving v. City of Highlands, 11 Colo. App. 363; Com. v. Brooks, 109 Mass. 355; State v. Schoenig, 72 Minn. 528; City of St. Paul v. Lytle, 69 Minn. 1; Borough of Warren v. Geer, 117 Pa. 207, 11 Atl. 415; International Trading Stamp Co. v. City of Memphis, 101 Tenn. 181. This was a privilege tax, and therefore held ultra vires. See, also, article in 25 Am. Law Rev. 595, by Wm. L. Hodge, and §§ 398-409, post, on license fees, where the subject is fully considered.

[177] State v. Robinson, 42 Minn. 107; Ex parte Battis, 40 Tex. Cr. R. 112, 48 S. W. 513. An ordinance in this case making it a misdemeanor to "stop, stand or detain" any "carriage, hack or vehicle" under certain circumstances and at certain places was held an unreasonable and invalid exercise of the police power as possessed by a city to license, tax and regulate hackmen, draymen and others. Ex parte Vance, 42 Tex. Cr. R. 619, 62 S. W. 568. Here an ordinance requiring hack drivers to remain with their vehicles, excluding those in charge of street cars, was held an unreasonable discrimination. See, also, §§ 399-409, post, where subject of license fees is fully considered.

[178] Lindsay v. City of Anniston, 104 Ala. 257; Com. v. Matthews, 122 Mass. 60; City of Chillicothe v. Brown, 38 Mo. App. 609. In Napman v. People, 19 Mich. 352, it is held that arrangements made, by railroad companies with omnibus companies for the delivery of passengers and their baggage, not unlawful in themselves, and which if carried out in their own cars or on their own premises are exempt from municipal interference, and city ordinances prohibiting hackmen from approaching within a certain distance of trains to solicit business, so far as they attempt such interference, are invalid. Village of Niagara Falls v. Salt, 45 Hun (N. Y.) 41.

[179] Borough of Lansdowne v. Springfield Water Co., 7 Del. Co. R. 506.

Bicycles: Davis v. Petrinovich, 112 Ala. 654; Mercer v. Corbin, 117 Ind. 450; Swift v. City of Topeka, 43 Kan. 671; In re Wright, 29 Hun

cover the cost of the regulation or inspection, such charge will undoubtedly be held unreasonable and the ordinance imposing the same invalid, upon the theory that the police power cannot be invoked or exercised as a general means of raising revenue.[180]

§ 133. The exercise of the police power; further illustrations.

The peace and safety of the community are proper ends for the exercise of the police power by public authorities, and if in their discretion, subject to general limitations, the carrying on of an occupation, the making of certain noises,[181] or the doing of certain acts,[182] are held to disturb the public peace or be a

(N. Y.) 457; Fuller v. Redding, 16 Misc. (N. Y.) 634; State v. Yopp, 97 N. C. 477.

[180] City of Saginaw v. Swift Elec. Light Co., 113 Mich. 660. An ordinance charging electric light companies fifty cents per annum for inspecting each pole maintained by them held unreasonable and invalid, as the actual cost of the inspection did not exceed five cents per pole. City of New Haven v. New Haven Water Co., 44 Conn. 105. See, also, as illustrating text: Taylor v. City of Pine Bluffs, 34 Ark. 603, which holds that under the authority granted to pass ordinances providing for the weighing of hay, wood and other articles offered for sale, a municipal corporation has no power to pass such an ordinance for the purpose of raising revenue.

[181] City of Chariton v. Simmons, 87 Iowa, 226; City of Bloomington v. Richardson, 38 Ill. App. 60; Com. v. Plaisted, 148 Mass. 375. An ordinance restraining itinerant musicians from playing on the street, valid, and a member of the Salvation Army participating in a parade defined as an itinerant musician. This held true although it was claimed that the act was one of religious worship only. The court said that the constitutional guarantee of religious freedom did not prevent the adoption of reasonable rules for the use of streets and public places.

Frazee's Case, 63 Mich. 396. An ordinance in this case which prohibited persons, associations or organizations from marching, parading or driving in or upon or through the streets of the city with musical instruments, bugles, flags or torches without first having obtained the consent of the mayor or common council of the city, was held unreasonable and invalid. Village of Vicksburg v. Briggs, 102 Mich. 551. Boisterous assemblages prohibited; In re Bushey, 105 Mich. 64; State v. White, 64 N. H. 48; Roderick v. Whitson, 51 Hun (N. Y.) 620,—itinerant musicians; Washington Com'rs v. Frank, 46 N. C. (1 Jones) 436. The principle stated in Frazer's Case, 63 Mich. 396, has been followed in City of Chicago v. Trotter, 136 Ill. 430; Anderson v. City of Wellington, 40 Kan. 173, and State v. Dering, 84 Wis. 585.

[182] Saxton v. City of Peoria, 75 Ill. App. 397. Ordinance prohibiting persons from entering upon private

menace to the public safety, comfort and convenience, regulations controlling or prohibiting such acts or occupations are undoubtedly valid.[183]

§ 134. Establishment of public markets.

The power of the public authorities to inspect and control the sale of articles of food intended for consumption is conceded, the object being the preservation of the health of the community. The power exists therefore in municipal authorities to either establish, and then regulate and control public markets,[184] as they

premises against consent of owner is a valid police regulation.

Ex parte McCarver, 39 Tex. Cr. R. 448, 46 S. W. 936. Curfew ordinance held unreasonable and therefore void.

City of Buffalo v. Marion, 13 Misc. (N. Y.) 639. An ordinance prohibiting sale of watches at auction after six o'clock in the evening valid.

[183] City of Cottonwood Falls v. Smith, 36 Kan. 401. Shooting fire arms. City of Newport v. Holly, 108 Ky. 621. Boisterous and disorderly conduct. Com. v. Abrahams, 156 Mass. 57. Speaking in public park without permission. Village of Vicksburg v. Briggs, 102 Mich. 551. Boisterous assemblage. In re Bushy, 105 Mich. 64. General disturbance. State v. Cantieny, 34 Minn. 1. Noisy and disorderly conduct. An ordinance of the city of Minneapolis prohibited the making of "any noise, riot, disturbance or improper diversion." The court in construing the word "noise" said, "We think too, that it was a valid prohibition of the making of any unreasonable 'noise' of a nature to disturb the community such as shouting upon the streets at night even though it should so happen that no one was in fact aroused from sleep, alarmed or disturbed." City of St. Charles v. Meyer, 58 Mo. 86. Charivari. State v. Cainan, 94 N. C. 880. Loud and boisterous swearing. See, also, cases cited generally under this section.

[184] See cases on the establishment and regulation of public markets collected in 27 Am. & Eng. Corp. Cas. 625; Attorney General v. Borough of Cambridge, L. R. 6 H. L. 303; City of New Orleans v. Morris, 3 Woods, 103, Fed. Cas. No. 10,182; Ex parte Byrd, 84 Ala. 17; City of Jacksonville v. Ledwith, 26 Fla. 163; Blanchard v. Ivers, 40 Fla. 117; Bethune v. Hughes, 28 Ga. 560; City of Atlanta v. White, 33 Ga. 229; Caldwell v. City of Alton, 33 Ill. 416.

City of Bloomington v. Wahl, 46 Ill. 489. A grant to a municipality to establish and maintain public markets with the proviso that the mayor may license private markets does not give to that municipality the power to prohibit sales elsewhere than at the public market.

City of Burlington v. Dankwardt, 73 Iowa, 170; Davis v. Town of Anita, 73 Iowa, 325; Guillotte's Heirs v. City of New Orleans, 12 La. Ann. 479. Power of council to discontinue public markets considered. Cougot v.

may be termed, or places at which all articles of food shall be offered for sale and sold, or to regulate and control markets established by private individuals and carried on as private enterprises. The health of the community being, as many times suggested, one of the purposes of the organization of government, and the purity of food and drink having such an important effect upon that health, is a ground for the exercise of the power.[185]

§ 135. Public markets; the power to regulate.

The power to establish and maintain a public market would necessarily carry with it as incidental to that authority or as an implied power, the right to pass all the rules and regulations

City of New Orleans, 16 La. Ann. 21; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71.

Gale v. Village of Kalamazoo, 23 Mich. 344. A city cannot by contract bargain away any of its legislative powers. Henkel v. City of Detroit, 49 Mich. 249; Taggart v. City of Detroit, 71 Mich. 92.

Petz v. City of Detroit, 95 Mich. 169. Power to discontinue public market after once being established considered in this case. City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16); State v. District Ct. of Ramsey County, 84 Minn. 377; City of St. Louis v. Jackson, 25 Mo. 37; Harney v. City of St. Louis, 90 Mo. 214.

Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356. The express power given to establish a market, as a necessary incident to that authority, follows the right to purchase real estate upon which to locate that market. Peterson v. City of New York, 17 N. Y. 449; Wade v. City of New Bern, 77 N. C. 460; State v. Tyson, 111 N. C. 687; White v. Kent, 11 Ohio St. 550; Gall v. City of Cincinnati, 18 Ohio St. 563.

Wartman v. City of Philadelphia, 33 Pa. 202. The right to establish markets and to shift them from place to place does not grant by implication the right to build them on the public highway. City of Palestine v. Barnes, 50 Tex. 538; Yates v. City of Milwaukee, 12 Wis. 673; Wahl v. City of Milwaukee, 23 Wis. 272. Ordinance authorizing city butchers to have their slaughtering done at certain specified establishments, etc., valid.

In common with many powers belonging to municipal corporations, the right to establish markets is a continuing one. See City of Jacksonville v. Ledwith, 26 Fla. 163; Cooper v. City of Detroit, 42 Mich. 584; Gall v. City of Cincinnati, and Wartmen v. City of Philadelphia, supra.

[185] State v. Garibaldi, 44 La. Ann. 809. The power to regulate private markets cannot be delegated or vicariously exercised unless the authority to delegate is specially granted by the legislature, and an ordinance requiring written consent of all property owners within six hundred feet of place selected for market is void. Twelfth St. Market Co. v. Philadelphia & R. Terminal R. Co., 142 Pa. 580.

necessary to maintain the market itself and the foods offered for sale in that condition which best accomplish the purpose the basis of a legal exercise of the power,[186] and so long as these rules and regulations—concerning the manner and the time in which goods shall be offered for sale;[187] the right of inspection by the proper officials of the municipality; the confiscation and destruction of foods tainted or otherwise unfit for food, and provisions that no articles shall be offered for sale except as inspected or offered at such public market,[188]—are uniform and certain in their application, are reasonable, and do not discriminate either as against persons or localities; they are valid and legitimate exercises of the police power of the state.[189]

[186] City of Bowling Green v. Carson, 73 Ky. (10 Bush) 64; Douat v. Beombay, 15 La. Ann. 377; City of New Orleans v. Stafford, 27 La. Ann. 417; Vidalat v. City of New Orleans, 43 La. Ann. 1121; Hatch v. Pendergast, 15 Md. 251.

State v. Rowe, 72 Md. 548. An ordinance setting apart a portion of the public market for the sale of fish and requiring those desiring to engage in such business to pay a yearly license of $100 is void, being an attempt to raise revenue and not a legitimate exercise of the police power.

Graves v. City of Biloxi (Miss.) 29 So. 768; City of St. Louis v. Jackson, 25 Mo. 37; City of St. Louis v. Freivogel, 95 Mo. 533.

Kip v. City of Paterson, 26 N. J. Law (2 Dutch.) 298. An ordinance is illegal and not a reasonable police regulation where it imposes a tax of 5c upon those using market stands for each time used. But in City of Cincinnati v. Buckingham, 10 Ohio, 257, a charge of twenty-five cents was not held unlawful.

Hutchins v. Town of Durham, 118 N. C. 457. The municipal power to revoke a license granted one for the use of a stall in a municipal market house sustained. City of Philadelphia v. Davis, 6 Watts & S. (Pa.) 269; Newson v. City of Galveston, 76 Tex. 559.

[187] Henry v. City of Macon, 91 Ga. 268; City of Bowling Green v. Carson, 73 Ky. (10 Bush) 64; State v. Sarradat, 46 La. Ann. 700.

[188] Henry v. City of Macon, 91 Ga. 268; City of Bloomington v. Wahl, 46 Ill. 489. An ordinance prohibiting persons from keeping, at any hour of the day, private markets outside of the designated public market, held unreasonable as being in restraint of trade and tending to create a monopoly.

City of New Orleans v. Kientz, 52 La. Ann. 950; Town of Crowley v. Rucker, 107 La. 213; Nightingale's Case, 28 Mass. (11 Pick.) 167; Taggart v. City of Detroit, 71 Mich. 92; Hughes v. Recorder's Ct. of Detroit, 75 Mich. 574.

[189] As a rule, ordinances are valid, prohibiting the sale of the usual market commodities at places other than those designated or at the public market. This is especially true where such regulations or prohibitions are uniform and reasonable in their operation and application, see Natal v. State of Louisiana, 139 U.

§ 136. The right to authorize private markets.

As already stated, the public authorities may, in their discretion, either construct and maintain public markets or they may give to certain individuals within their jurisdiction the right to construct and maintain private markets at which foods or other articles intended for consumption by the community may be offered for sale and sold.[190] The power to pass necessary rules for

S. 621; affirming 39 La. Ann. 439; Shelton v. City of Mobile, 30 Ala. 540; Ex parte Byrd, 84 Ala. 17; City of Jacksonville v. Ledwith, 26 Fla. 163; State v. Berard, 40 La. Ann. 172; Gossigi v. City of New Orleans, 41 La. Ann. 522; State v. Davidson, 50 La. Ann. 1297. But an ordinance cannot interfere with the sale of articles in the original packages in which they are imported into the state. Com. v. Ellis, 158 Mass. 555; People v. Keir, 78 Mich. 98; State v. McMahon, 62 Minn. 110; City of St. Louis v. Jackson, 25 Mo. 37; Porter v. City of Water Valley, 70 Miss. 560; Bush v. Seabury, 8 Johns. (N. Y.) 327; City of Buffalo v. Webster, 10 Wend. (N. Y.) 100; State v. Pendergrass, 106 N. C. 664; Town Council of Winnsboro v. Smart, 11 Rich. Law (S. C.) 551; Vosse v. City of Memphis, 77 Tenn. (9 Lea) 294; Newson v. City of Galveston, 76 Tex. 559. Though some cases hold such ordinances in restraint of trade, as tending to create a monopoly, oppressive and unreasonable, and therefore illegal, see Bethune v. Hughes, 28 Ga. 560; Henry v. City of Macon, 91 Ga. 268; Caldwell v. City of Alton, 33 Ill. 416. Decision based upon limited charter provisions. City of Bloomington v. Wahl, 46 Ill. 489; City of Davenport v. Kelly, 7 Iowa, 102; City of Burlington v. Dankwardt, 73 Iowa, 170; City of Bowling Green v. Carson, 73 Ky. (10 Bush) 64; Lamarque v. City of New Orleans, 1 McGloin (La.) 28; State v. Blaser, 36 La. Ann. 363; Mestayer v. Corrige, 38 La. Ann. 707; Vidalat v. City of New Orleans, 43 La. Ann. 1121; Hughes v. Recorder's Ct. of Detroit, 75 Mich. 574; City of St. Paul v. Laidler, 2 Minn. 190 (Gil. 159).

[190] Natal v. State of Louisiana, 139 U. S. 621; Le Claire v. City of Davenport, 13 Iowa, 210; State v. Berard, 40 La. Ann. 33; State v. Barthe, 41 La. Ann. 46. Ordinance prohibiting private markets within radius of six squares from public market does not contemplate measurement on an air line, but a distance of six squares over which customers would be able to walk from one market to the other.

State v. Natal, 42 La. Ann. 612. Square and block mean the same thing, in regard to distance from city market.

State v. Dubarry, 44 La. Ann. 1117. A city ordinance giving the city council the power to grant permits for the establishment or maintenance of private markets was held invalid, the discretion vested by such ordinance in the city council being in no way regulated or controlled. State v. Dubarry, 46 La. Ann. 33; Gossigi v. City of New Orleans, 41 La. Ann. 522; City of New Orleans v. Faber, 105 La. 209. New Orleans ordinance No. 312, adopted under au-

keeping the building itself and the articles within it in a healthful and proper condition exists in the same degree and to the same extent as in the maintenance of public markets.[191]

§ 137. The control of nuisances.

Public authorities have also the further power either inherently possessed or as subordinate agencies obtained through the grant of lawful authority to regulate and suppress or abate what are commonly called public nuisances.[192] This right to control

thority of Act No. 34 of 1900, not unconstitutional as prohibiting a private market within 3200 feet of a public market when prior to the passage of the ordinance a dealer had established a market within the prohibited lines. The court held that every citizen holds his property subject to the proper exercise of the police power and that he did not acquire a vested right to conduct the same business in the same place.

Com. v. Ellis, 158 Mass. 555. Ordinance prohibiting selling of goods or articles in any street or from any building, except in accordance with a permit from superintendent of streets is reasonable, constitutional and valid.

Porter v. City of Water Valley, 70 Miss. 560; Schopp v. City of St. Louis, 117 Mo. 131. A power "to regulate the use of streets" does not authorize an ordinance leasing space on a street in front of business houses for produce dealers, such use of street being a nuisance and unlawful.

[191] City of Jacksonville v. Ledwith, 26 Fla. 163; City of New Orleans v. Morris, 3 Woods, 103, Fed. Cas. No. 10,182.

[192] Soltau v. De Held, 2 Sim. (N. S.) 133. "I conceive that to constitute a public nuisance the thing must be such as in its nature or its consequences, is a nuisance, an injury or a damage to all persons who come within the sphere of its operation though it may be so in a greater degree to some than it is to others."

Ex parte Taylor, 87 Cal. 91; Beckley v. Skroh, 19 Mo. App. 75. "The only requirement of the law is, that the damage must be real, not fanciful; not a mere annoyance to a person of fastidious tastes and habits, but such sensible and real damages as a sensible person, if subjected to it, would find injurious to him. Any use of property that corrupts the atmosphere with noxious vapors and noisome smells, producing injury to property or health, or impairing the comfortable enjoyment of it as a dwelling, etc., is a nuisance inviting a recovery for the damage."

Westcott v. Middleton, 43 N. J. Eq. (16 Stew.) 478; Board of Health v. Jersey City, 55 N. J. Eq. 116; Board of Health of Yonkers v. Copcutt, 140 N. Y. 12.

City of Rochester v. Collins, 12 Barb. (N. Y.) 559. The power given to abate and remove nuisances in this case was held as conferring no authority to prevent them nor to impose penalties for their creation.

Clark v. City of Syracuse, 13 Barb. (N. Y.) 32; Rogers v. Barker, 31 Barb. (N. Y.) 447; Hellen v. Noe,

and suppress public nuisances comes within the valid exercise of the police power by the state and has for its purpose the care and protection of society as a whole and the regulation of the use of property and the acts of individuals as to best conserve the public interests and lead to that condition of the state resulting in the greatest advantage to all.

The various acts or conditions named in preceding sections may be controlled and regulated not only as especially detrimental to the public health, safety or morals, but directly as nuisances and indirectly detrimental or injurious.

A nuisance has been defined as "Anything that produces an annoyance, anything that disturbs one or is offensive; but in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, or from his own improper, indecent or unlawful personal conduct, working an obstruction of or injury to a right of another or of the public, and producing such material annoyance, inconvenience, discomfort or hurt, that the law will presume a consequent damage." And further: "A public nuisance is a violation of a public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the

25 N. C. (3 Ired.) 493; Appeal of Borough of Butler (Pa.) 1 Atl. 604.

Com. v. Miller, 139 Pa. 77. "If it affects the rights of the community in general; not merely of a few persons; if it damages or menaces all persons who come within the sphere of its operation though it may vary in its effects on individuals it amounts to a common or a public nuisance."

Com. v. Yost, 197 Pa. 171; Parker & W. Pub. Health, § 178. "If the unwarranted act or thing complained of does in fact operate injuriously upon the rights of the public, it is a common nuisance, irrespective of any motive or intent, wrongful or innocent, on the part of the person charged. No excuse or defense is possible. The fact being established, that the act or thing endangers the life, health or property of the public, or any considerable part of it, the offense is proved, and there can be no justification. Every person is absolutely bound so to conduct himself, and so to exercise what are regarded as his natural or personal rights, as not to interfere unnecessarily or unreasonably with other persons in the exercise of rights common to all citizens. Every breach of this obligation constitutes a nuisance. Such has always been the law; the principle has been invariable."

duty of a person to do, and the omission to do which results injuriously to the public. Every person owes certain duties to the public, and the failure to discharge them, whereby the public is injured, is regarded at common law as a quasi crime. Among these duties is that of so using his own property as not to injure the public."[193]

Motive ordinarily is not one of the essentials of an act necessary to characterize it as a nuisance. Neither is it true that the mere legislative determination that a certain act or use of property is a nuisance, establishes the fact that such act, condition

[193] Wood, Nuisances, §§ 1, 17; Costello v. State, 108 Ala. 45; City & County of San Francisco v. Buckman, 111 Cal. 25; Walker v. Jameson, 140 Ind. 591; City of Evansville v. Miller, 146 Ind. 613; City of Centerville v. Miller, 57 Iowa, 56; Municipality No. 1 v. Wilson, 5 La. Ann. 747; Board of Aldermen of Opelousas v. Norman, 51 La. Ann. 736; Hisey v. City of Mexico, 61 Mo. App. 248; Ex parte O'Leary, 65 Miss. 80.

Hutton v. City of Camden, 39 N. J. Law, 122. "The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere." * * * "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common-law right, and is derived in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court. The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind."

In re Jacobs, 98 N. Y. 98; People v. Rosenberg, 138 N. Y. 410; Wilson v. Phoenix Mfg. Co., 40 W. Va. 413; Town of Davis v. Davis, 40 W. Va. 464; Huntington & K. Land Development Co. v. Phoenix Mfg. Co., 40 W. Va. 711; People v. Burtleson, 14 Utah, 258. One who uses his property so as to annoy, injure or endanger the comfort, repose, health or safety of three or more persons, though he does so in conducting a lawful business in a reasonable and careful manner and in good faith, commits a nuisance. See, also, definitions in preceding note.

or use of property is a nuisance, without regard, as the cases hold, to its nature, situation and use.[194]

[194] Ward v. City of Little Rock, 41 Ark. 526; Gaines v. Waters, 64 Ark. 609; Town of Arkadelphia v. Clark, 52 Ark. 23; Ex parte Ah Fook, 49 Cal. 402; Ex parte Fiske, 72 Cal. 125; In re Flaherty, 105 Cal. 558. In Los Angeles County v. Spencer, 126 Cal. 670, Cal. St. 1881, p. 88, as amended by St. 1889, p. 413, and 1891, pp. 260 and 268, held constitutional. The power granted to declare orchards and nurseries nuisances where certain pests exist not interfering or encroaching upon other executive, judicial or legislative functions of government.

City of Denver v. Mullen, 7 Colo. 345; Darst v. People, 51 Ill. 286. The declaration that all intoxicating liquors constitute a nuisance held in this case not to make them such without judicial determination.

Chicago, R. I. & P. R. Co. v. City of Joliet, 79 Ill. 25. See, also, Harmon v. City of Chicago, 110 Ill. 400; and Moses v. U. S., 16 App. D. C. 428; Laugel v. City of Bushnell, 197 Ill. 20; Nazworthy v. City of Sullivan, 55 Ill. App. 48; Village of Des Plaines v. Poyer, 123 Ill. 348; Everett v. City of Council Bluffs, 46 Iowa, 66; Train v. Boston Disinfecting Co., 144 Mass. 523; City of Newton v. Joyce, 166 Mass. 83; State v. Mott, 61 Md. 297; Pieri v. Town of Shieldsboro, 42 Miss. 493; Lake v. City of Aberdeen, 57 Miss. 260; Ex parte O'Leary, 65 Miss. 80; Liles v. Cawthorn, 78 Miss. 559.

City of St. Paul v. Gilfillan, 36 Minn. 298. The charter conferring power upon a city council to remove or abate nuisances was held as conferring no power to declare what acts or omissions constitute a public nuisance.

New Jersey R. & Transp. Co. v. Jersey City, 29 N. J. Law (5 Dutch.) 170; Board of Health of Asbury Park v. Rosenthal, 67 N. J. Law, 216, 50 Atl. 439; Coast Co. v. Borough of Spring Lake, 56 N. J. Eq. 615; affirmed 58 N. J. Eq. 586; Underwood v. Green, 42 N. Y. 140; Golden v. Health Dept. of New York, 21 App. Div. 420, 47 N. Y. Supp. 623. In Griffin v. City of Gloversville, 67 App. Div. 403, 73 N. Y. Supp. 684, the question of whether a particular thing is a common nuisance held to be one for judicial determination; the declaration by city ordinance that it is such, not giving it that character.

Grossman v. City of Oakland, 30 Or. 478. Ordinance absolutely prohibiting a railroad company from fencing its tracks in the platted portion of the city, and declaring such fence a nuisance, is void, since the city cannot assert a particular use of property to be a nuisance, unless such use comes within the common law or statutory idea of a nuisance, or is so in fact.

Com. v. Yost, 11 Pa. Super. Ct. 323, holds that a board of health has the power to declare and abate as a nuisance whatever was per se a nuisance at common law. Miller v. Burch, 32 Tex. 208; Pye v. Peterson, 45 Tex. 312; Bittenhaus v. Johnston, 92 Wis. 588. See, also, McQuillin, Mun. Ord. §§ 440-444; Parker & W. Pub. Health, §§ 177 et seq., and Horr. & Bemis, Mun. Ord. §§ 250-255; State v. Indianapolis Union R. Co., 160 Ind. 45, 60 L. R. A. 831.

In a recent case in the supreme court of the United States the late Justice Miller said: "The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."[195] The use of care in the doing of

Public authorities ordinarily without legislative authority cannot legalize a common nuisance. State v. Luce, 9 Houst. (Del.) 396; Lewis v. Alexander, 24 Can. Sup. Ct. 551. Some cases, however, hold contrary to the great weight of authority that city officials may be vested with the power to determine and abate nuisances. See Com. v. Yost, 11 Pa. Super. Ct. 323; Roberts v. Ogle, 30 Ill. 459; Block v. Town of Jacksonville, 36 Ill. 301.

North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207. "In doubtful cases where a thing may or may not be a nuisance depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions under a general delegation of power like the one we are considering, their action under such circumstances would be conclusive of the question." City of St. Louis v. Stern, 3 Mo. App. 48; Green v. Lake, 60 Miss. 451.

[195] Yates v. City of Milwaukee, 77 U. S. (10 Wall.) 497, 505. See, also, Lawton v. Steele, 119 N. Y. 233, where the court say: "The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests or to the injury of the health, morals or welfare of the community, public nuisances, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere evasion, or was framed for the purpose of individual oppression, it will set it aside as unconstitutional, but not otherwise."

an act is not a question ordinarily involved in a determination of its character as a nuisance. As said by a writer on this subject, "It is merely a question of results."[196]

In the notes will be found many cases classified and chronologically arranged, illustrating the application of controlling principles to individual cases.[197] The grant to a municipal cor-

[196] Cahill v. Eastman, 18 Minn. 324 (Gil. 292); Tremain v. Cohoes Co., 2 N. Y. (2 Comst.) 162; Wood, Nuisances, § 27. "The question of care is not an element in this class of wrongs; it is merely a question of results, and the fact that injurious results proceed from the business under such circumstances would have a tendency to show the business a nuisance per se rather than to operate as an excuse or defense, and the courts would feel compelled to say that, under such circumstances, the business is intolerable, except so far removed, from residences and places of business as to be beyond the power of visiting its ill results upon individuals or the public."

[197] Ordinances prohibiting the running at large of *domestic animals*. Brophy v. Hyatt, 10 Colo. 223; City of Quincy v. O'Brien, 24 Ill. App. 591; Cochrane v. City of Frostburg, 81 Md. 54; Com. v. Chase, 60 Mass. (6 Cush.) 248; Grover v. Huckins, 26 Mich. 476; Perry v. Chatham County Com'rs, 130 N. C. 558, 41 S. E. 787; Crosby v. Warren, 1 Rich. Law (S. C.) 385; Moore v. State, 79 Tenn. (11 Lea) 35; City of Waco v. Powell, 32 Tex. 258; Washington Corp. v. Lynch, 5 Cranch, C. C. 498, Fed. Cas. No. 17,231.

Ordinances relative to the running at large of *dogs*. Washington Corp. v. Lynch, 5 Cranch, C. C. 498, Fed. Cas. No. 17,231; Haller v. Sheridan, 27 Ind. 494; Com. v. Dow, 51 Mass. (10 Metc.) 383; Com. v. Chase, 60 Mass. (6 Cush.) 248; City of Faribault v. Wilson, 34 Minn. 254; City of Carthage v. Rhodes, 101 Mo. 175. But see City of Washington v. Meigs, 1 MacArthur (D. C.) 53, where it is held that an ordinance which punishes by fine or imprisonment the keeping of dogs without the payment of the license required is invalid.

The *keeping* and *use* of *animals* for certain purposes regarded as a public nuisance: Gibson v. Town of Harrison, 69 Ark. 385,—an ordinance regulating keeping of dogs held valid; Ex parte Foote, 70 Ark. 12, 65 S. W. 706; In re Linehan, 72 Cal. 114,—an ordinance prohibiting the keeping of more than two cows within certain parts of the city of San Francisco, valid; Hoops v. Village of Ipava, 55 Ill. App. 94; Walker v. Towle, 156 Ind. 639,—an ordinance providing for the muzzling of dogs, valid; State v. Holcomb, 68 Iowa, 107,—an ordinance prohibiting the maintenance of hog pens held not unreasonable in city of 15,000 people.

City of Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988, the fact that pig pens were kept as clean as they could be under the circumstances constituted no defense when evidence proved that the stench therefrom was a public nuisance.

City of Washington v. Meigs, 1 MacArthur (D. C.) 53. In the ab-

poration to control or regulate a nuisance, or the general grant of the right to exercise the police power, it seems to be quite generally held, does not carry with it the power to totally sup-

sence of a stated law declaring the keeping of dogs an abatable nuisance, their simple ownership could not be punished as an offense under the general implied powers of a city to prescribe police regulations.

State v. Mahner, 43 La. Ann. 496; City of Hagerstown v. Witmer, 86 Md. 293. An ordinance prohibiting *dogs* from running at large held good under general authority to abate nuisances. In Com. v. Young, 135 Mass. 526, the power of a board of health to interfere with the "employment" of one keeping one hundred and fifty *swine*, considered. State v. Boll, 59 Mo. 321; Board of Health of Raritan Tp. v. Henzler (N. J. Eq.) 41 Atl. 228. In Fox v. Mohawk & H. R. Humane Soc., 165 N. Y. 517, 59 N. E. 353, Laws New York, 1896, c. 448, authorizing the humane society to dispose of unlicensed dogs held not unconstitutional, the killing of such dogs without notice to the owner not considered as the taking of property without due process of law, the court holding that there can be no property in dogs as against the police power of the state. Ex parte Robinson, 30 Tex. App. 493. See, also, McQuillin Mun. Ord. §§ 449-451, with cases cited relative to the establishment and maintenance of dairies and cow stables and the keeping of livery stables, hogs and hog pens.

The doing of certain acts regarded as a nuisance: Johnson v. Baltimore & P. R. Co., 4 App. D. C. 491. Unlawful occupation of a public thoroughfare a public nuisance to be abated by public authorities.

Moses v. U. S., 16 App. D. C. 428. Act of Cong. Feb. 2d, 1899 (30 Stat. 81z), declaring the emission of dense black smoke or cinders from any smoke stack or chimney a public nuisance, not unconstitutional. The court also held that no discrimination was made through its sole application to "any stationary engine, steam boiler or furnace."

Ex parte Casinello, 62 Cal. 538. Throwing garbage into the public streets, a nuisance.

People v. Truckee Lumber Co., 116 Cal. 397. The placing of deleterious refuse in a stream, thereby poisoning the waters and killing fish, are acts constituting a public nuisance.

Ex parte Knapp, 127 Cal. 101. The transportation of game from one county to another cannot be interfered with. The weight of authority seems to be contrary to this holding, however.

May v. People, 1 Colo. App. 157. To prohibit storing hides within a city without permission from the city council is not within the powers conferred on municipal authorities to declare what shall be a nuisance and to abate the same. In Northwestern Fertilizing Co. v. Village of Hyde Park, 70 Ill. 634, the license to manufacture granted by town authorities to a fertilizing company held not a continuing right but only a police regulation under which the company could claim no privileges.

North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207. The running of street cars by steam declared a nuisance.

press a nuisance. Other limitations and restrictions upon the power of municipal authorities to control, regulate or abate nuisances, will be found in the constitutional restrictions and lim-

In State v. Heidenhain, 42 La. Ann. 483. Smoking in street cars not permitted.

Boehm v. City of Baltimore, 61 Md. 259; People v. Lewis, 86 Mich. 273. Smoke ordinance exempting dwelling houses and steamboats from its operation is not invalid as unreasonable discrimination between classes.

City of Grand Rapids v. De Vries, 123 Mich. 570. Garbage ordinance is reasonable and valid, since refuse accumulations of themselves might be legally regarded as nuisances.

City of St. Paul v. Gilfillan, 36 Minn. 298. Ordinance No. 618, as passed by the city council of St. Paul, Minnesota, void, the ordinance declaring the emission of dense smoke from smoke stacks a public nuisance. The court held that the question of whether such act was a nuisance depended upon the facts in the case.

City of St. Louis v. Edward Heitzeberg Packing & Provision Co., 141 Mo. 375. The court here followed the doctrine announced in City of St. Paul v. Gilfillan, and held that a city has no power to declare the emission into the open air of dense black or thick gray smoke a nuisance under a charter giving it the power to "declare, prevent and abate nuisances."

Sigler v. City of Cleveland, 3 Ohio, N. P. 119. City has no power to prohibit the emission of dense smoke unless it causes an injury or constitutes a nuisance.

New Jersey R. & Transp. Co. v. Jersey City. 29 N. J. Law (5 Dutch) 170; People v. Cunningham, 1 Denio (N. Y.) 524. The delivery of slops by a distillery to carts and wagons in a public street held a public nuisance and abatable.

Gould v. City of Rochester, 105 N. Y. 46. Discharge of sewage by a city is a public nuisance and abatable by the town injured.

In People v. Garabed, 20 Misc. 127, 45 N. Y. Supp. 827. An ordinance prohibiting the beating of drums and tambourines in the street without the permission of the president of the village held valid. In People v. City of Rochester, 44 Hun (N. Y.) 166, a singing "Salvation Army" procession held not a nuisance.

City of Philadelphia v. Brabender, 201 Pa. 574. An ordinance prohibiting the casting of advertisements into vestibules of dwelling houses is valid, though newspapers and addressed envelopes are excepted from its operation.

Thompson v. Kimbrough, 23 Tex. Civ. App. 350. A pest house established within 192 feet of a public school is a nuisance and abatable as such.

Kuehn v. City of Milwaukee, 92 Wis. 263. The dumping of garbage of a city into one of the Great Lakes, fifteen miles from shore is not prima facie a nuisance.

City of Centerville v. Miller, 57 Iowa, 56. Keeping of a house where loud and unusual noises are permitted, held a nuisance.

Use of property: Town of Lake View v. Letz, 44 Ill. 81; Gilbert v. Showerman, 23 Mich. 448. In this case carrying on a steam flouring

itations constantly referred to in the preceding sections discussing a valid exercise of the police power. It is not necessary to repeat them. The application of the principle seems to be that individual members of society possess the natural right to use

mill in the proper manner was not restrained, the court basing its decision among other reasons, upon the principle, as stated in the text, that it was not every act of an individual or use of property that constituted it a nuisance, or even the declaration of a legislative body to that effect, irrespective of its nature, situation or use, the flouring mill in the case before the court being in the proper business portion of the city. City of Red Wing v. Guptil, 72 Minn. 259.

In City of St. Louis v. Russell, 116 Mo. 248, the use of buildings as livery and sales stables declared not a nuisance per se. The main question involved was the right of the city to delegate its power in this respect to one-half the owners of property in the block where the livery stable was proposed to be located. Gundlach v. Hamm, 62 Minn. 42; Board of Health v. Jersey City, 55 N. J. Eq. 116; Beetz v. City of Brooklyn, 10 App. Div. (N. Y.) 382. State v. Ray, 131 N. C. 814, 60 L. R. A. 634. Ordinance closing stores at 7:30 P. M. held invalid. Harrington v. Board of Aldermen of Providence, 20 R. I. 233; Miller v. Burch, 32 Tex. 208.

Employments: Town of Arkadelphia v. Clark, 52 Ark. 23; City of St. Louis v. Robinson, 135 Mo. 460. Garbage ordinance construed.

City of Kansas v. McAleer, 31 Mo. App. 433. Under a charter giving the city council power by ordinance to define what shall be a nuisance and to prevent or abate them, it has the power to declare a rock crushing machine a nuisance and provide for its abatement.

Tanner v. Trustees of Albion, 5 Hill (N. Y.) 121. Bowling alley declared a nuisance. Coe v. Schultz, 47 Barb. (N. Y.) 64. The manufacture of a preparation of lime held a public nuisance. Laugel v. City of Bushnell, 96 Ill. App. 618. City and village authorities may lawfully adopt ordinances declaring places where hop ale is kept for sale nuisances.

Condition of property: City Council of Montgomery v. Hutchinson, 13 Ala. 573. Burden on plaintiff to prove that building taken down by city was not a nuisance. In Grove v. City of Ft. Wayne, 45 Ind. 429, projecting corners held a nuisance and dangerous. Allison v. City of Richmond, 51 Mo. App. 133. In the absence of established fire limits, municipal authorities have no power to declare as a nuisance and destroy an old frame building filled with inflammable rubbish, but only authority to suppress its use for that purpose.

Green v. Lake, 60 Miss. 451; Village of Hempstead v. Ball Elec. Light Co., 9 App. Div. 48, 41 N. Y. Supp. 124. Poles, wires and lamps no longer used for the purpose of lighting declared an abatable nuisance. Eckhardt v. City of Buffalo, 19 App. Div. (N. Y.) 1; Theilan v. Porter, 82 Tenn. (14 Lea) 622. Bristol Door & Lumber Co. v. City of Bristol, 97 Va. 304, holds where a building is a nuisance only because of the use to which it is devoted,

their property and conduct themselves as they see fit, limited and controlled only by the power of the state to determine in its discretion whether such use of property or individual acts results or may result in an injury to the public good. As said, this

the building itself cannot be pulled down, but only the wrongful use stopped.

The general condition of streets, highways or lands as affecting public health: State v. Payssan, 47 La. Ann. 1029; Baker v. City of Boston, 29 Mass. (12 Pick.) 184; City of Cambridge v. Munroe, 126 Mass. 496; Rodwell v. City of Newark, 34 N. J. Law, 264. The power conferred to direct the draining and filling up of city lots whenever such draining shall be necessary to prevent or abate a public nuisance is to be exercised reasonably.

Coast Co. v. Borough of Spring Lake, 56 N. J. Eq. 615. The mere erection of a building upon public land does not constitute it an abatable nuisance. New Jersey R. & Transp. Co. v. Jersey City, 29 N. J. Law (5 Dutch.) 170.

Babcock v. City of Buffalo, 56 N. Y. 268. A slip or canal, a public highway, which became unwholesome by reason of stagnant water and filth was held not abatable as a public nuisance. Chambers' Adm'r v. Ohio Life Ins. & Trust Co., 1 Disn. (Ohio) 327.

City of Charleston v. Werner, 38 S. C. 488. The filling of a low lot declared a public nuisance by the board of health, held legal.

Regulation of business: State v. Mott, 61 Md. 297. Municipal authorities have no power to prohibit the operation of lime kilns within the city limits. Lake v. City of Aberdeen, 57 Miss. 260; People v. Board of Health of New York, 33 Barb. (N. Y.) 344; Schuster v. Metropolitan Board of Health, 49 Barb. (N. Y.) 450.

Miscellaneous: Haskell v. City of New Bedford, 108 Mass. 208. Municipal authorities have no right, in the construction of any public improvement such as a system of drainage or sewage, to create a nuisance either upon private or public property.

Waters v. Townsend, 65 Ark. 613. A house infected with smallpox may be abated as a nuisance injurious to the public health. Ward v. City of Little Rock, 41 Ark. 526. A city cannot enjoin as a nuisance the working of convicts on its streets, since it cannot condemn or abate as such any act which in itself does not come within the legal notion of a nuisance. Harmon v. City of Chicago, 110 Ill. 400; City of Denver v. Mullen, 7 Colo. 345.

Poyer v. Village of Des Plaines, 18 Ill. App. 225; affirmed in 123 Ill. 348. An ordinance declaring "all public picnics and open-air dances" within its limits to be a nuisance, held void; the question whether they are so conducted as to become a nuisance being one of fact, not of law.

Northwestern Fertilizing Co. v. Village of Hyde Park, 70 Ill. 634; Everett v. City of Council Bluffs, 46 Iowa, 66. Trees growing in a street or highway do not constitute a nuisance unless they make an obstruction to travel.

Municipality No. 1 v. Wilson, 5 La. Ann. 747; Green v. Lake, 60

is an inherent and discretionary power on the part of the state but still controlled by the great underlying principle of law that property, personal or vested rights cannot be confiscated nor arbitrarily destroyed. The act of the sovereign must have for its real and legitimate end and aim the accomplishment of a governmental power, and this must be done by agencies which are uniform, definite and certain in their operation and application.[198]

Miss. 451; City of Kansas v. McAleer, 31 Mo. App. 433; New Jersey R. & Transp. Co. v. Jersey City, 29 N. J. Law (5 Dutch.) 170; Nicoulin v. Lowery, 49 N. J. Law, 391; City of Rochester v. Simpson, 57 Hun (N. Y.) 36; Grossman v. City of Oakland, 30 Or. 478; Town of Davis v. Davis, 40 W. Va. 464.

[198] California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29. The question of the power of a municipal corporation to grant an exclusive privilege for the collection of city garbage fully discussed and many authorities cited. The court holds such contract or privilege valid. In discussing the police power the court say: "It must be admitted that the power of the legislature or municipality under what is commonly designated as the 'police power of the state,' is not absolute. It does not necessarily follow that every statute which may be enacted by the legislature, or order passed by a municipality, ostensibly for the purpose of preserving the public health, protecting the public morals, and guarding the public safety, is always to be accepted as a legitimate exercise of the police power of a state. Neither the legislature nor municipality can, under the guise of police regulations, arbitrarily invade private property or personal rights; and when such regulations are called in question the test should be whether they have some relation to the public health or public safety, and whether such is, in fact, the end sought to be attained. The means used must be such as are reasonably necessary for the accomplishment of the purpose, and must not be unduly oppressive upon individuals or the public. Every act, order or ordinance is subject to review by the courts, and, if the power granted by the constitution is exceeded by the legislature or municipality, it is the duty of the courts to declare such act, order, or ordinance invalid. Under the guise of protecting the public interests, neither the legislature nor the municipality can arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful business and occupations. The police power cannot be used as a shield for all the ills that legislation is heir to, but it must be recognized that the power and purposes of laws of this character are necessarily very broad and far-reaching, and, if the power granted does not exceed the limits of the constitution, and clearly comes within the legitimate exercise of the police power, it should be sustained. * * * One thing, however, is certain, that everything which, from its nature, and surroundings, is, or is liable to become, a menace to the public health or public safety, is a proper subject to be dealt with under the police power of a state.

§ 138. Nuisances; their abatement and removal.

It is scarcely necessary to say that since public authorities possess the power in some instances to declare what are public nuisances, and in all cases the power to remove or abate them, upon an official or judicial declaration of their character as such, they have the power to abate and remove all conditions or acts which in their nature, situation or use are public nuisances.[199] The

This case comes within that class. The power to make the law necessarily carries with it the power to judge of its necessity, expediency, and justice, and, primarily at least, of the reasonableness of the means and methods used to accomplish the end sought to be obtained. Courts have nothing to do with the wisdom, policy or expediency of the law. The courts are only authorized to deal with the question of the power of the legislature or municipality to pass the laws or orders in question, and determine whether they are valid, and, if so, to construe their provisions. There their duty ends. These general principles are axiomatic in the jurisprudence of this country."

[199] United States v. Holly, 3 Cranch, C. C. 656, Fed. Cas. No. 15,381; Schoen v. City of Atlanta, 97 Ga. 697; Baumgartner v. Hasty, 100 Ind. 575; Walker v. Jameson, 140 Ind. 591. Power to compel the deposit of garbage in certain designated places and its collection by the city's licensed agent held not a confiscation of property. See, also, California Reduction Co. v. Sanitary Reduction Works (C. C. A.) 126 Fed. 29; City of Waverly v. Page, 105 Iowa, 225.

In Knauer v. City of Louisville, 20 Ky. L. R. 194, 45 S. W. 510. Excessive fees allowed those removing dead animals held unauthorized; and in Meyer v. Jones, 20 Ky. L. R. 1632, 49 S. W. 809, the same decision is made with the qualification that if the ordinance gave the owner of a dead animal the right to remove it within a prescribed time, the objectionable features would be eliminated. See, also, to same effect, State v. Morris, 47 La. Ann. 1660; Sawyer v. State Board of Health, 125 Mass. 182; Com. v. Cutter, 156 Mass. 52; Stone v. Heath, 179 Mass. 385; Sprigg v. Town of Garrett Park, 89 Md. 406; Wreford v. People, 14 Mich. 41; City of Grand Rapids v. De Vries, 123 Mich. 570; City of Red Wing v. Guptil, 72 Minn. 259; City of St. Louis v. Edward Heitzeberg Packing & Provision Co., 141 Mo. 375.

Coast Co. v. Borough of Spring Lake, 56 N. J. Eq. 615. Municipality as representative of the public has the right to sue for abatement of nuisance on public property. Hart v. City of Albany, 9 Wend. (N. Y.) 571; Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397; Town of Newton v. Lyons, 11 App. Div. 105, 42 N. Y. Supp. 241; Smith v. Irish, 37 App. Div. 220, 55 N. Y. Supp. 837; Cartwright v. City of Cohoes, 39 App. Div. 69, 56 N. Y. Supp. 731.

Underwood v. Green, 42 N. Y. 140. A dead animal is not per se a nuisance or necessarily dangerous to public health. An ordinance direct-

manner in which nuisances may be removed or abated depends largely upon charter and statutory provisions. Corporate charters usually contain in detail, provisions controlling the manner in which they may exercise powers granted. The doctrine, as already stated, is well settled that municipal authorities cannot, arbitrarily, declare an act or thing a nuisance and remove and abate the same until there has been a judicial adjudication of

ing the removal of "dead animals" held not capable of enforcement if literally construed, otherwise dead animals provided for food could be lawfully removed as nuisances or detrimental to the public health.

Eckhardt v. City of Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204. Here the right to abate a nuisance is held as limited to the removal of that in which the nuisance consists. The right is derived from and based upon necessity.

Wood v. City of Hinton, 47 W. Va. 645. The principle that the public authorities cannot bargain or grant away the right to exercise the police power, followed. Permission from a council to run an engine can not become a vested or continuing right such as to prevent the council from modifying the permit or forbidding the use of the engine after it becomes a nuisance. City of Marshfield v. Wisconsin Tel. Co., 102 Wis. 604. A city is held in Iler v. Ross, 64 Neb. 710, 57 L. R. A. 895, to have no right to grant, by contract, a monopoly to one individual to enter upon the private premises of the inhabitants of the city and, at their expense, collect and remove innoxious substances, like ashes, cinders and other things not in themselves nuisances, though, which if allowed to accumulate, would become such. Soon Hing v. Crowley, 113 U. S. 703; King v. Davenport, 98 Ill. 305; Kennedy v. Phelps, 10 La. Ann. 227; New Orleans Gas Light Co. v. Hart, 40 La. Ann. 474; State v. Heidenhain, 42 La. Ann. 483; Com. v. Thompson, 53 Mass. (12 Metc.) 231,—smoking on streets. Carleton v. Rugg, 149 Mass. 550; Hart v. City of Albany, 9 Wend. (N. Y.) 571; Lawton v. Steele, 119 N. Y. 226; Village of Carthage v. Frederick, 122 N. Y. 268; City of Charleston v. Werner, 38 S. C. 488; Theilan v. Porter, 82 Tenn. (14 Lea) 622. See, also, Bush v. City of Dubuque, 69 Iowa, 233. In some jurisdictions, however, it is held, either pursuant to statutory provision or rule of law, that before property constituting a nuisance can be removed as such, notice must be given to the owner or party interested in the same and an opportunity given to defend the charge. Amyx v. Taber, 23 Cal. 370; Hartman v. City of Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74, holds such notice unnecessary where the party interested has his remedy by injunction or a personal liability against the members of the offending board; Roberts v. Ogle, 30 Ill. 459; Chamberlain v. City of Litchfield, 56 Ill. App. 652; Ward v. City of Murphysboro, 77 Ill. App. 549; Gosselink v. Campbell, 4 Iowa, 296; Com. v. Bean, 80 Mass. (14 Gray) 52; Com. v. Curtis, 91 Mass. (9 Allen) 266; Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71; Hall v. Staples, 166 Mass. 399; People v. Bennett, 83 Mich. 457,—no notice to remove

this fact.[200] But this doctrine may not apply where the objectionable thing or act is unquestionably a nuisance per se. Municipal authorities in such cases would clearly have the right to remove or abate the nuisance limited only by the purpose of their organization, namely, the public health, welfare and safety.[201] Where the legislature has granted the public authorities

held necessary; Chase v. Middleton, 123 Mich. 647; City of St. Paul v. Clark, 84 Minn. 138; Hellen v. Noe, 25 N. C. (3 Ired.) 493; Rose v. Hardie, 98 N. C. 44; State v. Tweedy, 115 N. C. 704; Heath v. Hall (Tex. Civ. App.) 27 S. W. 160. See, also, § 139, post. But see Slessman v. Crozier, 80 Ind. 487, and Collins v. Hatch, 18 Ohio, 523, and see Wilson v. Beyers, 5 Wash. 303, and Miles v. Chamberlain, 17 Wis. 446, which deny the power upon the failure of its express grant.

[200] Bates v. District of Columbia, 1 MacArthur (D. C.) 433; McLean v. Mathews, 7 Ill. App. 599; Baker v. Bohannan, 69 Iowa, 60; City of Cambridge v. Munroe, 126 Mass. 496; City of St. Louis v. Stern, 3 Mo. App. 48; City of St. Louis v. Steele, 12 Mo. App. 570; Board of Health of Hamilton Tp. v. Neidt (N. J. Eq.) 19 Atl. 318; Board of Health of Vailsburgh v. Inhabitants of East Orange, 53 N. J. Eq. 498; McLaren v. City of New York, 1 Daly (N. Y.) 243; Boom v. City of Utica, 2 Barb. (N. Y.) 104; People v. New York Board of Health, 33 Barb. (N. Y.) 344; Gregory v. City of New York, 40 N. Y. 273; U. S. Illuminating Co. v. Grant, 55 Hun (N. Y.) 222; Gould v. City of Rochester, 105 N. Y. 46. See, also, authorities cited, § 137, note 94; Bliss v. Kraus, 16 Ohio St. 55. Proceedings merely colorable and designed under the pretense of removing a nuisance not capable of enforcement. Easby v. City of Philadelphia, 67 Pa. 337; City of Charleston v. Werner, 38 S. C. 488.

[201] Williams v. City Council of Augusta, 4 Ga. 509; City of Americus v. Mitchell, 79 Ga. 807, 5 S. E. 201; Harmison v. City of Lewiston, 46 Ill. App. 164; King v. Davenport, 98 Ill. 305; North Chicago City R. Co. v. Town of Lake View, 105 Ill. 207. "There are many things which courts without proof will * * * declare nuisances. Such, for instance, would be the digging of a pit or the erection of a house or other obstruction in a public highway." Miller v. City of Valparaiso, 10 Ind. App. 22, 31 N. E. 418. "When a public nuisance creates an imminent danger, a necessity for immediate action arises. If the public authorities were compelled to give notice and await the action of courts or other bodies, the delay might result in public calamity. The right of self-preservation is one of the first laws of nature and applies to organized societies as well as individuals." Baumgartner v. Hasty, 100 Ind. 575; Joyce v. Woods, 78 Ky. 386; State v. Heidenhain, 42 La. Ann. 483; City of Baltimore v. Radecke, 49 Md. 217; City of St. Louis v. Stern, 3 Mo. App. 48; Metropolitan Board of Health v. Heister, 37 N. Y. 661; Nolan v. Town of Franklin, 12 Tenn. (4 Yerg.) 163; 1 Am. & Eng. Enc. Law (2d Ed.)—Abatement of Nuisances.

the power to abate nuisances, they may, after the legal determination of such a fact, summarily abate or remove the same even by destruction of the property.[202] The creation of a nuisance may be prevented by proceedings in equity where the usual rules in respect to the granting of injunctions will apply; ordinarily, a private person is not a proper party complainant when a public nuisance is involved; where no injury is suffered beyond

[202] License Cases, 5 How. (U. S.) 504. Justice McLean in this case said: "The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed." Mugler v. State of Kansas, 123 U. S. 661; Ferguson v. City of Selma, 43 Ala. 398,—decayed and dilapidated houses; Harvey v. Dewoody, 18 Ark. 252; Baumgartner v. Hasty, 100 Ind. 575; Miller v. Horton, 152 Mass. 540; Ferrenbach v. Turner, 86 Mo. 416. A well located within the limits of a public street. Green v. Lake, 60 Miss. 451; Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. (8 C. E. Green) 255; Newark & S. O. Horse Car R. Co. v. Hunt, 50 N. J. Law, 308,—killing diseased horses; In re Jacobs, 98 N. Y. 98. Sometimes, however, compensation for property destroyed is required, Safford v. Detroit Board of Health, 110 Mich. 81, and other cases hold that only in extreme instances should one be deprived of the use of his property and that in any case there cannot be a wanton or willful destruction. Allison v. City of Richmond, 51 Mo. App. 133; Waggoner v. City of South Gorin, 88 Mo. App. 25. Neither can property used so as to constitute a nuisance be destroyed or forfeited as a punishment for the wrong. Lawton v. Steele, 119 N. Y. 226, 239. "But where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (9 Wend. 571), or the nets in the present case, the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner. But the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, we think, to prevent a future illegal use of the property, it not being a nuisance per se, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisances, the legislature cannot take into its own hands the enforcement of the criminal or quasi criminal law."

that shared in common with the general public,[203] unless it clearly appears that he is likely to sustain damages peculiar to himself and in excess of those suffered by the public generally.[204] The usual agency for the regulation or removal of a public nuisance is through a board or department of health acting under authority of the corporate charter or the general statutes and according to the manner designated by law. The mode of action may sometimes be found in ordinances passed by the corporate legislative body, or the manner and time of official action may rest in the body itself to be exercised in their sound discretion. The grant of power or authority may be general in its terms either as to its extent or as to the manner or time of its exercise, and again the precise manner of its exercise may be designated by law or ordinance.

In common with other powers granted public corporations, they have the right within their charter limitations to enforce regulations, rules or orders which they can legally make.[205] If the

[203] People v. Truckee Lumber Co., 116 Cal. 397. The fact that a public nuisance is made punishable by law is not a bar to a suit to enjoin it. Reed v. Cheney, 111 Ind. 387; Brown v. Perkins, 78 Mass. (12 Gray) 89; Clark v. Lake St. Clair & N. U. R. Ice Co., 24 Mich. 508; Fields v. Stokley, 99 Pa. 309; Godsell v. Fleming, 59 Wis. 52.

[204] Owens v. State, 52 Ala. 400; Whaley v. Wilson, 112 Ala. 627. A bill in equity can be maintained by a private person to abate a public nuisance, where it can be shown that the complainant had suffered a special damage and where the wrong complained of was continuous. Earp v. Lee, 71 Ill. 193; Bidinger v. Bishop, 76 Ind. 244.

Douglass v. City of Leavenworth, 6 Kan. App. 96, 49 Pac. 676. A private person specially injured by a public nuisance has the right to sue for its abatement. Turner v. Holtzman, 54 Md. 148; Brown v. Perkins, 78 Mass. (12 Gray) 89; Miller v. Forman, 37 N. J. Law, 55; Brown v. De Groff, 50 N. J. Law, 409; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Lawton v. Steele, 119 N. Y. 226; State v. Keeran, 5 R. I. 497.

[205] For specific illustrations of a violation of regulations preventing or abating public nuisances see: United States v. The Emperor, 49 Fed. 751; City of Bloomington v. Costello, 65 Ill. App. 407. A city cannot acquire the prescriptive right to continue a public nuisance.

Long v. City of Portland, 151 Ind. 442; Town of Nevada v. Hutchins, 59 Iowa, 506. Under the power to abate a nuisance a municipality has no right to fine a person for obstructing a street.

In City of Knoxville v. Chicago, B. & Q. R. Co., 83 Iowa, 636, the court held that an incorporated town had no authority to pass an ordinance imposing a fine for the maintenance of a nuisance under the general grant of power "to prevent

power exists to abate, remove or suppress a nuisance, with the necessary authority to execute this power, it impliedly follows that the legal right exists to employ or use all necessary and proper means in the execution of the powers possessed, express or implied.[206] The question has been raised where a charter

injury or annoyance from anything dangerous, offensive or unhealthy."

Barring v. Com., 63 Ky. (2 Duv.) 95; City of Waycross v. Houk, 113 Ga. 963. The obligation is mandatory upon the city council and mayor to abate any nuisance they might create within the city limits, and the court also held that upon their refusal to do so they could be held accountable for its maintenance.

Harper v. City of Milwaukee, 30 Wis. 365. A municipal corporation has no greater right to erect and maintain a public nuisance than a private individual, and is responsible to the same extent.

The weight of authority is to the effect that where the abatement or removal of a nuisance is included within the discretionary or legislative powers of the public corporation, a person injured by the failure of the corporation to exercise the power and remove or abate a nuisance has no right of action against the corporation. See City of Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 25 L. R. A. 538; City of Anderson v. East, 117 Ind. 126; James' Adm'r v. City of Harrodsburg, 85 Ky. 191; McCormock v. Patchin, 53 Mo. 33; Saxton v. St. Joseph, 60 Mo. 153; Armstrong v. Brunswick, 79 Mo. 319; Kiley v. Kansas City, 87 Mo. 103; Hill v. Charlotte, 72 N. C. 55; McDade v. Chester, 117 Pa. 414; Hutchinson v. Town of Concord, 41 Vt. 271; Schultz v. City of Milwaukee, 49 Wis. 254; Hubbell v. City of Viroqua, 67 Wis. 343. But the rule is somewhat different in Maryland. See Taylor v. City of Cumberland, 64 Md. 68; City of Baltimore v. Marriott, 9 Md. 160.

[206] Sanitary Reduction Works of San Francisco v. California Reduction Co., 94 Fed. 693. A franchise granted for the cremation of city garbage held controlled by Cal. St. 1893, p. 288, § 1, prescribing the manner in which franchises and privileges should be granted by municipalities; affirmed (C. C. A.) 126 Fed. 29,—the validity of an exclusive franchise for such work decided in the affirmative with many authorities collated.

Alpers v. Brown, 60 Cal. 447. Construing exclusive right to remove dead animals within twenty-four hours. Walker v. Jameson, 140 Ind. 591, and authorities cited; Martin v. Montgomery County Com'rs, 27 Ind. App. 98, 60 N. E. 998. Secretary of board of county commissioners has no authority to bind the county for an indebtedness incurred in abating a stagnant pond without authority from the board.

State v. Payssan, 47 La. Ann. 1029. Removal of offal by contract authorized. River Rendering Co. v. Behr, 77 Mo. 91. The exclusive right to remove and appropriate animal carcasses found in the city and not killed for food held not capable of enforcement as to those not a nuisance. Hannibal v. Richards, 82 Mo. 330; Waggoner v. City of South Gorin, 88 Mo. App. 25; Iler v. Ross, 64

gives to municipal authorities the power to prevent injury or annoyance and abate or suppress nuisances, of the right to delegate to some subordinate agency created by them the execution of this power. As a general proposition it can be said that when the statutes give to a certain agency, to be executed by itself, specific powers or duties, such agency possesses the right to delegate the performance of these duties or powers to subordinate agencies, unless they involve legislative functions. Or, to state the proposition in another way, the duties prescribed devolving upon a certain governmental agent are discretionary in their character as to the extent and manner of their exercise, unless the provisions of the statute are mandatory in thus granting the powers and directing the extent and manner of their exercise when the right of delegation does not exist. If, however, a power is granted in general terms to the governmental agent, a public corporation, such agent usually possesses the power of delegation.[207] If there is any doubt as to the soundness of this principle it can be stated that such doubt does not exist where the character of the duties to be performed are ministerial or clerical.

§ 139. Objections to the removal or abatement of nuisances.

As already suggested in a preceding section some jurisdictions

Neb. 710, 90 N. W. 869. Removal of garbage under contract. Balch v. City of Utica, 42 App. Div. 562, 59 N. Y. Supp. 513. Right of municipality to contract for removal of garbage and offal construed and authorized. City of Philadelphia v. Provident Life & Trust Co., 132 Pa. 224. Authority exceeded. State v. McCulla, 16 R. I. 196; Harrington v. Board of Aldermen of Providence, 20 R. I. 233; City of Huron v. Bank of Volga, 8 S. D. 449. Municipal authorities held in this case as having the right in the exercise of the granted power to invoke the aid of a court of equity.

State v. Corporation of Shelbyville, 36 Tenn. (4 Sneed) 176. Indictment maintained against municipal corporation for its failure to remove and abate a slaughter house kept to the detriment of the public health where such municipal corporation had the power to enact ordinances necessary to preserve public health and remove nuisances.

Llano County v. City of Llano, 9 Tex. Civ. App. 372; Kilvington v. City of Superior, 83 Wis. 222. Contract for the construction and operation of crematory for the consumption of refuse construed. Dean v. Charlton, 23 Wis. 590, distinguished and limited.

[207] Gaines v. Waters, 64 Ark. 609; Welch v. Stowell, 2 Doug. (Mich.) 332.

hold that to maintain the validity of proceedings having for their purpose the abatement or removal of nuisances, it is necessary that the owners of such property or those interested or affected should have notice of such proceedings or actions that they may have an opportunity to appear and defend themselves or their property against the charges made.[208] The action of boards of health or like bodies in passing upon and determining the character of acts or the condition of property while not conclusive is usually considered of such a discretionary character as will prevent the courts from reviewing it, except in cases of fraud, mistake, or where the official body has clearly exceeded its authority under powers conferred either by the charter of the municipal corporation or the laws or constitution of the state.[209] The time for action by the property owner or individual affected in some cases is also held material, the rule being that until a final order or adjudication is made he may not have the right to contest such action, order or adjudication.[210]

III. The Power to Incur Indebtedness Other Than by the Issue of Bonds.

§ 140. The corporate power to incur indebtedness.

Of the essential and characteristic differences between public and private corporations a few have been discussed, some have

[208] See § 124; Bush v. City of Dubuque, 69 Iowa, 233; City of Salem v. Eastern R. Co., 98 Mass. 431; Weil v. Ricord, 24 N. J. Eq. (10 C. E. Green) 176; Lydecker v. Eells, 50 Hun, 606, 3 N. Y. Supp. 324; People v. Board of Health of Seneca Falls, 58 Hun (N. Y.) 595; Gould v. City of Rochester, 105 N. Y. 46; City of Philadelphia v. Dungan, 124 Pa. 52; Teass v. City of St. Albans, 38 W. Va. 1.

[209] Hartman v. City of Wilmington, 1 Marv. (Del.) 215, 41 Atl. 74. The action of a municipal board of health in determining a nuisance and ordering its abatement is not such an adjudication as can be reviewed on certiorari. Com. v. Cutter, 156 Mass. 52; Stone v. Heath, 179 Mass. 385. The superior court has no power under its general equity jurisdiction to restrain a town board of health from abating nuisances.

Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589. In an action to abate a nuisance by a riparian owner an order of a town board of health requiring the defendant to discharge sewage from his hotel into a watercourse was held not a defense. Brown v. District of Narragansett, 21 R. I. 156.

[210] Gauld v. City & County of San Francisco Sup'rs, 122 Cal. 18, 54 Pac. 272.

been suggested, and others have been merely intimated in the preceding sections. As one of the last, fundamental in its character and of controlling influence in doubtful cases involving the incurring of an indebtedness or the creation of an obligation, is the source of funds raised for the payment of these obligations. A private corporation is a private enterprise designed usually for the direct personal pecuniary advantage of the members. The funds for its promotion and the transaction of the corporate business are derived through contributions from or assessments upon their private means. If by mismanagement, the dishonesty or extravagance of its agents, or the creation of ill-advised or imprudent obligations, a loss is sustained by the corporation, such loss is met by and falls upon the members personally. Entirely different are the conditions and results with public corporations. They are organized as governmental agents and as such share in the administration of governmental affairs and the exercise of public duties resting upon the sovereign. All the expenditures of these corporations in their public capacity are paid by moneys raised through the imposition and collection of taxes upon taxable interests of the community. Those in charge of the expenditures of public money may be irresponsible agents elected by some misguided, temporary, popular feeling. Irresponsible, however, or otherwise, there is ever an irresistible tendency on the part of public officials, prudent though they may be in the management of their private finances, to expend public moneys lavishly and extravagantly, and unnecessarily to incur debts or contract obligations intended to advance their personal interests or to perpetuate themselves in power. The expenditures of public moneys must be met by the levying and collection of taxes, the incurring of indebtedness or the creation of obligations, and fall ultimately upon the public purse. Foolish, unwise or extravagant expenditures, and losses resulting from fraudulent or improvident contracts do not fall except in the most indirect manner, and then only to a limited extent, upon the private means of these irresponsible official agents. It is chiefly this difference in the manner of raising revenue which leads the courts to adopt the strict rule of construction in allowing and recognizing the right to incur indebtedness by public corporations.

§ 141. Must be expressly given; it cannot be implied.

Owing to the fact that public corporations are controlled and managed by agents who do not contribute, except in a most indirect manner and to a slight extent, to the funds for carrying on the corporate work, and the further fact that they are governmental agents created, organized and designed to fill a want or place entirely different in its character and nature from that which is the basis of the creation of the private corporation, the necessity exists to maintain at all times and upon all questions the strict rule for the construction of corporate powers. A corporation is an artificial person possessing such powers as are given to it by the charter of its creation, which, as has been said repeatedly by the supreme court of the United States, is "the measure of its powers." These powers, as stated in a preceding section,[211] may be divided into express and implied, with the further subdivision of implied powers into those absolutely necessary to the corporate existence and those proper, necessary or convenient for the carrying on of corporate work. The power to incur indebtedness, except as modified by the doctrine stated in a succeeding section,[212] must be expressly given to a public corporation before a valid debt or obligation can be contracted or incurred.[213] This strict rule is adopted universally by the

[211] See §§ 108 and 109, ante.

[212] See post, § 143.

[213] Brenham v. German-American Bank, 144 U. S. 173; Watson v. City of Huron, 97 Fed. 449; Lindsey v. Rottaken, 32 Ark. 619; Ex parte Sims, 40 Fla. 432. Delegated corporate powers which may result in public burdens should be strictly construed.

City of Galena v. Corwith, 48 Ill. 423. A municipality has the implied power to fund its debts or provide means for their payment and to issue the necessary evidences thereof.

Myers v. City of Jeffersonville, 145 Ind. 439; Law v. People, 87 Ill. 385; Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Frost v. Inhabitants of Belmont, 88 Mass. (6 Allen) 152; State v. City of Great Falls, 19 Mont. 518. See this case for definition of "loan of credit" as prohibited by Act of Cong. 1886, § 2 (Comp. St. Mont. p. 32). Tukey v. City of Omaha, 54 Neb. 370.

Town of Hackettstown v. Swackhamer, 37 N. J. Law, 191. Where the specific grant of power does not exist to borrow money, a note given by a corporation for and authorizing the loan cannot be enforced even though the money borrowed has been expended for municipal purposes.

Wells v. Town of Salina, 119 N. Y. 280. The power to "raise money" in this case defined as the "power to raise money by taxation, not by borrowing."

La Ross v. Allegheny County, 22

courts as the only available means for curbing and restraining the dishonesty or extravagance of public officials. The power must exist either in some charter, statutory or constitutional provision;[214] if necessary to corporate life it may impliedly exist though not expressly given. These provisions are usually considered mandatory in their character,[215] not directory, and if the manner for the incurring of the indebtedness is prescribed, all the steps directed by law to be taken must be, and in the way designated, or lawful authority does not exist.

An indebtedness may be incurred through the issue of negotiable bonds, a subject to be considered in succeeding sections,[216] where express authority is given for the incurring of a certain debt fixed both in amount and character. Or it may be incurred through the issue of evidences or certificates of indebtedness, assignable or negotiable in their character, but not partaking of the legal character or coupled with the formalities of a negotiable bond.[217]

Pa. Co. Ct. R. 360. Act of May 15, 1893, rule 40 (p. 83), held invalid. This provided that a mine foreman, in case of injury to a person in or about a mine, should secure medical or surgical treatment and in case of the inability of the injured person to pay that the same should be borne by the county. The court said that a debt by this act could be contracted as against a county without its consent or knowledge, something beyond the powers of the legislature.

[214] Coggeshall v. City of Des Moines, 78 Iowa, 235; Frantz v. Jacob, 88 Ky. 525; Belknap v. City of Louisville, 99 Ky. 474; Washburn v. Com., 137 Mass. 139; French v. South Arm Tp., 122 Mich. 593; City of Greenville v. Laurent, 75 Miss. 456; Tenth Nat. Bank v. New York City, 4 Hun (N. Y.) 429; Douglass v. Virginia City, 5 Nev. 147; Young v. Town of Henderson, 76 N. C. 420; Black v. Buncombe County Com'rs, 129 N. C. 121; Barr v. City of Philadelphia, 191 Pa. 438.

[215] Dunbar v. Canyon County Com'rs, 6 Idaho, 725, 49 Pac. 409.

[216] See post, §§ 169-225.

[217] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Cothran v. City of Rome, 77 Ga. 582. No power existing to issue change-bills or promises in the similitude of currency.

Newgass v. City of New Orleans, 42 La. Ann. 163. The power to issue unconditional obligations to pay money having the attributes of negotiable instruments held as not existing in the absence of expressly stated authority.

Halstead v. City of New York, 5 Barb. (N. Y.) 218; De Voss v. City of Richmond, 18 Grat. (Va.) 338; Mills v. Gleason, 11 Wis. 470. A public corporation has the implied power to borrow money for a use expressly authorized by its charter, in the execution of which money will be a necessary means.

§ 142. To what extent discretionary if expressly given.

The courts usually hold that if the power to incur indebtedness or create an obligation is expressly given in the charter, statutes or constitution, it is to be considered in the issue of bonds not a continuing power but exhausted through their issue to the amount and for the purpose specified.[218] The power to incur other indebtedness for governmental work or usual municipal purposes, if granted, has a different character and is generally considered a continuing power, to be exercised however for the purpose and in the manner as provided by law and subject to all constitutional restrictions on indebtedness or obligations legally incurrable by public corporations. The courts further hold in construing this last power, whether expressly given or found in the first class of implied powers, that unless the specific purpose is designated by the authority, the time and place or the expediency of its exercise rests within the sound discretion of the public authorities, so long as the purpose is a "public one," and the amount within constitutional limitations.[219]

§ 143. Implied power of the courts to compel the payment of debts.

To protect the tax-paying public the courts have adopted and enforced almost universally the strict rule of construction of a corporate right to incur a valid indebtedness. The practical effect of the workings of this rule is to deny to public corporations the legal authority to incur an indebtedness if the question may arise or if there exists any doubt or ambiguity. There will be found, however, on an examination of the authorities, many cases holding that a defect of power may be no defense. For the purpose of enforcing honest obligations, courts have adopted what might be termed the implied power of a public corporation to incur indebtedness other than by ordinance, charter, or statutory provision,[220] either considered as withholding the power or

[218] Millsaps v. City of Terrell, 60 Fed. 193; Wilson v. City Council of Florence, 40 S. C. 290, 426.

[219] Rogers v. City of Burlington, 70 U. S. (3 Wall.) 654; Mitchell v. City of Burlington, 71 U. S. (4 Wall.) 270. But see Brenham v. German-American Bank, 144 U. S. 173, as partially reversing the two cases last cited; Gilman v. City of Sheboygan, 2 Black (U. S.) 510.

[220] Dodge v. City of Memphis, 51

regulating the manner in which it shall be exercised. The late Justice Field when upon the supreme bench of the state of California held in an early case that[221] "The doctrine of implied municipal liability applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mis-

Fed. 165. "The authorities show that if negotiable paper is uttered by a municipal corporation without authority of law it is void, and a suit cannot be maintained thereon for any purpose. City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Hitchcock v. City of Galveston, 96 U. S. 341; City of Little Rock v. Merchants' Nat. Bank, 98 U. S. 308; Wall v. Monroe County, 103 U. S. 74; Hill v. City of Memphis, 134 U. S. 198; Merrill v. Town of Monticello, 138 U. S. 673. They show no doubt that when a municipal corporation sells bonds which are void and receives the money it may be compelled to restore it in an action for money had and received. So when a municipal corporation is authorized to purchase property for any purpose or to contract for the erection of public buildings, or for any other public work, and it enters into such authorized contract, but pays for the property acquired or work done in negotiable securities which it has no express or implied power to issue, it may be compelled to pay for that which it has received in a suit brought for that purpose. In no case, however, does it appear that a suit has been sustained on a void bond, treating it as non-negotiable and as something entirely different from what the parties intended it should be. As the court understands the cases, suit must be brought on the implied promise which the law raises to pay the value of that which the municipality has received, but has in fact not paid for, because the securities issued in pretended payment were void."

City of Denver v. Webber, 15 Colo. App. 511, 63 Pac. 804. The implied power possessed to carry out powers expressly granted in this case and to contract for the employment of special counsel held valid.

F. C. Austin Mfg. Co. v. Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011. A debt contracted in excess of the statutory limitation cannot be enforced against a township though it has received and used the supplies sold. French v. South Arm Tp., 122 Mich. 593. A township not liable for an indebtedness not created or ratified by vote of its electors. See, also, Young v. Board of Education of Independent School Dist. No. 47, 54 Minn. 385, as holding that the officers of a school district, originally, without authority, cannot bind the district by their action, notwithstanding the fact that it retains the benefits of the transaction. People v. Brennan, 39 Barb. (N. Y.) 522.

[221] Argenti v. City of San Francisco, 16 Cal. 25; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453-470.

take, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law, which always intends justice, implies one; and her liability thus arising is said to be a liability on an implied contract, and it is no answer to a claim resting upon a contract of this nature to say that no ordinance has been passed on the subject, or that the liability of the city is void when it exceeds the limitation of $50,000 prescribed by the charter. The obligation resting upon her is imposed by the general law, and is independent of any ordinance and the restraining clauses of the charter. It would be indeed a reproach to the law, if the city could retain another's property because of the want of an ordinance, or withhold another's money because of her own excessive indebtedness. In reference to money or other property, it is not difficult to determine in any particular case whether a liability with respect to the same has attached to the city. The money must have gone into her treasury, or been appropriated by her; and when it is property other than money, it must have been used by her, or be under her control. But with reference to services rendered, the case is different. Their acceptance must be evidenced by ordinance to that effect. Their acceptance by the city with the consequent obligation to pay for them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. The acceptance, upon which alone the obligation to pay could arise, would be wanting."[222] The

[222] San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453; Argenti v. City of San Francisco, 16 Cal. 25; City of Logansport v. Dykeman, 116 Ind. 15. Art. 13, of the Constitution of Indiana limiting municipal indebtedness affords no defense to an action upon a contract made by a city to pay for services rendered in effecting a compromise of the municipal indebtedness.

In Boyd v. Mill Creek School Tp., 124 Ind. 193, the court held that where a debt was fraudulently incurred, even when the goods were retained by the municipality, no action could be maintained to recover their actual value in a suit upon the

consideration that one of the parties to the transaction is a public corporation should not permit it to rob others or to play fast and loose with contract obligations. A rule of construction other than the strict ought to prevail where a corporation is endeavoring to extend its power to the injury of others, or where it sets up by way of defense to an action brought against it that it has itself been guilty of usurpation of power.[223] And the further fact should not be forgotten that the contract or other obligation is entered into on behalf of the corporate body by agents elected by the people to represent them and bind the corporation during official life. If these agents dishonestly or imprudently, or perhaps illegally, so far as the manner of the act is concerned, place burdens upon their principal, this of itself should be no excuse for the failure to compensate the other party to the transaction for that of value with which he has parted, or to enforce specific contracts.

In applying this doctrine of implied power on the part of a public corporation to incur indebtedness it may not be necessary for the courts to openly and arbitrarily override charter or constitutional provisions or to hold contrary to the strict rule of construction. In considering the powers exercised by corpora-

certificate of indebtedness originally given.

Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367. A town without special legislative authority can borrow money to pay its lawful debts or arrange for a refunding of its indebtedness.

Backman v. Town of Charlestown, 42 N. H. 125. Although a debt was originally contracted without authority yet the use of the supplies furnished constitutes a ratification of the original act and the town is bound.

Bigelow v. Inhabitants of Perth Amboy, 25 N. J. Law (1 Dutch.) 297; Oklahoma City v. T. M. Richardson Lumber Co., 3 Okl. 5. In this case the power of provisional governments in the Territory of Oklahoma established prior to Act of Congress, May 2, 1890, to contract debts binding upon municipalities afterwards formed under the law, held not to exist. The city was nevertheless thereafter bound to pay for the lumber bought or return it, and upon refusal, became liable for conversion.

Town of Topsham v. Rogers, 42 Vt. 189. A purchase of supplies held ratified by the officers in whom the power to purchase was vested, and therefore became a binding obligation against the municipality.

Richmond & W. P. Land, N. & I. Co. v. Town of West Point, 94 Va. 668. Where the power to purchase real estate exists, the implied power will follow to make valid non-negotiable notes or evidences of indebtednes for the consideration.

[223] Bank of Chillicothe v. Town of Chillicothe, 7 Ohio (pt. 2) 31.

tions either public or private we have the classes already enumerated. An ultra vires act of a corporation is one beyond or in excess of its legal authority or power. In considering the character of an act whether ultra or intra vires those cases where the power is absolutely lacking or wanting must be distinguished from those cases in which the power may exist for designated purposes, or acts done may be valid if done in a certain manner, but otherwise not.

A corporation may be authorized to exercise certain powers or do certain acts to carry out certain designated purposes. If these are exercised or done for a different purpose or in excess of the designated power, the act is not questionable because of a lack of power but on account of the distinction between a want of power and a misuse or abuse of power. Or again a corporation may be authorized to exercise certain powers or do certain acts which are valid if done in a specific manner, but otherwise not. Here we have a distinction and a difference between a want of power and a want of necessary formality in executing a granted power.

In applying the principle of the implied power of a public corporation to incur indebtedness, advantage is taken by the courts of the distinctions suggested in the preceding paragraph, and a legal reason, in addition to the moral one, may support a righteous decision.

§ 144. Manner of its exercise; body authorized.

A public corporation may be possessed of the power to incur indebtedness derived from lawful authority, the indebtedness however will be valid and enforceable only when contracted by the corporation in a specified manner and by the official body or agent of the corporation designated by law to act in a particular instance and bind the corporation by such action. There exist always the implied limitation that the indebtedness must be incurred for a public purpose which will be considered in later sections, and usually constitutional limitations upon the amount and the particular purpose for which it can be legally contracted.[224]

[224] F. C. Austin Mfg. Co. v. Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011; Grady v. Pruit, 111 Ky. 100, 63 S. W. 283; Brown v. Inhabitants of Melrose, 155 Mass. 587; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859; Read v. Atlantic City, 49 N. J. Law, 558; Jamaica Sav. Bank v. City of

In this section the official body authorized to bind the corporation will be considered and the questions of its implied power to set in motion within its discretion, action resulting in the contraction of a legal debt, or whether the power can be exercised only pursuant to direct statutory or other authority. It is self-evident that public corporations of all the different grades are represented in particular functions they possess or powers they may exercise by representative bodies or officials. A municipal corporation proper may have as one of its subordinate departments a school or park board, police or fire department. In matters of public education, the school board represents and is authorized to engage in contracts or incur debts binding upon its principal. It is clearly without the province or the authority of a school board to incur indebtedness binding upon the municipality in support of or for the benefit of the fire or police departments. Indebtedness, therefore, to be valid, if the authority to incur exists, must be contracted by the particular official body representing the public corporation in the exercise of certain of its duties.[225]

New York, 61 App. Div. 464, 70 N. Y. Supp. 967.

[225] Seward County Com'rs v. Aetna Life Ins. Co., 90 Fed. 222; Fitzgerald v. Walker, 55 Ark. 148; Hilliard v. Bunker, 68 Ark. 340; Waldo v. Town of Portland, 33 Conn. 363; Whitney v. City of New Haven, 58 Conn. 450; Barnard v. Sangamon County, 190 Ill. 116; Smith v. Shawnee County Com'rs, 21 Kan. 669; Harrison County Ct. v. Smith's Adm'r, 54 Ky. (15 B. Mon.) 155; Capmartin v. Police Jury, 23 La. Ann. 190. In Louisiana "police juries" so-called, have usually the power to contract debts obligatory on a parish, if in the same ordinance, they provide means for payment.

Talbott v. Parish of Iberville, 24 La. Ann. 135; Citizens' Bank v. Town of Jennings, 107 La. 547. The court said "that debts contracted (by a police jury) in violation of the above provision were stricken with nullity and incapable of judicial enforcement."

Gray v. Bourgeois, 107 La. 671, 32 So. 42; Shea v. Town of Milford, 145 Mass. 528, 14 N. E. 764. A town committee having charge of erection of a building was held to have power to act by agreement of the members separately obtained and that they need not act in session as an organized body.

Holderness v. Baker, 44 N. H. 414; Redmon v. Chacey, 7 N. D. 231, 73 N. W. 1081; City of Philadelphia v. Flanigen, 47 Pa. 21. The power of expending money for public purposes by municipal corporations was lodged in the legislative and not executive authorities, the city council therefore, and not the heads of departments, are empowered to authorize public expenditures. Barr v. City of Philadelphia, 191 Pa. 438; Jones v. Town of Lind, 79 Wis. 64. See, also, the following cases construing

It is also generally held that the implied power does not exist on the part of public officials to contract indebtedness of their own motion. Especially is this true where they do not possess original powers of administration.[226] It is equally true as to the character of the indebtedness they may incur. Possibly the power does exist on their part to contract a temporary indebtedness to carry on what might be termed the ordinary running or operating expenses of the corporation,[227] but the

the powers of the special officials named with respect to the incurring of indebtedness.

Town or township officials: Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121; Ladd v. Town of Franklin, 37 Conn. 53; White v. Town of Stamford, 37 Conn. 578; Farrel v. Town of Derby, 58 Conn. 234; Dibble v. Town of New Haven, 56 Conn. 199; Town of Bruce v. Dickey, 116 Ill. 527; Reed v. Town of Orleans, 1 Ind. App. 25; Boyd v. Mill Creek School Tp., 114 Ind. 210; Bluffton Corp. v. Studabaker, 106 Ind. 129; Dennett v. Nevers, 7 Me. (7 Greenl.) 399; Willey v. Inhabitants of Greenfield, 30 Me. 452; Vose v. Inhabitants of Frankfort, 64 Me. 229; Brown v. Inhabitants of Winterport, 79 Me. 305; Hosier v. Higgins Tp. Board, 45 Mich. 340; Wrought Iron Bridge Co. v. Jasper Tp., 68 Mich. 441; Boyce v. Auditor General, 90 Mich. 314; Evans v. Town of Stanton, 23 Minn. 368; Gifford v. Town of White Plains, 25 Hun (N. Y.) 606; Clark v. Saratoga County Sup'rs, 107 N. Y. 553; Maneval v. Jackson Tp., 141 Pa. 426; Clay v. Wright, 44 Vt. 538; Judevine v. Town of Hardwick, 49 Vt. 180; Davenport v. Town of Johnson, 49 Vt. 403; Town of Remington v. Ward, 78 Wis. 539.

Municipal officers: Allen v. Intendant & Councilmen of La Fayette, 89 Ala. 641; Fitzgerald v. Walker, 55 Ark. 148; In re City of Cedar Rapids, 85 Iowa, 39; Turner v. Brigantine Borough, 54 N. J. Law, 476; In re Village of Plattsburgh, 157 N. Y. 78; Lynchburg & D. R. Co. v. Person County Com'rs, 109 N. C. 159.

County officials: Sullivan v. State, 121 Ind. 342; Vigo County Com'rs v. Weeks, 130 Ind. 162; Butler v. Sullivan County, 108 Mo. 630; Hamilton County Com'rs v. Webb, 47 Kan. 104.

School officials: School Directors v. Sippy, 54 Ill. 287; Clark v. School Directors, 78 Ill. 474; Adams v. State, 82 Ill. 132; Folsom v. School Directors, 91 Ill. 402; Noble School Furniture Co. v. Washington School Tp., 4 Ind. App. 270; Johnson School Tp. v. Citizens' Bank, 81 Ind. 515; Miller v. White River School Tp., 101 Ind. 503; Union School Tp. v. First Nat. Bank of Crawfordsville, 102 Ind. 464; State v. Hawes, 112 Ind. 323; Boyd v. Mill Creek School Tp., 114 Ind. 210; Litten v. Wright School Tp., 127 Ind. 81.

[226] Police Jury v. Britton, 82 U. S. (15 Wall.) 566; People v. Albany County Sup'rs, 28 How. Pr. (N. Y.) 22; Sterling v. Parish of West Feliciana, 26 La. Ann. 59.

[227] White v. Town of Decatur, 119 Ala. 476. Ordinarily municipal expenditures are within the sound discretion of the municipal authorities. In re Contracting of State Debt by

power does not exist to issue negotiable bonds payable to bearer or other evidences of indebtedness negotiable in their character.[228] The manner of the incurring of indebtedness may also be established by the charter or the general statutes of the state, and if the legal authority requires the performance of certain ministerial acts by public officials the indebtedness may be held invalid if contracted without the performance of such acts;[229] or possibly the electors of the corporation, during some part of the proceedings, having for their purpose the incurring of the indebtedness, must pass upon the question, and if indebtedness is incurred without the submission to the electors at the proper time the same legal result will follow.[230]

Loan, 21 Colo. 399; Barrett v. City of East St. Louis, 89 Ill. 175; Musgrove v. Kennell, 23 N. J. Eq. (8 C. E. Green) 75. Township committee has no power to borrow money on the faith of the township or authorize this to be done. However, if the members of the township committee can induce third parties to loan money necessary for proper township purposes, if this debt was subsequently adopted by the town, it then becomes a valid indebtedness.

In Van Dusen v. State, 11 S. D. 318, indebtedness for fuel furnished an agricultural college held valid. At the time of its contraction the indebtedness was within the legal limit. Under a subsequent misappropriation of funds appropriated for specific purposes, the debt in question, with other subsequently incurred obligations, exceeded the limit. The misappropriation cannot affect the legality of the debt in question.

Hull v. Ames, 26 Wash. 272. A city can legally incur indebtedness in excess of the constitutional limit where such indebtedness is used in payment of the salaries of its city officers, the court holding that such salaries were necessary expenses incurred in maintaining the existence of a municipality.

[228] Breaux v. Iberville Parish, 23 La. Ann. 232; Marionneaux v. Police Jury of Iberville, 23 La. Ann. 251; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Stewart v. Otoe County, 2 Neb. 177.

[229] Higgins v. City of San Diego Water Co., 118 Cal. 524, 45 Pac. 824; Pollok v. City of San Diego, 118 Cal. 593; People v. Chicago & A. R. Co., 194 Ill. 51; Shortell v. Green County, 22 Ky. L. R. 1010, 59 S. W. 522; Hubbard v. Woodsum, 87 Me. 88; Hall v. Anne Arundel County Com'rs, 94 Md. 282; Sanborn v. Rice County Com'rs, 9 Minn. 273 (Gil. 258.) An act of the legislature of the state of Minnesota requiring certain ministerial acts held in contravention of the state constitution as being an attempt to confer judicial power on the commissioners named in the act. Shuttuck v. Smith, 6 N. D. 56.

[230] Dyer v. Erwin, 106 Ga. 845; Strodtman v. Menard County, 56 Ill. App. 120; Gray v. Mount, 45 Iowa, 591. A proposition for the outlay of money submitted to the electors

§ 145. The power limited by the purpose or use of funds to be raised.

Limitations upon the power of a public corporation to incur indebtedness may exist either as an inherent, implied, or fundamental principle of law or as a written and express restriction found in the charter of the corporation, the statutes, or the constitution of the state. There is found, as an implied and inherent limitation on the power of every public corporation to incur a debt, the one, namely, that the purpose for which it may be contracted or the uses to which the funds realized shall be put must be public in their character. This limitation impliedly and inherently exists, based upon differences between a public and private corporation suggested in a preceding section.[231] A public corporation is an agency of the government, an aid to the

must be so worded as to give them a real choice.

Grady v. Pruitt, 23 Ky. L. R. 506, 63 S. W. 283; Tinkel v. Griffin, 26 Mont. 426, 68 Pac. 859. Where a majority of the electors voting at elections is necessary to contract valid indebtedness, it can be created under the favorable action of a majority of those voting upon that particular question, although such number was not a majority of all the votes cast at the election.

Galloway v. Jenkins, 63 N. C. 147; Theis v. Washita County Com'rs, 9 Okl. 643; Shaw v. Statler, 74 Cal. 258; Gavin v. City of Atlanta, 86 Ga. 132; Broadfoot v. City of Fayetteville, 128 N. C. 529; Appeal of Luburg (Pa.) 17 Atl. 245; Keller v. City of Scranton, 202 Pa. 586; Metcalfe v. City of Seattle, 1 Wash. St. 297; State v. Snodgrass, 1 Wash. St. 305.

[231] Hackett v. City of Ottawa, 99 U. S. 86. The development of the natural resources of a city for manufacturing purposes held to be within a public and corporate purpose. Town of Bloomington v. Lillard, 39 Ill. App. 616.

See § 140.

People v. Chicago & A. R. Co., 194 Ill. 51. Town meeting not authorized to raise money under provisions of the revised statutes "for town purposes" without defining such purposes and affirmatively showing they are such as authorized by law.

Frantz v. Jacob, 88 Ky. 525; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340; Rexroth v. Ames, 55 N. J. Law, 509, 26 Atl. 787. The power of a township to raise money for "incidental purposes" was denied, without specifying such purposes. The court held that under such general terms the township might raise funds to be used for purposes not authorized.

Thrift v. Town of Elizabeth City Com'rs, 122 N. C. 31, 30 S. E. 349; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174. Even where expenditures are public in their character, the amount of indebtedness incurrable is limited by constitutional provisions.

sovereign in carrying out its purposes and performing duties which are public in their nature and intended to protect and benefit society at large, the community rather than the individual. If the individual is benefited by the establishment and maintenance of an organized government it is not because of the purpose to directly accomplish that result but because the individual indirectly and as a member of a community or society shares in the benefits and advantages of that government. To the government belongs the exercise of certain powers and the performance of certain duties. There can be no question of the character of certain of these powers and duties. The exercise of the police power, the maintenance of government, the construction of public buildings, the provision for a system of public education, and others, will be recognized clearly as governmental duties.[282] Other acts will be clearly recognized as not

[282] Chief Justice Black in the case of Sharpless v. City of Philadelphia, 21 Pa. 147, speaking of the purposes for which taxes could be lawfully levied, has given a comprehensive statement of public purposes. He said, as quoted in Simonton Mun. Bonds, § 35: "Taxes may be imposed for roads of all kinds, canals, and bridges, that there may be facilities for transportation of freight and for travel; for public schools and colleges, that the people may be educated; for public libraries, that their means of improvement may be increased; for the poor, the dumb, the blind, the insane, lest they suffer from want; for the police of the state, in regulations for the preservation of health or the detection of crime; for courts of law, that individual rights may be protected and enforced, and that crime, when detected, may receive its fitting punishment; for the preservation of peace and the protection of the country from foreign enemies; to aid, encourage and stimulate commerce, domestic and foreign, by the establishment of mints, postage system and maintaining navies to keep open the highways of nations; to encourage citizens in the defense of their country, by suitable rewards and mementoes for past services in times of war, or by bounties for enlistment for future services; and for the promotion of arts and sciences."

In Simonton, Mun. Bonds, § 36, is found an interesting discussion of a public purpose. He says in part: "While no definition can be given that will exactly distinguish those purposes which are public from those that are private, it may safely be said that the purpose is public when all the inhabitants are interested in the work, as public schools, where the children of any inhabitant may attend; libraries, because for the education of the people, and open to all alike, waterworks controlled by the municipality, because every resident may have water; almshouses and insane institutions, because open to all who are unfortunate enough to require their aid or care, likewise hospitals

belonging to this category, and there are still other powers and duties which it is difficult sometimes to assign to either class and which lie along the dividing line between the two. It is clearly beyond the power of a public corporation or the state itself to appropriate public property for private purposes or to expend public moneys for the personal advantage and benefit of private individuals or personal and private enterprises, such funds raised through a system of public taxation designed for the benefit and advantage of the public at large, the legality of the system based upon the idea that the use of the proceeds shall be public.[232]

for same reason; * * * police and fire departments, as well as the necessary buildings to house and localize them, for the protection and convenience of the public; courts to enforce the law; and so one can enumerate all the known public conveniences and necessities to be found in a city, county and town; but in all the public works or purposes it will be found that the municipality has the care and supervision of the same, and that the humblest citizen is entitled to the same enjoyment, or same care and protection and in the same respect, as the most influential. The distinguishing feature between a private and a public work or purpose is that, in the former case, the supervision and gains are vested in, and received by, but a few of the inhabitants, and sometimes by nonresidents of the municipality, while in a public work or purpose the care and supervision are lodged in public officers, and the gains, if any, belong to the municipality."

[232] "The legislature," said Chief Justice Black in Sharpless v. City of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759, "has no constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the general assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder."

Burroughs, Pub. Secur. p. 388. "In those cases where the purpose is declared to be public, such as highways, state-houses and other public buildings, railroads, canals, schools, and drainage for health, the benefit is direct to all the people of the state. The construction of such works, or the doing of these acts, is a duty of the state to all the people of the state. The purpose, the object, is governmental, although incidentally individuals may be benefited; while in those cases where the purpose is declared to be private, the object of the act was the benefit of individuals, although incidentally the public was benefited. When the purpose is a public or governmental one, the benefit to which the citizen is entitled is one that he may claim for himself—he can lay his hand upon it himself. For instance, the

The character of certain uses for which public moneys may be expended is established beyond question as well as certain purposes to which they shall not be put. It is impossible to give an exact definition of public purpose. Whether the purpose is a public one for the expenditure of moneys is a question exclusively for the courts to determine. Legislative bodies cannot be the judges of their own infractions of fundamental law.[234]

right to use the highways or railways, or to use the public schools. He asserts this privilege for himself. He is not dependent on the action of a private owner of such institutions, who may grant or withhold the privilege claimed. In the case of the various corporations, when the purpose was said to be private, the privilege of using the lumber mills and other factories was one that might be granted or refused by the owner, and for a refusal there was no remedy."

[234] Burroughs, Pub. Secur. pp. 367, 368; 20 Am. & Eng. Enc. Law (2d Ed.) p. 1084, gives in a negative way a good definition of a public purpose. "The promotion of the interests of individuals, either in respect of property or of business, although it may result incidentally in the advancement of the public welfare, is in its character essentially a private and not a public object. However certain and great the resulting good to the general public, it does not by reason of its comparative importance, cease to be incidental. The incidental advantage to the public which results from the promotion of private interests and the prosperity of private enterprises or business does not justify their aid by the use of public money, raised by taxation, or for which taxation may become necessary."

Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 664. Justice Miller in delivering the opinion of the court said: "To lay with one hand the power of the government on the property of the citizen and with the other bestow it upon favored individuals, to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under forms of law and is called taxation. This is not legislation; it is a decree under legislative forms." He also said: "And in deciding whether, in the given case, the object for which the taxes are assessed falls on the one side or the other of this line (between public or private purpose), they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Weismer v. Village of Douglas, 64 N. Y. 91, where Justice Folger distinguishes a public from a private purpose. "It may also be conceded that this is a public purpose from

The term can best be defined by giving concrete illustrations of expenditures which courts have authorized as having such a character.

§ 146. The construction of buildings a public purpose.

The cases hold without dissent that public moneys expended in the construction of buildings for use by government officials or departments in the performance of their public or governmental duties is a proper and legal expenditure for a "public purpose," and if such buildings are constructed in a lawful manner and upon legal authority, the indebtedness incurred by the corporation is a valid one and capable of enforcement. The power to construct public buildings is considered an implied one not only as necessary to corporate existence but also as a proper and convenient means for carrying into effect governmental powers expressly granted. School houses,[235] town halls,[236] court

the attainment of which will flow some benefit or convenience to the public, whether of the whole commonwealth or of a circumscribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right, and take unto his own use at his own option, upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others, or to receive it in uncertain degree or manner or roundabout way, or hampered with discriminating distinctions and conditions."

[235] Allen v. Intendant & Councilmen of Lafayette, 89 Ala. 641; Turney v. Town of Bridgeport, 55 Conn. 412. The Court here holds that though the committee might deem it necessary to expend more than was voted, they would not be allowed to do so. "We think it clear beyond discussion that when a town, by legal vote, limits the amount of an appropriation for a particular and specified purpose, and by the same vote appoints a committee to carry that purpose into effect, such committee has no implied authority to involve the town in any additional expense whatever."

City of Cartersville v. Baker, 73 Ga. 686. The power to build a school house exists where authority is conferred "to aid in the building up of such schools." Hensly Tp. v. People, 84 Ill. 544; Marks v. Purdue University, 37 Ind. 155; Bicknell v. Widner School Tp., 73 Ind. 501; Grady v. Landram, 23 Ky. L. R. 506, 63 S. W. 284. See 11 L. R. A. 123; Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500; Gordon v. Cornes, 47 N. Y. 613; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166.

houses and jails,[237] hospitals, poorhouses, public markets,[238] state[239] and county buildings, may be properly erected through the expenditure of public funds.

[236] People v. Harris, 4 Cal. 9; Greeley v. People, 60 Ill. 19; Woodbury v. Inhabitants of Hamilton, 23 Mass. (6 Pick.) 101; Friend v. Gilbert, 108 Mass. 408; Foster v. City of Worcester, 164 Mass. 419; Clarke v. Inhabitants of Town of Brookfield, 81 Mo. 503; Bates v. Bassett, 60 Vt. 530.

[237] Pauly Jail-Bldg. & Mfg. Co. v. Kearney County Com'rs, 68 Fed. 171; Lewis v. Lofley, 92 Ga. 804; Jackson County v. Rendleman, 100 Ill. 379; Rock v. Rinehart, 88 Iowa, 37; City of Leavenworth v. Norton, 1 Kan. 432; State v. Marion County Com'rs, 21 Kan. 419; Johnson v. Wilson County Com'rs, 34 Kan. 670; Callam v. City of Saginaw, 50 Mich. 7.

Borough of Henderson v. Sibley County, 28 Minn. 515. The Court here say, "The corporate powers of counties are confined to such powers as are expressly granted, * * * and the county commissioners are confined to the duties and powers directly conferred, or in like manner clearly implied. The general power of a county to make contracts is confined to the property and business of the county; and the uses to which a county may put real estate as to provide a suitable court house, jail, offices and other necessary buildings. It may not erect buildings for the use of other municipal corporations, or for any third party. It may sell and convey real estate not necessary to its use, but it may not improve it for the accommodation of third parties, nor enter into contracts by which it shall bind itself to hold it for the benefit of third parties. Such objects are foreign to the purpose for which counties are organized, and, if permitted, would open the door to entanglements and abuses against which the public should be, and is, by law protected." Citing Williams v. Lash, 8 Minn. 496 (Gil. 441); James v. Wilder, 25 Minn. 305; Hefferlin v. Chambers, 16 Mont. 349, 40 Pac. 787; Roach v. O'Dell, 33 Hun (N. Y.) 320; Black v. Buncombe County Com'rs, 129 N. C. 121, 39 S. E. 818.

[238] See authorities cited in notes 23 Am. St. Rep. 581-584; 25 Am. St. Rep. 887, and 85 Am. Dec. 286-289; Smith v. City of Newbern, 70 N. C. 14; Wade v. City of New Bern, 77 N. C. 460. See, also, cases cited under § 134.

[239] State v. McGraw, 13 Wash. 311; Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598. A city has no authority to incur indebtedness to pay the expenses of a campaign having for its purpose its selection as the capital of the state. The court say: "Plaintiffs, the capital commission, and all other persons dealing with the officers of the municipality had notice and were charged with a knowledge of the law, under the limitations and restrictions of which no liability could be created or debt incurred against the city of Huron for printing capital campaign literature and the warrants when issued were void in toto. * * * As a municipal corporation is forbidden by law, and has no vested right or inherent power to contract debts and issue evidences

§ 146a. Illustrations of a "public purpose" continued; the support of the poor; water supply.

It is clearly within the province of a government to care for and support its indigent, infirm, or the suffering.[240] It is also clearly within the limits of a governmental or a public purpose to care for, maintain and protect the public health and safety. Modern authorities assume that one of the agencies most conducive to the maintenance and protection of the public health is a system by which a sufficient supply of pure and wholesome water may be furnished to a community. The expenditures of public moneys therefore for the establishment and maintenance of a system of water supply is now considered legal, such use or purpose being a public one and within the power of the corporation.[241] That a certain expend-

thereof to advance the interests of individuals, no taxpayer of the city of Huron can be compelled to contribute money for the purpose of promoting a capital campaign however much the inhabitants of the city might be personally benefited."

[240] People v. Emigration Com'rs, 15 How. Pr. (N. Y.) 177; Trumbull v. Moss, 28 Conn. 253; Town of Marlborough v. Town of Chatham, 50 Conn. 554; La Salle County Sup'rs v. Town of South Ottawa, 12 Ill. 430; Seagraves v. City of Alton, 13 Ill. 366; Perry County v. City of De Quoin, 99 Ill. 479; Inhabitants of Granville v. Inhabitants of Southampton, 138 Mass. 256; Crossman v. New Bedford Inst. for Savings, 160 Mass. 503; City of Moultonborough v. City of Tuftonborough, 43 N. H. 316; In re McFarlan, 2 Johns. Ch. (N. Y.) 440; Goodale v. Lawrence, 88 N. Y. 513; Overseers of Milton v. Overseers of Williamsport, 9 Pa. 46; Overseers of Poor of Nippenose Tp. v. Overseers of Poor of Jersey Shore, 48 Pa. 402; Hamlin County v. Clark County, 1 S. D. 131.

[241] New Orleans Water-Works Co. v. Rivers, 115 U. S. 674; National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Andrews v. National Foundry & Pipe Works (C. C. A.) 61 Fed. 782; Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; City of Helena v. Mills, 94 Fed. 916. A contract obligation for the supply of water furnished for municipal purposes when in excess of the constitutional limit of indebtedness cannot be enforced, the court holding that such contract obligation is a debt within the meaning of the limitation.

Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Anoka Water-Works, Elec. Light & P. Co. v. City of Anoka, 109 Fed. 580; City of Ft. Madison v. Ft. Madison Water Co., 110 Fed. 901; affirmed (C. C. A.) 114 Fed. 292; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; Stein v. City of Mobile, 24 Ala. 591; Wells v. City of Atlanta, 43 Ga. 67; Ford v. City of Cartersville, 84 Ga. 213; Murphy v. City of Waycross, 90 Ga. 36; City Council of Dawson v. Dawson Water-Works Co., 106 Ga.

iture may have for its purpose the furnishing of a water supply does not necessarily make it valid. A constitutional or charter limitation upon the amount of municipal indebtedness controls always independent of the purpose for which such indebtedness is incurred. Purpose or use does not in all cases determine its validity.

The authorities referred to in this section and the notes are considered abstractly without regard to such limitations. Some of the cases cited, it will be found upon an examination, hold the indebtedness invalid not because of its purpose but on account of a constitutional limitation.

§ 146b. "Public purposes" continued; light.

In a case in the supreme court of the United States the court held in construing an exclusive contract for the use of the streets

696; Dutton v. City of Aurora, 114 Ill. 138; Culbertson v. City of Fulton, 127 Ill. 30; Prince v. City of Quincy, 128 Ill. 443; City of Valparaiso v. Gardner, 97 Ind. 1; Schneck v. City of Jeffersonville, 152 Ind. 204; Grant v. City of Davenport, 36 Iowa, 396; Burlington Water Co. v. Woodward, 49 Iowa, 61; City of Clinton v. Walliker, 98 Iowa, 655; Allen v. City of Davenport, 107 Iowa, 90; Burlington Water Works Co. v. City of Burlington, 43 Kan. 725; State v. Caffery, 49 La. Ann. 1748; Smith v. Inhabitants of Dedham, 144 Mass. 177; Hale v. Houghton, 8 Mich. 458; Niles Water Works v. City of Niles, 59 Mich. 311; Farr v. City of Grand Rapids, 112 Mich. 99; Monroe Water Co. v. Heath, 115 Mich. 277; Menominee Water Co. v. City of Menominee, 124 Mich. 386, 83 N. W. 127; Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558; Davenport v. Kleinschmidt, 6 Mont. 502; State v. City of Great Falls, 19 Mont. 518; State v. City of Helena, 24 Mont. 521, 63 Pac. 99; State v. Ruhe, 24 Nev. 251, 52 Pac. 274; Hackensack Water Co. v. City of Hoboken, 51 N. J. Law, 220; Mittag v. Borough of Park Ridge, 61 N. J. Law, 151; Stroud v. Consumers' Water Co., 56 N. J. Law, 422, 28 Atl. 578; Comstock v. City of Syracuse, 5 N. Y. Supp. 874; City of Rochester v. Quintard, 136 N. Y. 221; Town of Klamath Falls v. Sachs, 35 Or. 325, 57 Pac. 329; Peabody v. Westerly Water Works, 20 R. I. 176, 37 Atl. 807; Cleveland v. City of Spartanburg, 54 S. C. 83; Miles v. Benton Tp., 11 S. D. 450, 78 N. W. 1004; Pearl v. Town of Nashville, 18 Tenn. (10 Yerg.) 179; City of Austin v. McCall, 95 Tex. 565, 68 S. W. 791; City of Palestine v. Royall, 16 Tex. Civ. App. 36; Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439; Schultze v. Township Committee of Manchester, 61 N. J. Law, 513; City of Springville v. Fullmer, 7 Utah, 450; People v. City Council of Salt Lake City, 23 Utah, 13, 64 Pac. 460; Lucia v. Village of Montpelier, 60 Vt. 537, 15 Atl. 321; Winston v. City of Spokane, 12 Wash. 524; Attorney

in supplying gas to the city and people of New Orleans that the proper lighting of public highways and streets was a valid exercise of the police power, having for its purpose the protection of the lives and property of the people of the community, a governmental purpose. Properly lighted streets and public places give a certain degree of immunity from attack by thieves or burglars at night. A public corporation consequently is justified in attending to this so it is claimed, a governmental duty, and supplying, either through a system of its own or through an exclusive contract, or otherwise, with private[242] corporations or individuals, artificial light for lighting public places when necessary. Public moneys therefore when used for such purpose are properly and legally expended, and debts incurred or obligations created will be enforceable as against a corporation unless other considerations enter into the determination of their validity.[243] The statement made

General v. City of Eau Claire, 37 Wis. 400; Ellinwood v. Reedsburg, 91 Wis. 131. See, also, 30 Am. St. Rep. 399-401.

[242] New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Hamilton Gas-Light & Coke Co. v. City of Hamilton, 146 U. S. 258; affirming 37 Fed. 832; Thompson-Houston Elec. Co. v. City of Newton, 42 Fed. 723; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229; Nelson v. City of La Porte, 33 Ind. 258; City of Crawfordsville v. Braden, 130 Ind. 149; State v. City of Hiawatha, 53 Kan. 477; City of Newport v. Newport Light Co., 84 Ky. 166; Pontchartrain R. Co. v. Lafayette & P. R. Co., 10 La. Ann. 741; Fee v. New Orleans Gas Light Co., 35 La. Ann. 413; City of Boston v. Richardson, 95 Mass. (13 Allen) 146; Opinion of the Justices, 150 Mass. 592; Spaulding v. Inhabitants of Peabody, 153 Mass. 129; City of Detroit v. Hosmer, 79 Mich. 384; Christensen v. City of Fremont, 45 Neb. 160; State v. Cincinnati Gas Light & Coke Co., 18 Ohio St. 268; State v. City of Hamilton, 47 Ohio St. 52; Wade v. Borough of Oakmont, 165 Pa. 479. But see Village of Ladd v. Jones, 61 Ill. App. 584.

[243] Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692; City of Denver v. Hubbard, 17 Colo. App. 346, 68 Pac. 993; Lott v. City of Waycross, 84 Ga. 681; Coggeshall v. City of Des Moines, 78 Iowa, 235; Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; Gordon v. Winchester Bldg. & Accum. Fund Ass'n, 75 Ky. (12 Bush) 110; Laycock v. City of Baton Rouge, 35 La. Ann. 475; Lebanon Light & Magnetic Water Co. v. City of Lebanon, 163 Mo. 246, 63 S. W. 809; Hequembourg v. City of Dunkirk, 49 Hun (N. Y.) 550; Clark v. City of Columbus, 23 Wkly. Law Bul. (Ohio) 289; Town of Klamath Falls v. Sachs, 35 Or. 325; Wheeler v. City of Philadelphia, 77 Pa. 338. A gas plant is property belonging to the city not for speculation but for the comfort of all the people, and debts contracted in its construction and operation

in the preceding paragraph in respect to the legality of certain indebtedness applies also to that incurred for this purpose. An Iowa case held that the necessity for an electric light plant constituted no excuse or justification for the construction of such a plant when this would result in an increase of the municipal indebtedness beyond the constitutional limitation. The purpose of the expenditure is not attacked, but the contemplated amount.[244]

§ 147. The construction of internal improvements.

(a) In general. The purposes enumerated in preceding sections come clearly within that class or use denominated "a public purpose" or "a public use," and there is no doubt as to the authority of the public corporation to incur indebtedness or expend the public moneys therefor.

Considering other uses or purposes not so clearly within those authorized by law or about which there can be doubt, works of internal improvement, as they are termed, may constitute a use to the construction of which public moneys can be properly appropriated,[245] although some cases hold squarely to the contrary doctrine.[246] The protection of the public health is clearly a

must therefore be paid by the municipality.

[244] Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476. "But where the contract is for the erection of electric light plants, or for any other improvement, and the time of payment is postponed to a later date, and no special levy for the purpose of erecting such works is authorized, the rule seems to be well settled that the sums to become due in the future must all be taken into account in estimating the amount of the existing indebtedness of the municipality." Citing Culbertson v. City of Fulton, 127 Ill. 30; French v. City of Burlington, 42 Iowa, 614.

[245] Miles v. Benton Tp., 11 S. D. 450. A public artesian well held a public purpose justifying the expenditure of public moneys. The court say: "We are aware of no constitutional provision which precludes the legislature from authorizing either of these classes of corporations to expend their revenues in supplying their inhabitants with water for all the uses named in the law under consideration. * * * The maintaining of a public water tank, as provided for in the act, is, in itself, a sufficient benefit to all the taxpayers of a civil township to warrant the construction of an artesian well at the public expense."

[246] Rippe v. Becker, 56 Minn. 100. A law providing for the purchase of a site and the erection of a state elevator or warehouse for the public storage of grain held a violation

governmental power and duty. To execute this power and perform this duty all usual, necessary, convenient and proper means may be employed. To construct or aid in the construction of works of internal improvement is not so clearly a governmental power or duty. The character and purpose of a work of internal improvement depends largely upon the determination by public officials that the enterprise in question is not only one of the usual, proper, necessary and convenient means for performing or exercising a governmental duty or power, but that it is itself such a power or duty. It certainly is unsafe to leave without restraint such a far-reaching and conclusive determination to public officials. The opportunity for the insidious and unconscious influence of self-interest is too apparent.[247]

There are certain works of internal improvement in regard to the construction or the granting of aid in the construction of which the law is well established, namely, the establishment of

of a constitutional provision that the "state shall never contract any debt for works of internal improvement or be a party in carrying on such works." See, also, Traver v. Merrick County Com'rs, 14 Neb. 327; Leavenworth County Com'rs v. Miller, 7 Kan. 493. In Rippe v. Becker, 56 Minn. 100, the Court said through Justice Mitchell: "It would admit not only of building grain elevators, but also of engaging in schemes of drainage; irrigation; developing water powers, building public grist mills * * * and other like enterprises almost without limit. Certainly to engage in such enterprises as these at the expense of the taxpayers of the state is quite as much within the mischiefs aimed at by the constitution as to engage in the construction of highways for commerce. * * * The present constitution was not framed on any such lines." See, also, People v. State Treasurer, 23 Mich. 499.

[247] Mitchell v. Burlington & Mt. P. Plank-road Co., 72 U. S. (4 Wall.) 270; Larned v. Burlington & Mt. P. Plank-road Co., 72 U. S. (4 Wall.) 27o; Brauns v. Town of Peoria, 82 Ill. 11; Prince v. Crocker, 166 Mass. 347, 44 N. E. 446. The Boston subway.

Attorney General v. Pingree, 120 Mich. 550, 79 N. W. 814. Where the constitution prohibits the state from being a party to or interested in any work in internal improvement, it should not authorize a municipality to undertake or become interested in that which in itself it was prohibited from doing.

Walker v. City of Cincinnati, 21 Ohio St. 14; Maneval v. Jackson Tp., 141 Pa. 426, 21 Atl. 672; Brooke v. City of Philadelphia, 162 Pa. 123. Expense of elevating tracks may be assumed by a city where this resulted in abolishing grade crossings. Note, however, in this case, the dissenting opinion of Mr. Chief Justice Sterrett, and see, also, Bank for Savings v. Grace, 102 N. Y. 313.

§ 148. Express limitations on power to incur indebtedness.

It is an inherent and implied limitation upon the power of a public corporation to incur indebtedness that to be valid it must

138 U. S. 67; reversing 62 Fed. 718; French v. Teschemaker, 24 Cal. 518; Quincy, M. & P. R. Co. v. Morris, 84 Ill. 410; City of New Orleans v. Grahle, 9 La. Ann. 561; City of St. Louis v. Alexander, 23 Mo. 483; Wood v. Town of Oxford, 97 N. C. 227. But see Taylor v. Ross County Com'rs, 23 Ohio St. 22; Brown v. Philadelphia County Com'rs, 21 Pa. 37. See, also, authorities collected and cited in Dillon, Mun. Corp. (4th Ed.) p. 224. In section 153 of that able work the author says: "The most noted of extraordinary powers conferred upon municipal and public corporations is the authority to aid in the construction of railways by subscribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred. Legislation of this kind belongs to a period comparatively recent, and has been more or less resorted to at times, by almost every state in the Union. As it is an author's duty to state what the law is rather than what, in his judgment, it ought to be, he is constrained to admit that a long and almost unbroken line of judicial decisions in the courts of most of the states has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid, in the manner above indicated, the construction of railways running near, or to, or through its territory. * * * Notwithstanding the opinion of so many learned and eminent judges, there remain serious doubts as to the soundness of the principle, viewed simply as one of constitutional law. Regarded in the light of its effects, however, there is little hesitation in affirming that this invention to aid the enterprises of private corporations has proved itself baneful in the last degree."

In Iowa decisions will be found both for and against the legality of railway aid. In Michigan the state courts have uniformly ruled against the validity of such a contribution on the part of public corporations and in Wisconsin the recent course of judicial decision has been against the granting of aid. Stokes v. Scott County, 10 Iowa, 166; McClure v. Owen, 26 Iowa, 243. Contra, Stewart v. Polk County Sup'rs, 30 Iowa, 9; Renwick v. Davenport & N. W. R. Co., 47 Iowa, 511; People v. Salem Tp., 20 Mich. 452. But see Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175; Butz v. City of Muscatine, 75 U. S. (8 Wall.) 575; Burlington & M. R. Co. v. County of Otoe, 83 U. S. (16 Wall.) 667, and Pine Grove Tp. v. Talcott, 86 U. S. (19 Wall.) 666, where the supreme court of the United States in an able and exhaustive opinion held an act of the legislature of Michigan authorizing the issue of railroad aid bonds constitutional and valid thus reversing in effect the decisions of the supreme court of Michigan.

Whiting v. Sheboygan & F. R. Co., 25 Wis. 167, where Chief Justice

be, as has been stated in the preceding sections, incurred for "a public purpose." The state cannot arbitrarily under the guise of an ostensible public purpose, appropriate moneys for the benefit or advantage of private individuals and private enterprises. As stated in a Pennsylvania case, "Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder."[252] The declaration by the legislature that certain purposes or uses are public is not conclusive. The purpose must be public in its nature or the use for which public funds are appropriated must be such before a legal expenditure will exist.

In the notes will be found references to cases passing upon the validity of indebtedness incurred for specific purposes, the legal objections raised being those touching the character of the purpose of the expenditures of such moneys.[253]

Dixon said: "There are very many enterprises and occupations of a private character connected with trade, commerce and manufactures which are quite as much to our advantage as a people and quite as necessary and indispensable to our growth and prosperity as a nation, as the building and operating of railroads, and some are even more so. * * * The incidental public benefits or advantages, though in a general sense to be considered, do not, therefore, constitute in the sense of the law, a public use which will justify the interference of the government." The constitutionality of the same act considered in the Whiting Case, was before the supreme court of the United States in Olcott v. Fond du Lac Sup'rs, 83 U. S. (16 Wall.) 678, and its validity sustained. See, also, Long v. City of New London, 5 Fed. 559; Smith v. City of Fond du Lac, 8 Fed. 289; Foster v. City of Kenosha, 12 Wis. 688; Hasbrouck v. City of Milwaukee, 13 Wis. 42, and Fisk v. City of Kenosha, 26 Wis. 23.

[252] Sharpless v. City of Philadelphia, 21 Pa. 147, 59 Am. Dec. 759.

[253] In Burlington Tp. v. Beasley, 94 U. S. 310, where the statute authorized municipalities to issue bonds in aid of works of internal improvement, the court held that the term "internal improvement" included grist mills whether run by water or steam. See, also, as holding to the same doctrine, Brewer v. Merrick County Com'rs, 15 Neb. 180; State v. Clay County, 20 Neb. 452; George v. Cleveland, 53 Neb. 716, 74 N. W. 266, and Vail v. City of Attica, 8 Kan. App. 668, 57 Pac. 137; City of Ottawa v. Carey, 108 U. S. 110. Bonds issued by way of donation to an individual to aid him in developing the water power of the city were held, in this case, void in the hands of one taking them with the knowledge of such fact, although the city charter authorized the borrowing of money and the issuing of bonds to be "expended in developing the natural advantages of the city for manufacturing pur-

There are certain enterprises which while private in their organization, yet in their nature or the transaction of their business partake of a public character to such an extent that if the

poses." Cole v. City of La Grange, 113 U. S. 1. Aid not authorized to a private corporation operating a rolling mill. Commercial Nat. Bank v. City of Iola, 2 Dill. 353, Fed. Cas. No. 3,061. See, also, Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; City of Parkersburg v. Brown, 106 U. S. 487; Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. City of Boston, 111 Mass. 454; Weismer v. Village of Douglas, 64 N. Y. 91; In re Eureka Basin Warehouse & Mfg. Co., 96 N. Y. 42; Bissell v. City of Kankakee, 64 Ill. 249; English v. People, 96 Ill. 566. But see the opinion in Hackett v. City of Ottawa, 99 U. S. 86.

Central Branch U. P. R. Co. v. Smith, 23 Kan. 745. Purchasers of bonds in this case held bound to take notice of the purpose for which the corporation receiving aid was organized.

Chicago, K. & N. R. Co. v. City of Manhattan, 45 Kan. 419; People's Nat. Bank v. City of Pomona, 48 Kan. 55. Kansas Laws 1887, c. 114, authorizing counties and cities of second and third classes to issue bonds and subscribe to the capital stock of companies organized for the purpose of mining coal construed. See, also, as interpreting the same statutes: City of Geneseo v. Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co., 55 Kan. 358, 40 Pac. 655; Luques v. Inhabitants of Dresden, 77 Me. 186. Public moneys not authorized to be used in the care of a private cemetery.

In Lowell v. City of Boston, 111 Mass. 463, the question of a public purpose is thoroughly and fully discussed and many cases cited. The question as decided by the court arose upon the validity of a proposed issue of bonds by the city of Boston to be sold for the purpose of raising a fund for loaning on mortgage to landowners whose buildings had been burned in an extensive fire. The court said that the general result might indeed remotely involve a public benefit, but that the fund intended to be raised was to be appropriated distributively to numerous individuals, each one of which would be independent of any relation to the others or to any other purpose except that of individual enterprise in matters of private business, and that the power of municipal taxation could not be employed for such purposes.

In Adams v. Jackson Elec. R., Light & Power Co., 78 Miss. 887, 30 So. 58, money which had become forfeited to a city, it was held, could not be appropriated in aid of a railway or other corporation or association under Const. § 183, prohibiting the granting of aid to private enterprises.

Getchell v. Benton, 30 Neb. 870; French v. City of Millville, 66 N. J. Law, 392, 49 Atl. 465. The fact that a city is a member of a mutual insurance company does not bring such act within the prohibition of Const. art. 1, par. 19, prohibiting cities from loaning their credit to any corporation. Comstock v. City of Syracuse, 129 N. Y. 643; Sun Printing & Pub. Ass'n v. City of

law specifically names them as capable of receiving public aid, indebtedness incurred in pursuance of such authority will be held valid and enforceable. This principle as already stated applies to the granting by public corporations of aid in the construction of railway lines through their territory or such adjoining territory as to result in substantial benefit or advantage to them.[254] The character of the industry carried on by mills in frontier districts has also been held to partake of this public nature so as to authorize, under a law declaring such enterprises to be public, the incurring of valid indebtedness either through the issue of bonds or otherwise.[255] If authority to aid private enterprise already exists, subsequent legislation cannot affect the validity of debts legally incurred prior to such legislation.[256]

The limitations discussed in this and preceding sections exist not only as implied and inherent principles but may also as

New York, 152 N. Y. 257. The expenditures of public moneys in the construction of a street railway where private capital had failed to construct a necessary line of communication, was held not to be in contravention of Const. N. Y. art. 8, § 10, prohibiting the city from giving any money or property, or loaning its money or credit to or in aid of any individual association or corporation. New York Laws 1891, c. 4, and amendments, popularly known as Rapid Transit Acts, were construed and held valid in this case.

Sweet v. City of Syracuse, 60 Hun (N. Y.) 28; Tocci v. City of New York, 73 Hun, 46, 25 N. Y. Supp. 1089. In Kissell v. Village of Columbus Grove, 27 Wkly. Law Bul. (Ohio) 183, the issue of bonds for the purpose of aiding and encouraging manufacturing establishments, under Act of Gen. Assem. April 23, 1891 (88 Ohio Laws, p. 367), was held to conflict with Const. art. 8, § 6, prohibiting the granting of aid or loaning of credit by municipal corporations to any private corporation. Wilkesbarre City Hospital v. Luzerne County, 84 Pa. 55; Mauldin v. City Council of Greenville, 33 S. C. 1; Ohio Valley Iron Works v. Town of Moundsville, 11 W. Va. 1. Donations to a manufacturing and mining enterprise held prohibited by the provisions of the Constitution limiting expenditures of public moneys to a municipal or public purpose. See, also, Olcott v. Fond du Lac County Sup'rs, 5 Chicago Leg. N. 397.

[254] See § 147.

[255] Burlington Tp. v. Beasley, 94 U. S. 310, following Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 661; Blair v. Cuming County, 111 U. S. 363; Leavenworth County Com'rs v. Miller, 7 Kan. 479.

[256] Scotland County v. Thomas, 94 U. S. 682; County of Calloway v. Foster, 93 U. S. 567; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; State v. Sullivan County, 51 Mo. 522; State v. Greene County, 54 Mo. 540.

charter, statutory or constitutional provisions.[257] It is quite customary at this day. These provisions usually prohibit the expenditure of public moneys for any purpose except "a public one" without, however, giving a more specific definition of this term. The limitations may apply to the amount only of such indebtedness without reference to the purpose of the expenditure. They are construed liberally in their application and extended to include grades or classes of public corporations not enumerated but possessing similar characteristics.[258] The constitutional prohibition that the general assembly shall not authorize "any county, city or town" to become a stockholder in or loan its credit to any corporation it has been held includes a "township" as well as the organization named.[259]

[257] Weldin v. City of Wilmington, 3 Penn. (Del.) 472, 51 Atl. 157. The city of Wilmington by its charter was prohibited from issuing bonds exceeding a certain amount. In this case the court held that the legislature could pass an act which would in effect relieve the city from the limitation prescribed by the charter and give to it the right to increase its funded indebtedness beyond the charter limit.

Martin v. Tyler, 4 N. D. 278; Redmon v. Chacey, 7 N. D. 231, 73 N. W. 1081. The issue of bonds to pay the cost of locating and constructing a drain was held not "a loan of the credit of the county" so as to violate Const. § 185, where the bonds were to be paid from a sinking fund created from the proceeds of special assessments upon the property in municipalities benefited by the construction of such drain. The Court say: "These warrants are issued, not by the county commissioners, but by the drain commissioners—a board whose authority in that line is limited to dealing with the drainage fund, and that cannot bind the county generally. Moreover, these warrants are expressly drawn against the drainage fund. That a warrant so drawn creates no general liability against the municipality is well settled." Citing—Burroughs, Pub. Secur. 635 et seq., and 15 Am. & Eng. Enc. Law (1st Ed.) 1214 et seq.

Foster v. City of Kenosha, 12 Wis. 616. But see Fisk v. City of Kenosha, 26 Wis. 23. If the authority to incur indebtedness is derived from a legislative act, such provisions are void if there is a failure to provide a limitation upon the amount of such indebtedness. See, also, summary of state constitutions respecting aid to railway companies and to private enterprises, collected in Simonton, Mun. Bonds, § 262; and Burroughs, Pub. Secur. c. XIV.

[258] Walsh v. City of Augusta, 67 Ga. 293. Ga. Const. art. 7, § 7, limiting debts legally incurrable by municipal corporations, it was held in this case, applied as well to cities reaching the 7% limit specified as well as to those that do not.

[259] Harshman v. Bates County, 92 U. S. 569.

§ 149. Same subject continued.

In the preceding sections has been considered the power of a public corporation to incur indebtedness for proper municipal purposes other than by an issue of bonds. There has been suggested the implied limitation upon such power arising from the character of the purpose or use funds so derived are put, with a reference to further limitations found in the general statutes, the constitution of the state, or in the charter of the particular organization.[260] These restrictions have been found necessary because of the mania possessed apparently by all public corporations to incur debts without regard to the means or source of payment.[261] To restrict and limit the capacity for municipal extravagance, the courts have upheld their constitution-

[260] Gibbons v. Mobile & G. N. R. Co., 36 Ala. 410; Soule v. McKibben, 6 Cal. 142; Rice v. City of Keokuk, 15 Iowa, 579; Wallace v. City of San Jose, 29 Cal. 181; Wyncoop v. Congregational Soc., 10 Iowa, 185; Dunnovan v. Green, 57 Ill. 63; Foot v. Salem, 96 Mass. (14 Allen) 87.

[261] A compilation from the latest statistics published by the Commercial and Financial Chronicle shows the net debt of public corporations in the United States, including municipalities, to approximate over two billion of dollars. The same journal, the most conservative and best of its kind published, is authority for the statement that during the year 1901 the increase in state and municipal indebtedness, excluding refunding bonds, was $132,567,232; for 1902, $130,536,874; 1903 $139,047,254; and for 1904, $238,905,467. From statistics published by the same journal the following estimate is made of the increase for the years named in state and municipal indebtedness excluding refunding bonds: 1892, $75,441,164; 1893, $69,679,146; 1894, $105,458,603; 1895, $102,619,470; 1896, $95,846,454; 1897, $124,185,604; 1898, $92,776,314; 1899, $106,302,705; 1900, $131,159,756. A total for the period from 1892 to 1904, both inclusive, of $1,544,526,043. It is also evident that this mania is not confined to the United States, for, at a recent meeting in England, the manager of Lloyd's Bank in London spoke very emphatically on this subject. The debts of the British municipalities he said "had been increased by leaps and bounds during the last ten years and now amounted to £350,000,000 —half the national debt. The money had often been spent in municipal trading; the extravagance had been so great that the money market was now practically closed against municipalities, it being impossible for them to borrow except at usurious rates." The figures above given for the United States do not include either the debt of the United States or the repudiated debts of various states and municipalities. If this should be added, the total debt of all governmental organizations in the United States would approximate four billion of dollars.

ality whenever called in question, and applied to them the strict rule of construction, denying the power of the corporation to incur questionable debts. Their language varies and limits the amount of debt which can be legally incurred by public corporations by fixing a gross sum either in amount[262] or rate of taxation,[263] or, which is perhaps the usual and customary

[262] City of Brenham v. German American Bank, 144 U. S. 173, 549; reversing 35 Fed. 185; Argenti v. City of San Francisco, 16 Cal. 256; McCracken v. City of San Francisco, 16 Cal. 591. The restriction in the charter considered in the last two cases prevented the common council from creating or permitting the incurring of debts or liabilities in the aggregate with other debts not exceeding $50,000 over and above the annual city revenue.

Bank of Columbia v. Taylor County, 112 Ky. 243, 65 S. W. 451; Hoffman v. Gallatin County Com'rs, 18 Mont. 224, 44 Pac. 973. A constitutional provision prohibited the incurring of indebtedness for any single purpose exceeding $10,000 without the approval of a majority of the voters. Three separate loans of $10,000 each were made in one day by a county board and the court held the last two unauthorized, the constitutional limitation applying to the total amount of indebtedness not the indebtedness legally incurrable by single action.

Salem Water Co. v. City of Salem, 5 Or. 29. In Winters v. George, 21 Or. 251, the limitation construed was one providing that the city of Portland might incur an indebtedness of $500,000 for building bridges across the Willamette River, but that it should never incur indebtedness for more than two years in the future except by the issue of negotiable bonds.

[263] School Town of Winamac v. Hess, 151 Ind. 229; Allen v. City of Davenport, 107 Iowa, 90; Phillips v. Reed, 107 Iowa, 331. Saloy v. City of New Orleans, 33 La. Ann. 79. Where the constitution of the state limited the tax levy to ten mills, a levy of fifteen mills was legal, a portion of the proceeds of which were to satisfy antecedent contract obligations derived from legislative authority valid when the contracts were made and protected by the provision of the constitution of the United States against impairing the obligation of a contract.

Callaghan v. Town of Alexandria, 52 La. Ann. 1013; Reynolds v. City of Waterville, 92 Me. 292; Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069; Darling v. Taylor, 7 N. D. 538; Weber v. Dillon, 7 Okl. 568; Houston v. City of Lancaster, 191 Pa. 143. The constitution of Pennsylvania (art. 9, § 8), provides that the debt of any city shall not exceed 7% of the assessed value of the taxable property "nor shall any such municipality or district incur any new debt or increase its indebtedness to an amount exceeding two per centum upon such assessed valuation of property without the assent of the electors." The city in the case in question whose debt had not reached the 7% limit was held as not having the authority by successive addition of 2% or less to increase its indebtedness to the limit. The increase from 2%

method, by limiting such indebtedness to a certain proportion of the assessable or taxable value of property within the jurisdiction of the corporation.[264] In some cases words are found to the effect

to 7 % it was held could only be authorized by vote.

Barr v. City of Philadelphia, 191 Pa. 438; Roye v. Borough of Columbia, 192 Pa. 146, 43 Atl. 597; Gable v. City of Altoona, 200 Pa. 15, 49 Atl. 367; Cleveland v. City Council of Spartanburg, 54 S. C. 83; Freeman v. City of Huron, 10 S. D. 368; Mitchell County v. City Nat. Bank, 15 Tex. Civ. App. 172; Gould v. City of Paris, 68 Tex. 511, 4 S. W. 650.

Nolan County v. State, 83 Tex. 182, 17 S. W. 823. Where a limit is fixed of a tax of one-fourth of one per cent per annum for a specified purpose the commissioners authorized to handle the funds thus raised must be governed by the official rules made out by the tax assessors. They have no power to determine for themselves the actual value of the property in the county subject to taxation. Peck v. City of Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653; Faulkner v. City of Seattle, 19 Wash. 320; Graham v. City of Spokane, 19 Wash. 447; Rice v. City of Milwaukee, 100 Wis. 516.

[264] Corning v. Meade County Com'rs, 102 Fed. 57. The limitation of the indebtedness of a county is measured by the last assessed valuation of property before the issuing of the bonds, not by the valuation at the time they are voted. See, also, cases cited in the opinion including Dudley v. Lake County Com'rs, 80 Fed. 672, 677; Rathbone v. Kiowa County Com'rs, 83 Fed. 125, 132; Speer v. Kearney County Com'rs, 88 Fed. 749; Board of Education of Huron v. National Life Ins. Co., 94 Fed. 324, 328; Lake County Com'rs v. Sutliff, 97 Fed. 270, 281; Butts v. Little, 68 Ga. 272; Dutton v. City of Aurora, 114 Ill. 138; Sackett v. City of New Albany, 88 Ind. 473.

Campbell v. City of Indianapolis, 155 Ind. 186. The school city of Indianapolis, the court held in this case, must be considered separate from the civil city in determining whether the amount of indebtedness had passed the constitutional limit. French v. City of Burlington, 42 Iowa, 614; McPherson v. Foster, 43 Iowa, 48. Where indebtedness incurred is a part in excess of the constitutional limitation and a part within, that part within is legal and can be enforced.

Way v. Fox, 109 Iowa, 340. A court house the cost of which would raise a corporate debt beyond the constitutional limitation, the court held in this case could be legally constructed where such excess was paid through money donations by citizens.

Hall v. City of Cedar Rapids, 115 Iowa, 199, 88 N. W. 448. A municipality cannot evade the constitutional limitation by acquiring a system of waterworks, the same to be paid for through the application of hydrant rentals, the limit of indebtedness having been reached.

In Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7, it is held that Iowa Const. art. 11, § 3, limiting incurrable indebtedness to 5% of the taxable property of a municipality does not prevent a city al-

that public corporations shall not expend in any year moneys in excess of the actual revenue for such year, and that this yearly revenue shall be devoted to the expenditures of that same year.[265]

ready indebted to the constitutional limit from making a contract for street improvements to be paid for by special assessments on property benefited, and also that where the cost of paving street intersections is paid by the municipality the street paving contract may be void as to this but valid as to that portion providing for the payment of the contract obligations by abutting property owners.

Bartlett v. Atchison, T. & S. F. R. Co., 32 Kan. 134; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441; Adams v. City of Waterville, 95 Me. 242; Reynolds v. City of Waterville, 92 Me. 292, 42 Atl. 553. In determining the limit of indebtedness legally incurrable by a city, its own assessed value is to be taken not that made by a state board. Browne v. City of Boston, 179 Mass. 321, 60 N. E. 934. The city of Boston in order to purchase certain lands, the cost of which would exceed its debt incurring power under the revised statutes, agreed with the owners that they should mortgage the land for the amount of the excess and then sell the equity in the land to the city subject to mortgages. The court held this transaction void and that it could be enjoined, as the payment of the mortgage was an obligation devolving upon the municipality and in effect an increase of its debt beyond the legal limitation.

Farr v. City of Grand Rapids, 112 Mich. 99, 70 N. W. 411. The provision of a city charter authorizing the construction and operation of an electric light plant, with the creation of an indebtedness for that purpose, upon a vote of the people could not give such right contrary to the provisions of the constitution limiting the amount of indebtedness legally incurrable.

Murphy v. Cook County Com'rs, 74 Minn. 28, 76 N. W. 951, construing Minn. Laws 1895, c. 289. Board of Education of Eddy v. Bitting, 9 N. M. 588. The fact that there are no funds in the hands of the treasurer with which to pay school warrants does not prevent their issuance up to the 4% Federal limitation.

McMurtry v. Roger Mills County Com'rs, 6 Okl. 60; City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190; Martin v. Ter., 5 Okl. 188, 48 Pac. 106. The Federal limitation upon municipal indebtedness applies to that created by the legislature as well as to that incurred by the action of municipal authorities.

City of Erie's Appeal, 91 Pa. 398. A city cannot by contract create a new debt in excess of the 7% constitutional limitation already reached. Childs v. City of Anacortes, 5 Wash. 452. The constitutional prohibition against the incurring of a debt in excess of one and one-half per cent of the value of taxable property within its limits held not the source of the city's power to incur indebtedness but a limitation on such power. Petros v. City of Vancouver, 13 Wash. 423; State v. Blake, 26 Wash. 237, 66 Pac. 396; Neale v. Wood County Ct., 43 W. Va. 90. See, also, Burroughs, Pub. Secur. c. XIV, for

The existence of such limiting provisions does not ordinarily give to public authorities the discretionary or volitional power to incur indebtedness to the limit fixed, without a vote of the people

lengthy quotation from state constitution relative to the incurring of indebtedness.

[265] City of New Orleans v. United States, 49 Fed. 40; Crebs v. City of Lebanon, 98 Fed. 549, determining the rights of a corporate creditor to compel by mandamus the levying of a tax for the payment of a judgment against it. San Francisco Gas Co. v. Brickwedel, 62 Cal. 641; Bradford v. City & County of San Francisco, 112 Cal. 537. Under Cal. Const. art. 11, § 18, as amended in 1892, the court held that a municipality could not, even for pressing wants, during the remainder of a year, where the revenue for that year had been collected and expended, incur liabilities to be paid from the revenues of a subsequent year.

Buck v. City of Eureka, 124 Cal. 61. An implied liability on the part of the municipality held prohibited by Cal. Const. art. 11, § 18; City of Chicago v. Nichols, 177 Ill. 97. Rev. St. c. 24, § 90, provides that the expenditures of the city cannot lawfully exceed the amount provided for in the annual appropriation bill unless an improvement is necessitated by "casualty" or "accident" happening after such annual appropriation is made. The court held the necessity for additional light required by the construction of an elevated railroad was not "an accident" or "a casualty" so as to authorize a further expenditure.

Hodges v. Crowley, 186 Ill. 305; Dehm v. City of Havana, 28 Ill. App. 520. City of Covington v. McKenna, 99 Ky. 508, construing Const. Ky. § 157, which prohibits any city from becoming indebted to an amount exceeding in any year the revenue provided for such year without the consent of two-thirds of the voters thereof voting at an election to be held for that purpose.

Knipper v. City of Covington, 22 Ky. L. R. 676, 58 S. W. 498. An election is necessary even where an "emergency" exists; the Ky. Const. § 158, providing that municipalities shall not be authorized to incur indebtedness in excess of a certain limit "unless in case of 'emergency' the public health or safety should so require."

City Council of Richmond v. Powell, 16 Ky L. R. 174, 27 S. W. 1. Section 157 of the Const. of Ky. held in this case to apply to an indebtedness for school purposes as well as those strictly municipal. State v. Clinton, 28 La. Ann. 400; Creole Steam Fire Co. v. City of New Orleans, 39 La. Ann. 981, 3 So. 177; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Municipal Secur. Co. v. Baker County, 33 Or. 338, 54 Pac. 174.

In Booth v. Weiss, 15 Phila. (Pa.) 159, an obligation incurred for the present payment of money where the city had funds in its treasury was not held such an incurrence of indebtedness as to render it void for being in excess of the legal limit.

Kuhls v. City of Laredo (Tex. Civ. App.) 27 S. W. 791. A city is not liable on a contract for the construction of a sewer where no pro-

upon its creation. This is necessary. The authority to incur indebtedness within constitutional or other limiting provisions proceeds and is derived from the qualified voters of the corporation.[266] What is or may be considered an indebtedness coming within limits thus fixed will be considered in later sections.[267] It is impossible in the text to state a rule or principle of law which will be uniform in its application throughout the country.

vision was made at the time of its execution for payments thereunder as required by Tex. Const. art. 11, § 5.

Mitchell County v. City Nat. Bank, 91 Tex. 361. Under Tex. Const. art. 11, § 7, providing that no debt shall be incurred by any municipality unless provision is made for levying a sufficient tax to pay annually the interest and provide for, at least, a 2% sinking fund, a debt in order to be valid must have this rate of taxation so definitely fixed that it is merely a ministerial act to determine it.

Mineralized Rubber Co. v. City of Cleburne, 22 Tex. Civ. App. 621. A municipal contract for the purchase of fire hose without any provision being made for its payment as required by Const. art. 11, is void.

[266] Cunningham v. City of Cleveland, 98 Fed. 657; Hudson v. City of Marietta, 64 Ga. 286. A municipal corporation has no power to incur indebtedness for the purchase of a new steam fire engine without an election held in accordance with the provisions of the Constitution of the state.

Town of Fowler v. Austin Mfg. Co., 5 Ind. App. 489, 32 N. E. 596. Rev. St. Ind. § 3342, determines the manner in which certain indebtedness can be legally incurred by incorporated towns. It was held, in this case, that such provision did not prohibit the purchase of a road scraper, without complying with the statutory provisions, the note given for its payment being valid.

City of Covington v. McKenna, 18 Ky. L. R. 288, 36 S. W. 518; Maysville & L. Turnpike Road Co. v. Wiggins, 20 Ky. L. R. 724, 47 S. W. 434; Whaley v. Com., 23 Ky. L. R. 1292, 61 S. W. 35; Grand Island & W. C. R. Co. v. Dawes County, 62 Neb. 44, 86 N. W. 934; Sener v. Borough of Ephrata, 176 Pa. 80; Gable v. City of Altoona, 200 Pa. 15; Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520. A petition signed by the resident owners of five-eighths of the taxable property of the municipality is required by Comp. Laws, § 1048, to authorize a municipality to borrow money or incur debt. The petition in this case though lacking in formality was held sufficient under the statute.

Rehmke v. Goodwin, 2 Wash. St. 676; Strain v. Young, 25 Wash. 578. Const. art. 8, § 6, providing that no county shall become indebted exceeding a certain amount without the assent of three-fifths of the voters voting at an election to be held for that purpose, requires this proportion voting on that particular proposition not such proportion of the total votes cast at the election. Hazeltine v. Blake, 26 Wash. 231.

[267] Post, §§ 152 et seq.

There will be found upon an examination of the cases two conflicting principles to which attention has already been called, namely, the fixed purpose on the part of the courts to limit and restrict in every possible way the incurring of unnecessary and extravagant debts, even though the funds may be used for a proper municipal or public purpose, and that other one, that a public corporation may, through its duly elected and qualified agents, contract obligations and incur indebtedness morally binding upon the corporation, the proceeds enjoyed and used by the public and therefore which should be paid for by those enjoying such benefit and advantage.

It is quite uniformly held that where limiting provisions of a public character exist as to the amount or the purpose of indebtedness legally incurred, those dealing with the corporations are bound to take notice of such limitations, and if they contract or deal with the corporation the result being an indebtedness or an obligation in excess of the amount limited, they do so at their risk. In other words the doctrine of notice of limitation of corporate powers, so-called, as applied to private corporations, is applied with even more strictness to the acts of a public corporation. This doctrine, as will be remembered, is that a corporation is an artificial person of limited capacity or powers. Those dealing with it are charged legally with knowledge of this fact, and if in transactions the corporation exceeds its powers those who are legally chargeable with knowledge of the existence of the limitation cannot complain if they lose through their negligence or failure to see that the corporation is acting in excess of legal authority.[268] But even here the courts for the purpose often of

[268] Jutte & Foley Co. v. City of Altoona (C. C. A.) 94 Fed. 61; Gamewell Fire Alarm Tel. Co. v. City of Laporte, 96 Fed. 664, 102 Fed. 417. See, also, City of Litchfield v. Ballou, 114 U. S. 190; and 44 Am. St. Rep. 242; Arbuckle-Ryan Co. v. City of Grand Ledge, 122 Mich. 491, 81 N. W. 358. In this case the court say: "Have parties dealing with a municipal corporation the right to rely upon an apparent power in its agent, the common council, whose power is limited by the charter? What is an apparent power? Is it such as may be implied from a general agency? * * * Certainly not. It must follow that there is no apparent power upon which one may rely, but only the real actual power lodged in the municipality by the charter. Its charter is the sole guide which all are held to know. To that alone, parties must look and act at their peril."

effecting substantial justice as between parties, hold squarely that one who has enjoyed the use or the benefit of a transaction ought not and cannot be heard to say that because he ought not to have enjoyed it he should not pay for it. The cases, however, where this doctrine can and should be applied strictly, must be distinguished and differentiated from those where it should not control. The fact of whether the limitation depends upon data or records within the reach of those dealing with the corporation, or whether it depends upon such data and records not within the public knowledge or open for public inspection, will determine this point. Where the latter is true the doctrine will not apply;[269] where the former state of facts exists the doctrine is usually held.[270]

[269] In re City of New York, 72 N. Y. Supp. 378. The cost of improving a street, though there was a possibility of its exceeding the limit of the city debt declared by the Const. art. 8, § 10, it was held could be raised, the official report of the comptroller at the time of the institution of the proceedings not showing an excess and the indication being that there would be an ample margin before the debt limitation would be reached.

Johnson v. Pawnee County Com'rs, 7 Okl. 686. It must be affirmatively shown by a county that its warrants were not issued in anticipation of taxes already levied.

[270] Nesbit v. Riverside Independent Dist., 144 U. S. 610; affirming 25 Fed. 635. The purchaser of bonds no matter what recitals appear on their face is bound to take notice of the constitutional limitation and of the public official assessment of taxable property within the district.

Post v. Pulaski County, 49 Fed. 628. The recital in county bonds that they are issued pursuant to the order of the county court puts all persons upon inquiry as to the conditions of this order.

Francis v. Howard County, 50 Fed. 44; East St. Louis Gas Light & Coke Co. v. City of East St. Louis, 45 Ill. App. 591; Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89. Purchasers of bonds are bound at their peril to take notice of the authorized official valuation of taxable property upon which a constitutional indebtedness is based. The court say: "Purchasers of such bonds are bound, at their peril, to take notice of the constitutional limitation upon the power of such corporations to become indebted and of such facts as the authorized official assessments disclose touching the valuation of all taxable property within the limits of the corporation," citing Buchanan v. City of Litchfield, 102 U. S. 278; Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674; and Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220.

First Nat. Bank of Decorah v. District Tp. of Doon, 86 Iowa, 330, 53 N. W. 301; Anderson v. Orient Fire Ins. Co., 88 Iowa, 593; State v. Town of Columbia, 111 Mo. 365; Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871;

The failure on the part of public authorities to comply with constitutional or other provisions limiting the indebtedness legally incurrable usually renders void their acts and the indebtedness incurred by them, and this is especially true if power is lacking rather than a failure to comply with some formality required by law in the exercise of a granted power.[271]

The total obligation liable to rest upon a public corporation by the terms of a contract extending through a series of years for

Peck v. City of Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653; Fowler v. City of Superior, 85 Wis. 411.

[271] See note 44 Am. St. Rep. 241-243; Norton v. Taxing Dist. of Brownsville Com'rs, 129 U. S. 479. The effect of a constitutional amendment restricting the incurring of municipal indebtedness upon a previous legislative act was to abrogate such previous legislative act and render void an indebtedness incurred through proceedings authorized by this legislative act and pending or not completed at the time of the passage of the constitutional amendment. Dodge v. City of Memphis, 51 Fed. 165; Lyon County v. Ashuelot Nat. Bank, 87 Fed. 137; affirming 81 Fed. 127; Parks v. Soldiers' & Sailors' Home Com'rs, 22 Colo. 86; following In re Appropriations by Gen. Assem., 13 Colo. 316; Dunbar v. Canyon County Com'rs, 5 Idaho, 407, 49 Pac. 409; Fuller v. City of Chicago, 89 Ill. 282; Griswold v. City of East St. Louis, 47 Ill. App. 480.

School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81. The excess of indebtedness only held void in this case, and a contract for the construction of a school house the cost of which would raise the town indebtedness beyond the constitutional limitation was held enforceable, that part of the contract price within the limit, so the court held, being a sufficient consideration. McPherson v. Foster, 43 Iowa, 48. The excess only held void.

McAleer v. Angell, 19 R. I. 688, 36 Atl. 588. Where the debt limit has been reached, a town cannot contract a further liability even for materials to be used in repairing highways which it is required by statute to keep in repair. Allen v. City of Davenport, 107 Iowa, 90; Painter v. City of Norfolk, 62 Neb. 330, 87 N. W. 31. The city was authorized to indorse on bonds issued by a private waterworks company that it would pay the annual interest in lieu of hydrant rentals to such amount. The city clerk indorsed the statement that the city would pay the interest as it matured. It was held that the indorsement as made was in excess of the authority conferred by the ordinance and therefore void. People v. Parmerter, 158 N. Y. 385; Drhew v. Altoona City, 121 Pa. 401, 15 Atl. 636. A city not liable for damages on account of a breach of contract where the amount of the obligation would raise the municipal indebtedness above the constitutional limit.

State v. McGraw, 12 Wash. 541; State v. Winter, 15 Wash. 407. The assumption of indebtedness created by residents of the same territory,

services to be performed from time to time is not usually considered an indebtedness to be included within the constitutional or other limitation. A future contract obligation is not an absolute liability but is contingent on the performance of the contract before the corresponding obligation on the part of the municipality is created.[272]

included within the limits of a municipal corporation subsequently organized, was held constitutional and within the limits of legislative power.

[272] Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; Anoka Water Works, E. L. & P. Co. v. City of Anoka, 109 Fed. 580; McBean v. City of Fresno, 112 Cal. 159; City of San Diego v. Higgins, 115 Cal. 170. A contract extending over several years is not invalidated by the fact that the aggregate amount of the contract obligation as estimated by the municipality exceeds its constitutional limit.

City of Valparaiso v. Gardner, 97 Ind. 1; Crowder v. Town of Sullivan, 128 Ind. 486; Seward v. Town of Liberty, 142 Ind. 551; Foland v. Town of Frankton, 142 Ind. 546; Davis v. City of Des Moines, 71 Iowa, 500, 32 N. W. 470; Grant v. City of Davenport, 36 Iowa, 396; Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480, 78 N. W. 558: "The charter does limit the authority of the council in respect to incurring indebtedness, but the rule that a contract for future service to be paid for as rendered is not an incurring of indebtedness, is supported by abundant authority."

Smith v. Town of Dedham, 144 Mass. 177, 10 N. E. 782; Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188; Ter. v. City of Oklahoma, 2 Okl. 158; Wade v. Borough of Oakmont, 165 Pa. 479. In Duncan v. City of Charleston, 60 S. C. 532, the court held that a contract for the supply of water and light to a city requiring the payment of a certain sum each year out of its current receipts was void, being in violation of a constitutional provision in South Carolina prohibiting the incurring of indebtedness in excess of a certain per cent of the value of the taxable property, the city making such contract being indebteded at that time to an amount in excess of the constitutional limitation.

Stedman v. City of Berlin, 97 Wis. 505, 73 N. W. 57. See, also, § 257, post, and authorities cited. But see Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 3,275.

City of Springfield v. Edwards, 84 Ill. 626; Prince v. City of Quincy, 28 Ill. App. 490; affirmed 128 Ill. 443; Culbertson v. City of Fulton, 127 Ill. 30; Beard v. City of Hopkinsville, 95 Ky. 239; Niles Water-Works Co. v. City of Niles, 59 Mich. 311; Davenport v. Kleinschmidt, 6 Mont. 502; Read v. Atlantic City, 49 N. J. Law, 558.

The court after reviewing several cases said: "The plain object of such restrictions is to require that all moneys which are to be paid for municipal expenses after the debt has reached the fixed limit shall be raised by taxation. In view of this object it is clear (and all the cases agree in this) that prohibitions

§ 150. Retroactive effect of limitations.

The question of the retroactive effect of such provisions has arisen at times. The uniform decision of courts has been that the adoption of constitutional provisions or the passage of legislation limiting and restricting the power and capacity of a public corporation to incur indebtedness of any character does not render illegal or void indebtedness which was valid at the time of adoption of such constitutional amendment or the passage of such legislation though such indebtedness may be in excess of the limit therein fixed.[273] And it has even been held that debts

against increasing the indebtedness or the debt of a municiaplity are not to be construed as limited to obligations which are debts eo nomine, but are to be extended to all contracts for the payment of money or contracts whereon the payment of money may be enforced. But where the money to be paid upon such contracts is provided for to be raised by taxation, upon some fixed and definite scheme, such contracts are not, in my judgment, within such prohibitions. Where, however, the money required to meet such contracts is not provided for either by being legally ordered to be raised by taxation and appropriated for that purpose, or by some legislative scheme which positively prescribes that it shall be raised by taxation and appropriated for its payment as needed, then such contracts do increase the indebtedness or debt of municipal corporations within the meaning of such prohibitions. Any other construction would deprive these restrictions of the force requisite to reach and cure the evil intended to be prevented thereby." Salem Water Co. v. City of Salem, 5 Or. 29. An agreement to pay the *Salem Water Co.*, $1,800 per annum *for seventeen* years in quarterly installments for water to be furnished the city, created a liability against the city within the meaning of a charter provision prohibiting the common council from creating "any debt or liabilities in any manner" against the city which shall exceed the sum of $1,000. City of Erie's Appeal, 91 Pa. 398.

[273] Sibley v. City of Mobile, 3 Woods, 535, Fed. Cas. No. 12,829. Legislation affecting a contract obligation lawfully entered into and resulting in the incurring of an indebtedness is inoperative so far as it impairs that contract. Aydelott v. Town of South Louisville, 16 Ky. L. R. 166, 26 S. W. 717; City of Ludlow v. Board of Education of Ludlow, 16 Ky. L. R. 805, 29 S. W. 854; Warren v. City of Newport, 23 Ky. L. R. 1006, 64 S. W. 852; Bank of Columbia v. Taylor County, 23 Ky. L. R. 1483, 65 S. W. 451; City of Ashland v. Culbertson, 103 Ky. 161; Kansas City v. Wyandotte Gas Co., 9 Kan. App. 325, 61 Pac. 317. The passage of a subsequent law limiting assessments for the purpose of lighting streets and other public places does not authorize a municipality to repudiate a legal contract entered into before the passage of such legislation.

State v. Graham, 23 La. Ann. 622. In Johnson v. Pawnee County

created prior to the adoption of a state constitution are not to be considered in determining the indebtedness of a county with reference to the limitation placed upon such indebtedness by the constitution.[274]

§ 151. Construction of statutory and other limitations.

The courts in construing the extent and application of charter, statutory or constitutional limitations upon the power of a public corporation to incur an indebtedness, whether represented by negotiable bonds or other instruments, have constantly in mind the general limitations which should be applied in determining the extent of power attempted to be exercised by such corporations. The strict rule of construction therefore is the one most generally adopted. In this there is a difference between a public and a private corporation. The liberal rule of construction is the one usually adopted by the courts in cases of doubt in dealing with the attempted exercise of corporate powers by a private corporation, because that construction tends to facilitate the promotion of the enterprise, and the courts in such cases always hold that where this can be accomplished through the adoption of the liberal rule of construction it should be done, rather than the contrary one which might lead to the defeat of the enterprise or to the impairment of its success. The fundamental differences between a public and a private corporation necessarily lead the courts to adopt the strict rule of construction as applied to all

Com'rs, 7 Okl. 686, it was held that the indebtedness to be taken into consideration in determining whether or not the federal limitation had been exceeded should be that at the time certain indebtedness was voted not the time at which the warrants or other evidence of indebtedness authorized were actually issued. Citing Seward County Com'rs v. Aetna Life Co., 32 C. C. A. 585, 90 Fed. 222; Rollins v. Rio Grande County Com'rs, 33 C. C. A. 181, 90 Fed. 575; and Mountain Grove Bank v. Douglas County, 146 Mo. 42; Baird v. Todd, 27 Neb. 782, 43 N. W. 1143; Lawrence County v. Meade County, 10 S. D. 175; Pleasant Valley Coal Co. v. Salt Lake County Com'rs, 15 Utah, 97, 48 Pac. 1032; Neale v. Wood County Ct., 43 W. Va. 90.

[274] Rollins v. Rio Grande County Com'rs, 90 Fed. 575, citing Lake County v. Rollins, 130 U. S. 662; Wider v. Rio Grande County Com'rs, 41 Fed. 512; Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 29; People v. Rio Grande County Com'rs, 11 Colo. App. 124, 52 Pac. 748; Myers v. City of Jeffersonville, 145 Ind. 431, 44 N. E. 452.

acts of public organizations. These differences consist in the purpose of organization, source of revenue, and expenditure of funds. Through the strict rule of construction the power to incur indebtedness of whatever character is denied in cases of doubt. There exists the difficulty already suggested that the indebtedness may be one morally binding upon a community but in excess of the legal limitation or not incurred pursuant to the formal acts required by law. In such case the courts, in order to render substantial justice as between the parties, may adopt the less strict rule of construction which will permit the enforcement of a moral obligation. In the note will be found reference to cases construing particular charter, statutory and constitutional provisions as affecting the power of different public corporations to incur indebtedness.[275]

[275] *Alabama:* Alabama G. S. R. Co. v. Reed, 124 Ala. 253, 27 So. 19. Under Const. art. 11, § 5, which prohibits counties from levying an amount greater than one-half of one per cent per annum except to pay a liability for the erection of necessary buildings, etc., a tax was held properly levied for the purpose of furnishing a court house with suitable furniture, the court holding that the authority for levying a tax for the erection of a court house would necessarily include the power to provide suitable furnishings.

Arizona: McRae v. County of Cochise (Ariz.) 44 Pac. 299. A reward of $3,000 offered by a board of county supervisors to be paid to any person first securing an artesian well in the county, the court holds an obligation or indebtedness within the meaning of Act of Cong. 1886 known as the "Harrison Act" limiting the indebtedness of any county to four per cent of the value of the taxable property. The reward as offered was in excess of the four per cent limit and the county was therefore held incapable of contracting this obligation.

California: Shaw v. Statler, 74 Cal. 258. The county income for each year must be used to pay the debts of that year, the constitution of the state providing that no county shall incur any liability or indebtedness exceeding in any year its annual income without a two-thirds vote of the electors. In Welch v. Strother, 74 Cal. 413, construing same constitutional provision, the court held that the salaries of the public officers being fixed by law and payable out of the general fund they should be paid in the absence of any showing that the general fund would be exhausted by such payment, although the amount thus paid in one month exceeded its proportionate share of the limit allowed for the year.

Smith v. Broderick, 107 Cal. 644; Pacific Undertakers v. Widber, 113 Cal. 201. A claim under a contract between a board of supervisors and a firm of undertakers by which they were to bury the indigent dead for

§ 152. Definition of the word "indebtedness" or "debt" as used in limiting laws.

The word "debt" or "indebtedness" is the one ordinarily

the fiscal year at a certain sum for each burial was held in this case as being "indebtedness" within the meaning of art. 11, § 18 of the constitution. City of San Diego v. Higgins, 115 Cal. 170; following McBean v. City of Fresno, 112 Cal. 159. These cases hold that a contract extending over several years is not invalidated by the fact that the aggregate amount of the contract obligation as incurred by the municipality exceeds its constitutional limitation. W. W. Montague & Co. v. English, 119 Cal. 225. Materials purchased by a city during one year cannot be paid for out of the revenues of any future year.

Colorado: Dudley v. Lake County Com'rs (C. C. A.) 80 Fed. 672, but see dissenting opinion of Thayer, Circuit Judge, and cases cited. Indebtedness authorized by the electors to be incurred by a county warrants the incurring of an indebtedness to a less amount than that authorized, construing art. 11, § 6 of the Const. of Colo. In re Canal Certificates, 19 Colo. 63, construing Act of April 17, 1893, providing for payment of labor and materials in the completion of a state canal by certificate of indebtedness issued by the auditor of the state. In re Casual Deficiency, 21 Colo. 403; Colo. Const. art. 11, § 3, prohibits the state from contracting any debt by loan except to provide for casual deficiencies. Act April 8, 1895, construed in this case and certain bonds issued under its authority held as not in conflict with such constitutional provision. Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 23. Under the constitutional limitation upon the amount of indebtedness, the court held that a county's power to incur indebtedness based on its assessed valuation was measured by the corrected assessment for the current fiscal year.

Georgia: Gavin v. City of Atlanta, 86 Ga. 132. In determining the authority of a municipality to incur indebtedness under Const. 1877, art. 7, § 7, the court held that where a special method for registration of voters was provided, two-thirds of the number registered was sufficient to authorize the issuance of bonds under the constitutional provision, this providing that no debt exceeding a certain amount should be incurred by any municipality without the assent of two-thirds of the qualified voters thereof at an election for that purpose.

Illinois: People v. Lippincott, 81 Ill. 193, construing Illinois Acts of 1872 and 1875 relating to municipal indebtedness and its refunding. Barrett v. City of East St. Louis, 89 Ill. 175. The prohibition contained in the charter of East St. Louis applies only to debts incurred by borrowing money not to liabilities contracted as a part of the current expenses of the city. People v. Hamill, 134 Ill. 666. Under Ill. Const. art. 9, § 12, limiting the power of counties to contract indebtedness to five per cent "of the last assessment for state and county taxes," the assessment determining the authority

used in constitutional or other provisions limiting the obligations legally incurrable by public corporations. What charges or obli-

is that fixed by the state board of equalization, not that made by the local assessors.

Hodges v. Crowley, 186 Ill. 305. The Emergency Act of April 24, 1899, authorizing a special tax of one half per cent per annum for building and repairing roads held invalid as contrary to the provisions of the Const. art. 9, § 12.

Wabash R. Co. v. People, 187 Ill. 289. Under Starr & C. Ann. St. p. 734, providing that the aggregate amount of taxes levied for any one year, exclusive of the amount levied for the payment of bonded indebtedness or interest thereon, should not exceed the rate of two per cent on the aggregate value of property subject to taxation as equalized, the court held that that portion of a city's levy which was for "paving bonds and interest" was within the exception, and as the amount of the levy less this deduction was less than two per cent, it was valid.

City of Chicago v. Fishburn, 189 Ill. 367. The statutes of Illinois require assessors to determine the fair cash value of property and set down such value in a column headed "Full value," and one-fifth part thereof in another column headed "Assessed value," all taxes to be computed on the assessed value. The legal limit of indebtedness to be incurred under Const. art. 9, § 12, by a city should be based upon that column headed "Assessed value," and the percentage as fixed in the constitutional provision is to be estimated upon this and not upon the value given in the column headed "Full value."

City of Joliet v. Alexander, 194 Ill. 457. Bonds to be issued for the construction of a system of waterworks, the receipts from which were to be kept separate and devoted to the paying of the interest and principal of those bonds, it was held would be invalid as being in excess of the constitutional limitation, the existing indebtedness of the city other than the proposed issue of bonds having already reached that limit.

Strodtman v. Menard County, 56 Ill. App. 120. A warrant issued in payment of ordinary and necessary expenses in anticipation of taxes partly levied and to be collected for such purpose was held in this case as not being an indebtedness contrary to the constitutional provision.

City of East St. Louis v. People, 124 Ill. 655, 17 N. E. 447; True v. Davis, 133 Ill. 522, 22 N. E. 410. The fact that the aggregate indebtedness of two municipalities seeking consolidation exceeds the constitutional limit does not prevent such consolidation.

Indiana: Town of Winamac v. Huddleston, 132 Ind. 217. Under Const. art. 13, § 1, a town can not issue bonds for the purpose of rebuilding a school house, where such bonds if issued would create an indebtedness in excess of the limit contained in such provision.

Monroe County Com'rs v. Harrell, 147 Ind. 500. County commissioners have the power to issue bonds for the purpose of constructing gravel roads to be paid out of a special fund derived from assessments upon property benefited, although such bonds added to the other indebtedness of the county

gations can be included properly within the meaning of these words may be material and important in determining the amount

would exceed the constitutional limitation as found in Const. art. 13.

Iowa: Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523; Faulkner v. Same, Id. The Constitution of Iowa limits the aggregate legal indebtedness of any public corporation to five per cent of the value of its taxable property as ascertained by the last preceding state and county tax lists. An exemption based upon the planting of certain acreage of forest or fruit trees and deducted from the tax lists is not to be taken into consideration in determining the value of the taxable property for the purpose of ascertaining the constitutional limit of legal indebtedness.

Youngerman v. Murphy, 107 Iowa, 686, 76 N. W. 648; City of Cedar Rapids v. Bechtel, 110 Iowa, 196, 81 N. W. 468. The funding of municipal warrants issued for ordinary and current expenses and which at the time of their issuance were within the limit of the current revenue and such taxes as might be legally levied is not within the constitutional prohibition found in art. 11, § 3, which limits the indebtedness of municipal corporations to an amount not exceeding five per cent of the value of the taxable property, the court holding that such refunding did not create or increase indebtedness. Citing Grant v. City of Davenport, 36 Iowa, 396.

French v. City of Burlington, 42 Iowa, 614; Sioux City v. Weare, 59 Iowa, 95; Tuttle v. Polk, 92 Iowa, 433; Edmundson v. Independent School Dist. of Jackson, 98 Iowa, 639; Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Thompson v. Independent School Dist. of Allison, 102 Iowa, 94; Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476, construing the constitutional provision. Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568. A municipal contractor was paid in part by special assessment certificates. The liability of the municipality for damages resulting from an erroneous assessment of property for the payment of these certificates is not within the prohibition of a constitutional provision limiting the amount of indebtedness legally incurrable by public corporations, the constitutional prohibition not applying to a liability arising from a wrongful act.

Kansas: Chicago, K. & N. R. Co. v. City of Manhattan, 45 Kan. 419. Sess. Laws Kan. 1886, c. 67, grant authority to municipal corporations to issue bonds to railroads to aid in securing terminal facilities, even though the amount of such bonds with other indebtedness exceed the limitation as fixed in Sess. Laws Kan. 1885, c. 99, § 5. Garfield Tp. v. Samuel Dodsworth Book Co., 9 Kan. App. 752, 58 Pac. 565. The word "year" as used in Comp. Laws 1879, c. 25, § 1, means a calendar not a fiscal year. In order therefore to determine whether there had been an over-issue of county warrants in any one year, the calculation should commence with Jan. 1st of that year. Howard v. Hulbert, 63 Kan. 793. As applied to the county of Leavenworth, special acts of 1879 were repealed by implication in Gen. St. 1889, c. 25.

of indebtedness legally incurrable, and the courts from time to time have defined these words and included or excluded from

Kentucky: Holzhauer v. City of Newport, 94 Ky. 396. Const. § 166 continuing in force all city charters theretofore granted until the general assembly should provide by general law for the government of towns and cities, permits cities to incur indebtedness in the manner prescribed by their charters granted before the adoption of the constitution and until the passage of such law. Aydelott v. Town of South Louisville, 16 Ky. L. R. 166, 26 S. W. 717. Const. §§ 157 and 158 limiting tax rates and prohibiting towns from incurring indebtedness exceeding a specified amount does not affect the indebtedness of a town created by a vote of its taxpayers before the constitution was adopted. Followed by City of Ludlow v. Board of Education of Ludlow, 16 Ky. L. R. 805, 29 S. W. 854; Warren v. City of Newport, 23 Ky. L. R. 1006, 64 S. W. 852; Bank of Columbia v. Taylor County, 112 Ky. 243, 65 S. W. 451.

O'Mahoney v. Bullock, 97 Ky. 774, 31 S. W. 878. Act of May 3, 1890, is subject to the constitution, § 157; it attempting to authorize the County of Fayette to purchase or lease turnpikes and keep them in repair, the cost of such purchase or lease being met by taxes and the issuing of bonds. Commissioners of Sinking Fund of Louisville v. Zimmerman, 101 Ky. 432, 41 S. W. 428, construing Ky. St. § 3010, authorizing a city to retire existing bonds by a payment from the sale of new bonds or by direct exchange.

Louisiana: Warner v. City of New Orleans, 87 Fed. 829. The city of New Orleans by a constitutional amendment was prohibited from increasing its debt but it was authorized to issue certain drainage warrants in payment of a contract for the construction of drainage works then nearing completion. The court decided that the purchase of drainage works then being built and the issuance of warrants in payment thereof were within this exception. The decree was modified, however, in City of New Orleans v. Warner, 175 U. S. 120, which held that the city had the authority to complete the drainage works itself and to issue warrants paying for the purchase of the contractor's plant. Washington State Bank v. Baillio, 47 La. Ann. 1471. La. Const. art. 209, limiting the levy of taxes to ten mills construed.

Michigan: Schneewind v. City of Niles, 103 Mich. 301. A charter provision of the city of Niles construed and the total tax levy limited to two per cent of the property valuation.

Minnesota: Town of Alden v. Easton (C. C. A.) 113 Fed. 60. The act of 1868 is within the power reserved by the legislature in Gen. St. Minn. 1866, c. 11, §§ 78, 79, to permit in exceptional cases the creation of debts by towns in excess of the limit prescribed by the general law.

Rogers v. Le Sueur County, 57 Minn. 439. Under Gen. St. 1878, c. 11, §§ 49, 114, a board of county commissioners have no power to furnish a county court house where the amount expended will exceed the liability which a county is authorized to incur.

Missouri: Prickett v. City of Mar-

celine, 65 Fed. 469. The assessment contemplated by Const. art. 10, § 12, is the final one as made by the state board of equalization.

Webb City & C. Waterworks Co. v. City of Carterville, 153 Mo. 128. Mo. Const. art. 10, § 12, prohibits the city from becoming indebted to an amount exceeding in any year the income of that year. A contract between a waterworks company and the city the court held valid where the stipulated yearly rental together with preferred expenses as provided in Rev. St. § 4977 did not in the aggregate exceed the total income of the city for the year. Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188. The word "income" as used in Const. art. 10, § 12, providing that no county, city or town shall become indebted in any one year for a greater amount than the "income and revenue provided for such year" includes funds derived from all sources, not from taxation alone. *Reversed* in Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756.

Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190. Under Const. art. 10, § 12, fixing the limit of municipal indebtedness, a contract by the city to pay a fixed price annually for a specified period for water supply is valid, payment being contingent upon the supply furnished. State v. Johnson, 162 Mo. 621, 63 S. W. 390. A county warrant valid when issued does not become invalidated by the exhaustion of funds at the time it is presented for payment. It is payable from the surplus of the revenue collected in subsequent years for payment of current expenses.

Montana: Palmer v. City of Helena, 19 Mont. 61. The sewerage system contemplated by Const. art. 13, § 6 and Pol. Code, § 4800, subd. 64, forbidding municipal corporations to incur indebtedness exceeding three per cent unless "necessary to construct a sewerage system or procure a water supply," is one not in existence at the time of the adoption of the constitutional provision.

Nebraska: Chilton v. Town of Gratton, 82 Fed. 873. The Nebraska constitutional limitation affects expenditures only for works of internal improvement, which the court further holds does not include a county court house.

New Mexico: Board of Education of Eddy v. Bitting, 9 N. M. 588. The town board of education of Eddy has a civil existence independent of the town and therefore capable of incurring an indebtedness up to the 4 per cent limit as authorized by Act Cong. July 30, 1886, although both corporations are co-extensive with the same territory.

New York: People v. Denniston, 23 N. Y. 247. In construing N. Y. Const. which prohibits loans to aid corporations, it was held that bonds payable at a certain number of years after twenty was not an extension of time, nor a forbearance; nor the making of a new loan within the meaning of the constitutional provisions.

Adams v. East River Sav. Inst., 136 N. Y. 52. New York Const. (Amend. 1884) art. 8, § 11, provides that no county containing a city of over 100,000 inhabitants, or any such city, shall be allowed to become indebted in excess of 10% of the assessed valuation of the real estate of such county or city. The county irrespective of the indebtedness of the city can legally incur an indebtedness equal to ten per cent of the value of all the land in the county

without regard to the fact that ninety per cent of the real estate of the county is also in the city limits. Comstock v. City of Syracuse, 5 N. Y. Supp. 874. Sec. 20 of the Act to "establish and maintain a water department in and for the city of Syracuse" (Laws 1889, c. 291) is not in violation of Const. N. Y. art. 8, § 11. People v. City of Syracuse, 59 Hun, 258, 12 N. Y. Supp. 890, construing N. Y. Laws 1885, c. 26, § 106.

Gibson v. Knapp, 21 Misc. 499, 47 N. Y. Supp. 446; People v. Carpenter, 31 App. Div. 603, 52 N. Y. Supp. 781. The term "funded debt" as used in Laws 1892, c. 685, § 5, includes all indebtedness evidenced by bonds payable beyond the year of their issue with a periodical payment of interest. Newburgh Sav. Bank v. Town of Woodbury, 64 App. Div. 305, 72 N. Y. Supp. 222. The issue of bonds for reimbursing drafted men within the town of Woodbury is contrary to Const. art. 8, § 10, the use not coming within the proper definition of "town purposes."

North Carolina: Broadfoot v. City of Fayetteville, 128 N. C. 529, 39 S. E. 20. Under Const. art. 7, § 7, municipal corporations are prohibited from contracting debts except for their necessary expenses unless authorized by a vote of a majority of the qualified electors. Under this provision where bonds were originally issued bearing interest at the rate of six per cent the issue of refunding bonds bearing an increased rate of interest without the vote of the people was held invalid.

Ohio: City of Cincinnati v. Holmes, 56 Ohio St. 104. A contract for the performance of improvement work in a village is valid although the money for the payment of the work contemplated was not in the treasury at the time. Act of May 4, 1891 (88 Ohio Laws, 527), as affected by Rev. St. § 2702, construed.

Oklahoma: Hall Lithographing Co. v. Roger Mills County Com'rs, 8 Okl. 378. The limitation imposed by Act of Cong. July 30, 1886, § 4, providing that no political or municipal corporation of the territories of the United States shall ever become indebted in any manner to an amount exceeding in the aggregate four per cent on the taxable property is not a grant of the power to incur indebtedness, but a limitation upon it. Such power existed prior to the passage of such legislation without limit. Following Sauer v. McMurtry, 4 Okl. 447; D County Com'rs v. Gillett, 9 Okl. 583. The debt limitation as imposed by Act Cong. July 30, 1886, § 4, includes expenses incurred by operation of law as well as those debts arising from express contracts. The salary of the county clerk is a debt within the meaning of the act.

Martin v. Ter., 5 Okl. 188; followed in Spencer v. Gray, 5 Okl. 216. Warrants issued by a city under Laws 1890, c. 14, in settlement of debts incurred by provisional governments are void where the city at that time was in debt beyond the limit of four per cent as fixed by Act of Congress.

Pennsylvania: Dupont v. City of Pittsburgh, 69 Fed. 13, construing Pa. Act June 9, 1891, regulating the manner of increasing municipal indebtedness. Jutte & Foley Co. v. City of Altoona (C. C. A.) 94 Fed. 61. Municipal contractors held bound with notice of the limitations placed by ordinance upon the powers of a municipality. Pike County v. Rowland, 94 Pa. 238; Bruce v. City of Pittsburg, 166 Pa. 152. Act of

such definitions certain obligations.[276] There is no well-established rule of construction which the courts have adopted in

facilities. Indebtedness for the purpose of laying water mains might be incurred in excess of this where it was to be paid by taxes levied upon property specially benefited.

Wisconsin: Fowler v. City of Superior, 85 Wis. 411, 54 N. W. 800. Under a constitutional provision, art. 11, § 3, limiting the indebtedness legally incurrable by a municipality to 5 per cent of the value of taxable property, improvement bonds of a city payable out of the proceeds of special assessments chargeable on the property benefited, held void as being in excess of the constitutional limit. Such bonds were declared by the court an obligation of the city and therefore an indebtedness.

State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86, construing Tomahawk city charter (Laws 1891, c. 58, subc. 9, § 3), which provides for the incurring of indebtedness and holding that such provisions were controlled by Const. art. 11, § 3. This case also holds in common with many others where similar phraseology is used that the last assessment previous to the incurring of the indebtedness is that which is to be used in determining the value of the property upon which to base an estimate of its indebtedness. Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681. The construction of a sewage system held not a current expense.

Wyoming: In Miller v. School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879, the court holds that the adoption of constitutional restrictions upon the amount of bonded indebtedness legally incurrable by a public corporation applies to the indebtedness in existence at such time, and that those corporations cannot, at the time of the adoption of such constitutional provision, and thereafter, incur indebtedness to the amount as therein limited without reference to the indebtedness existing at the time of such adoption.

[276] In City of Conyers v. Kirk, 78 Ga. 480, 3 S. E. 442, it was held that a debt arising from a breach of contract to pay cash was not within the constitutional limitation. Law v. People, 87 Ill. 385. Certificates of indebtedness for temporary loans bearing interest intended to be paid out of the revenue levied for the current year, held an indebtedness under Ill. Const. art. 9, § 12, declaring that no "municipal corporation shall be allowed to become indebted, in any manner, or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment of state and county taxes previous to the incurring of such indebtedness," the court defining the word "indebtedness" used in the Constitution as including debts incurred to be paid in the future as well as those payable at once, and that where such temporary loans exceeded with other indebtedness the constitutional limit they were void, otherwise they might be regarded as a permissible mode of anticipating taxes.

Town of Kankakee v. McGrew, 178 Ill. 74. The term does not apply to current indebtedness or an obligation of the town not bearing interest

defining the words. The desire on their part not to limit the legal indebtedness of a municipality or to compel the payment of a moral obligation rather than any fixed rule of construction has at times influenced their decision. It would not seem ordinarily that there could be any dispute as to the meaning of such phrases. Iowa Const. art. 11, § 3, reads as follows: "No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness." In an able decision by Judge Lochren of the Federal bench[277] it was well said: "The language

and not deferred for payment to some future date. City of Richmond v. McGirr, 78 Ind. 192. The word "loan" as used in Ind. Rev. St. 1881, § 3159, does not include the issue of negotiable bonds payable in the future and bearing interest.

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. A city may become indebted through the misappropriation of funds raised for a certain purpose, and in this manner may increase its indebtedness beyond the constitutional limit. The court say: "If the city obligates itself to pay, no matter what its revenues from special assessments, a debt is created, which falls within the constitutional inhibition. If, however, it simply appropriates a part of its revenues, and pledges them to the payment of the obligation or if it simply undertakes as trustee or agent to collect these assessments and apply them upon the work without liability on its part for anything further, then no debt is created. Or, if it appears that it has on hand at the time the debt is created a sufficient fund to meet the indebtedness or if the debt is payable in installments and it has enough in its hands at the time the installments mature to pay them, then there is no debt in a constitutional sense."

City of Council Bluffs v. Stewart, 51 Iowa, 385; Quill v. City of Indianapolis, 124 Ind. 292; City of Springfield v. Edwards, 84 Ill. 626; City of Valparaiso v. Gardner, 97 Ind. 1; City of Laporte v. Gamewell Fire Alarm & Tel. Co., 146 Ind. 466, 45 N. E. 588; Baird v. Todd, 27 Neb. 782, 43 N. W. 1143; and Bonnell v. Nuckolls County, 28 Neb. 90, 43 N. W. 1145; hold that indebtedness incurred for the purpose of making internal improvements authorized by the adoption of Const. Neb. art. 9, § 5, limiting the amount of taxes levied, is not affected by this constitutional provision.

State v. Fayette County Com'rs, 37 Ohio St. 526; Fowler v. City of Superior, 85 Wis. 411.

Meaning of "indebtedness," see notes 44 Am. St. Rep. 230-232, also L. R. A. vols. 23, p. 402, and 33, p. 474.

[277] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315.

of this section is plain and simple, and its meaning is unmistakable. The incurring of indebtedness beyond the amount limited is absolutely and unqualifiedly prohibited; no matter what the pretext or circumstances, or the form which the indebtedness is made to assume. It curbs equally the power of the legislature, the officials and the people themselves, and was designed to protect the taxpayers from the folly and improvidence of either, or of all combined."

Ingenious attempts have been made to incur debts or indebtedness, which by a "jugglery of phrases" it is claimed are not "debts" or "indebtedness" within the meaning of a constitutional limitation.

Many public corporations have engaged in the construction of works of local or internal improvement, the cost of which is to be paid from the proceeds of special taxes or assessments upon property benefited. The objection has been made where bonds are issued as obligations of a public corporation that they are "debts" or obligations or constitute an "indebtedness" within the meaning of constitutional limitations and therefore invalid. The courts have quite generally held that it is largely the form of the obligation which determines a general liability in this case and the consequent result of holding it an "indebtedness" or a "debt." If the bonds or obligations in their form and recitals are not a general liability of the corporation but payable principal and interest from the proceeds of the special taxes or assessments levied upon benefited property, and if the holders are limited in their recovery to such sums as can be collected from these special or local assessments, then the bond or other evidence of indebtedness is not to be regarded as a general debt or charge against the municipality and should not be included within its indebtedness in determining whether the constitutional limitation has been reached.[278] If, however, the form of such bonds or evi-

[278] People v. May, 9 Colo. 404; Jacksonville R. Co. v. City of Jacksonville, 114 Ill. 562; Commissioners of Highways v. Jackson, 165 Ill. 17; affirming 61 Ill. App. 381; Quill v. City of Indianapolis, 124 Ind. 292; Switzerland County Com'rs, v. Reeves, 148 Ind. 467, 46 N. E. 995, holds contrary to the rule stated in the text; Davis v. City of Des Moines, 71 Iowa, 500; Tuttle v. Polk, 92 Iowa, 433; City of Atchinson v. Price, 45 Kan. 296, 25 Pac. 605; City of Clinton v. Walliker, 98 Iowa, 655, 68 N. W. 431. The court here say: "There ought to be no question that

dence of indebtedness is of a general character or nature and does not limit the holder in his right of recovery to such special assessments or taxes, then they will be considered as obligations or

the district improvement bonds are payable from the special assessment made against the owners of abutting property, and in no other manner. We will not set out a copy of these bonds. They plainly provide for payment to be made from the special assessments and they are not general bonds against the city. This court held years ago that where a contractor for a service accepted certificates of assessments made upon adjacent property in full satisfaction of his work, such certificates did not create a debt against the city within the meaning of the article of the constitution, limiting the lawful indebtedness of a city to five per cent of the value of its taxable property."

Davis v. City of Des Moines, 71 Iowa, 500; Kelly v. City of Minneapolis, 63 Minn. 125; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600. The court held here that park fund certificates payable from assessments on private property for park purposes and providing that the city should only be liable thereupon for the sums collected on account of such assessments were not an indebtedness within the meaning of a constitutional limitation. They were in legal effect an assignment only of the special assessments. Atkinson v. City of Great Falls, 16 Mont. 372; Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243; Little v. City of Portland, 26 Or. 235; Addyston Pipe & Steel Co. v. City of Corry, 197 Pa. 41. The court say: "It is not, however, always possible to adapt present action to future results with absolute precision, and if means are adopted which in good faith, according to reasonable expectation, will produce a sufficient fund, the contract entered into on the faith of them should not be held unlawful on account of an unintentional miscalculation, or an accidental and unexpected failure to produce the full result. Thus if a city at the time of making the contract levies a special tax in good faith supposed to be adequate to meet it, but in consequence of fire or flood or decline in values, the result is an insufficient fund, it cannot be held that the contract good at its inception would thereby be made bad. The constitutional restriction was not intended to make municipalities dishonest, not to prevent those who contract with them from collecting their just claims, but to check rash expenditure on credit, and to prevent loading the future with the results of present inconsiderate extravagance."

Austin v. City of Seattle, 2 Wash. St. 667; Baker v. City of Seattle, 2 Wash. St. 576; Winston v. City of Spokane, 12 Wash. 524; Faulkner v. City of Seattle, 19 Wash. 320, 53 Pac. 365; Burnham v. City of Milwaukee, 98 Wis. 128, 73 N. W. 1018. See, also, Grant v. City of Davenport, 36 Iowa, 396, where the court say: "Where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses within the limits of its current revenues and such special taxes as it may legally and in good faith intends to levy

indebtedness of the city to be included within its total or aggregate debt.[279]

therefor, such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provision limiting the power of municipal corporations to contract debts."

Pattison v. Yuba County Sup'rs, 13 Cal. 175; Leavenworth County Com'rs v. Miller, 7 Kan. 499; Cass v. Dillon, 2 Ohio St. 607; City of Erie's Appeal, 91 Pa. 398. "If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them however great the indebtedness of such municipalities may be, for in such case, their engagements do not extend beyond their present means of payment and so no debt is created."

Gould v. City of Paris, 68 Tex. 511; List v. City of Wheeling, 7 W. Va. 501. In City of Springfield v. Edwards, 84 Ill. 626, the question of municipal indebtedness beyond the constitutional limit is fully considered. The court say after speaking of the rule as given by majority of the authorities: "In this view we are only prepared to yield our assent to the rule recognized by the authorities referred to with these qualifications: First, the tax appropriated must, at the time, be actually levied, second by the legal effect of the contract between the corporation and the individual made at the time of the appropriation, the appropriation and issuing and accepting of a warrant or order on the treasury for its payment must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand it, is, there is in such case no debt because one thing is simply given and accepted in exchange for another. When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation—leaving no future obligation, either absolute or contingent upon it whereby its debt may be increased."

[279] Kimball v. Grant County Com'rs, 21 Fed. 145. County bonds issued under Ind. Laws for the construction of gravel roads, though specially provided for by assessments on lands benefited, the court held in this case were within the prohibition of the Ind. Const., and say, "The point established, as I think it must be held to be, that the bonds are an obligation or debt of the county, the constitutional restriction must apply, as it seems to me, notwithstanding the special fund or, rather, resource, provided in the statutory assessment for their payment, and notwithstanding the fact which may be conceded that in most cases the assessment will ultimately prove collectible in sums sufficient to pay the debt and interest. The assessment was doubtless designed mainly to secure an indemnity to the county and incidentally to enhance the value of the bonds in the market; but the special provision for payment cannot reasonably be said to remove the force of the authority given to issue the bonds of the county—words which *ex vi termini*, import an obligation of the county and such an obligation is a debt, within the clear and compre-

Another plan has been to issue bonds secured by a mortgage upon certain property, the interest and the principal of the mortgage payable from the net income of such property. This device has often been used in the construction of plants for the purpose of supplying the municipality and the inhabitants with water and light.[280]

In deciding the Iowa case, opinion by Judge Lochren, referred to above, where the indebtedness sought to be incurred involved a plan similar to that suggested, the court said, and its reasoning is so sound that it is quoted here in full: "Appellant's contention amounts to this, that notwithstanding the constitutional limitation referred to, and that the city, being already indebted beyond that limit, has no power, even with legislative sanction, to incur any new indebtedness to the amount of a single dollar, it may nevertheless borrow money to the extent of $400,000, issuing its negotiable bonds therefor with interest, contracting to pay the same at specified dates, and that this will not create any indebtedness, if it shall at the same time levy taxes to be collected annually from the taxable property of the city for a long term of years, or indefinitely till the sum borrowed is paid therefrom, and provide that the bonds shall only be paid from the taxes so specially levied. If this may be done to build waterworks, the city may go on and in the same way borrow and issue its bonds for an equal amount to build public buildings, and for another equal amount to construct a system of sewers, and for another equal amount to construct modern school houses, and an unlimited amount as bonus to some railroad, taking care in each case to levy once for all a sufficient annual tax to meet the maturing bonds; and though the property of the taxpayers may be thus

hensive language of the constitution, already quoted." Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Windsor v. City of Des Moines, 110 Iowa, 176, 81 N. W. 476; Fowler v. City of Superior, 85 Wis. 411. Special improvement bonds from their language held a general obligation, therefore indebtedness. See also cases cited in last preceding note.

[280] United States v. Ft. Scott, 99 U. S. 152, where the court holds the liability of the city absolute without reference to the fact that it was authorized to levy special assessments for the payment of its improvement bonds, and intended, as a fact, that the bonds should be paid out of the assessments when collected. Austin v. City of Seattle, 2 Wash. St. 667. Wash. Const. art. 8, § 6, contains a special provision for the incurring of indebtedness by a

practically confiscated, by being loaded down with taxes beyond any income which the property can produce and for periods beyond any expectation of life which the taxpayers can indulge in, still those taxpayers while groaning under such special levies, fixed upon them and extending hopelessly into the future, will have the happiness and satisfaction of knowing that they live in a city which has no municipal indebtedness large enough to cause uneasiness.

"The fact that these proposed bonds are to bear interest at 4½ per cent. cannot be overlooked. Why should the city pay interest,—that constant, distinguishing, most irksome and disagreeable feature of indebtedness,—upon money which it does not owe; money which belonged to it before it was received; being only its own fixed revenues, gotten hold of for present use, a little in advance, by 'anticipation,' and in no wise by incurring indebtedness?"[281]

Another plan often suggested and used for the increase of corporate indebtedness beyond the limit allowed by law is the making of contracts calling for the performance of certain acts during a series of years, the service performed or rendered the city under the contract to be paid for at an agreed rate from time to time as such services or contract obligations are performed. The courts have quite uniformly held that such contract obligations should not be considered as "indebtedness" or as a "debt" within the meaning of a constitutional or other express limitation, for the reason that the payment of the obligation on the part of the public corporation being contingent upon the performance of the act or the rendering of the service by the other party to the contract, so long as this contingency existed it could not be considered a fixed definite corporate obligation within the meaning of those words.[282] The modern construction by courts

municipality for the purpose of supplying it with water, artificial light and sewers.

[281] City of Ottumwa v. City Water Supply Co. (C. C. A.) 119 Fed. 315.

[282] See cases cited under §§ 147, and 255; Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175. A contract to pay a sum of money with interest to a person who had assumed the payment of interest on some of the city's debt not a "borrowing of money" within the prohibition against the city's borrowing money except upon certain terms, but see the dissenting opinion of Mr. Justice Miller. Daviess County v. Dickinson, 117 U. S. 657; Doon Tp. v. Cummins, 142 U. S. 366; Hedges v. Dixon County, 150 U. S. 182; Smilie v.

of the words "debt" or "indebtedness" uninfluenced by ulterior motives, includes all liabilities of whatever nature and contracted for whatever purpose and in whatever manner, that are or may become an obligation owing and to be met by the public corporation from the proceeds of public taxes levied and collected upon taxable property within its limits.[283] Such construction,

Fresno County, 112 Cal. 311. The rule applied to the construction of a county building where the payments were to be made in installments each year as they progressed. The court held that the debt created was not the aggregate amount of such installments but only those that arose from year to year as the work was constructed, the only limitation being that the installment due in any one year together with other indebtedness should not exceed the constitutional limit.

Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476, holds contrary to the rule stated in the text. Prince v. City of Quincy, 128 Ill. 443; Davis v. City of Des Moines, 71 Iowa, 500; Anderson v. Orient Fire Ins. Co., 88 Iowa, 579; Tuttle v. Polk, 92 Iowa, 433; City of Clinton v. Walliker, 98 Iowa, 655; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Beard v. City of Hopkinsville, 95 Ky. 239; Read v. Atlantic City, 49 N. J. Law, 558; State v. Fayette County Com'rs, 37 Ohio St. 526; Spilman v. City of Parkersburg, 35 W. Va. 605, 14 S. E. 279; and Phillips v. Reed, 107 Iowa, 331, 76 N. W. 850, 77 N. W. 1031. But see dissenting opinion of Judge Robinson.

Reynolds v. City of Waterville, 92 Me. 292, also holds contrary to the rule in the text. The incorporation of a city hall commission for the express purpose of constructing a city hall and incurring indebtedness for that purpose where such indebtedness would be in excess of the legal limit of the town was held in this case to be a scheme for the purpose of avoiding the constitutional limitation. Peck-Williamson H. & V. Co. v. Board of Education, 6 Okl. 279; Morris v. Taylor, 31 Or. 62; State v. Common Council of Tomahawk, 96 Wis. 73; Stedman v. City of Berlin, 97 Wis. 505; Burnham v. City of Milwaukee, 98 Wis. 128; Crogster v. Bayfield County, 99 Wis. 1; Davenport v. Kleinschmidt, 6 Mont. 502. In Read v. Atlantic City, 49 N. J. Law, 558, 9 Atl. 759, a contract requiring the payment of specified annual amounts for water supply for an indefinite period held within the meaning of the law limiting indebtedness.

[283] Hitchcock v. City of Galveston, 96 U. S. 341; Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 3,275; Spring Valley Waterworks v. Bartlett, 8 Sawy. 555, 16 Fed. 615; Denny v. City of Spokane (C. C. A.) 79 Fed. 719. A warrant issued for the payment of a debt in advance of a delayed assessment is not an indebtedness within the meaning of the charter of the city of Spokane.

Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274. A county contracting for the building of a court house to be paid for out of available funds in the treasury or taxes for the current year, does not create a "debt" within the meaning of the Constitution.

however, may exclude warrants issued in payment of compulsory obligations, fees of witnesses, jurors, constables or sheriffs, in

Murphy v. Town of East Portland, 42 Fed. 308. An obligation for the payment of money created by a municipality without providing the means for its payment creates an indebtedness within the meaning of Const. Or., art. 11, § 5. City of Council Bluffs v. Stewart, 51 Iowa, 385; Windsor v. City of Des Moines, 110 Iowa, 175. The court in this case defined an indebtedness as including implied as well as express promises creating obligations. The decision is evidently not based upon any sincere desire to limit the amount of indebtedness legally incurrable by a municipality but upon the concealed wish to defeat a legitimate contract between a municipality and a private corporation. City of Springfield v. Edwards, 84 Ill. 626. A debt payable in the future based upon a contingency as well as a debt payable absolutely and presently is within the constitutional provision concerning the incurring of debts by public corporations; the purpose for which the debt was contracted being immaterial. The court say: "A debt payable in the future, is obviously, no less a debt than if payable presently and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt and, therefore, within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute—the debt exists—and it differs from a present, unqualified promise to pay only in the manner by which the indebtedness was incurred and since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else." East St. Louis Gas Light & Coke Co. v. City of East St. Louis, 45 Ill. App. 591; Culbertson v. City of Fulton, 127 Ill. 30; Louisville & N. R. Co. v. Com., 106 Ky. 633; State v. Marion County Ct., 128 Mo. 427. Funding railway aid bonds held a "township indebtedness."

State v. Graham, 23 La. Ann. 402. In this case the court defines a "debt" as including an "appropriation whereby the liabilities of the state are increased."

Christie v. City of Duluth, 82 Minn. 202. The phrase "certificates of indebtedness" as used in connection with the creation of permanent improvement revolving fund held equivalent to term "bonds" as used in the same act, Gen. Laws 1899, c. 351, § 10.

Barnard v. Knox County, 105 Mo. 382. A county warrant issued in payment of official county books required by the statutes is void if at the time of its issuance the revenue for that year is already exhausted; it is a debt and obligation within the meaning of the constitutional prohibition. Overruling Potter v. Douglas County, 87 Mo. 240; Adams v. East River Sav. Inst., 47 N. Y. St. Rep. 175, 20 N. Y. Supp. 12. The water debt of the city of Brooklyn is to be included in the aggregate debt of the municipality in determining whether the limit of indebtedness has been reached.

Salem Water Co. v. City of Salem, 5 Or. 29; Municipal Secur. Co. v.

Baker County, 33 Or. 338, 54 Pac. 174. The liability on part of the county for indexing and platting public records is an indebtedness coming within the constitutional debt limit. The court also holds that a "necessary county expense" should not be included within that term as it is an involuntary obligation. Brooke v. City of Philadelphia, 162 Pa. 123. In determining the aggregate debts for the purpose of ascertaining whether the constitutional limitation has been exceeded, city loans purchased through sinking fund moneys held by the city but not canceled should be included.

In re State Bonds, 7 S. D. 42, 63 N. W. 223. Losses sustained by the school fund by defalcation or mismanagement constitute under Const. art. 8, §§ 2, 13, a permanent funded debt against the state which is not included in the "indebtedness" to which the state is limited by art. 13, § 2. City of Galveston v. Loonie, 54 Tex. 517; McLeary v. Dawson, 87 Tex. 524; City of Waxahachie v. Brown, 67 Tex. 519; City of Terrell v. Dissaint (Tex. Civ. App.) 9 S. W. 593; Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 879; Fritsch v. Salt Lake County Com'rs, 15 Utah, 83, 47 Pac. 1026. The limitation includes debts created by operation of law, salaries of officers, debts arising from express contracts and liabilities based upon the negligence of county officials.

McEwan v. City of Spokane, 16 Wash. 212, 47 Pac. 433; Seymour v. City of Spokane, 6 Wash. 362; Winston v. City of Spokane, 12 Wash. 524; Stanley v. McGeorge, 17 Wash. 8, 48 Pac. 736; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86. Water bonds held a part of the outstanding indebtedness within the constitutional provision. Crogster v. Bayfield County, 99 Wis. 1. A contract between a county and a railroad company by which the former agrees to issue bonds in exchange for stock of the railroad company constitutes an indebtedness within the meaning of Const. art. 11, § 3. Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341. A municipality, the court holds in this case, cannot pay a debt by using funds raised for another purpose.

State v. Laramie County Com'rs, 8 Wyo. 104, 55 Pac. 451. Uncollected taxes due the state should not be considered a debt within the Const. art. 16, § 4, limiting the power of counties to create debts. German-American Sav. Bank v. City of Spokane, 17 Wash. 315. A general liability defined in this case as a debt within the meaning of the constitution. See, also, Earles v. Wells, 94 Wis. 285, where the court said in dealing with a kindred question: "So long as the current expenses of the municipality are kept within the limits of the moneys and assets actually in the treasury and the current revenues collected or in process of immediate collection, the municipality may be fairly regarded as doing business on a cash basis, and not upon credit, even though there may be for a short time some unpaid liabilities. * * * But the moment an indebtedness is involuntarily created, 'in any manner or for any purpose' with no money nor assets in the treasury, nor current revenues collected or in process of collection for the payment of the same, that moment such debt must be considered in determining whether such

criminal cases,[284] or the expense attending the holding of a session of the legislature, the bill of rights providing for a speedy trial by jury for those accused of crime, and a legislative session considered necessary to the maintenance of organized government, a reason sometimes of doubtful applicability. Such construction also excludes bonds issued under authority of law for the purpose of funding or refunding outstanding corporate indebtedness, the courts holding without exception that the issue of such bonds does not increase or add to the debts or obligations of the corporation but merely changes their form.[285]

§ 153. Indebtedness must be a legal demand.

Constitutional or other limitations usually restrict the debt legally incurrable by public corporations to a certain definite amount as already suggested, or to a certain percentage of the taxable property within their corporate jurisdiction. What obli-

municipality has or has not exceeded the constitutional limit of indebtedness."

[284] Rollins v. Lake County, 34 Fed. 845. "Warrants issued by a county in payment of compulsory obligations, viz., fees of witnesses, jurors, constables, sheriffs and the like, are not within the prohibition and it is no defense to an action upon such warrants that at the time they were issued, the general limit of county indebtedness fixed by the constitution had been reached, overruling People v. May, 9 Colo. 404." Floyd County Com'rs v. Day, 19 Ind. 450; Hamilton County Com'rs v. Cottingham, 56 Ind. 559; Miller v. Dearborn County Com'rs, 66 Ind. 162. The rule in the text applied to temporary loans contracted for the purpose of meeting current expenses. Norton v. City of East St. Louis, 36 Ill. App. 171. The salary of a health officer included as a part of indebtedness. State v. Board of Liquidation of City Debt, 51 La. Ann. 1849, 26 So. 679. The unpaid salaries of teachers in the public schools for a series of years are not debts of the city and do not therefore fall under the provisions of the funding law of 1890 and the constitutional amendment of 1892. Ketchum v. City of Buffalo, 14 N. Y. 356; Rauch v. Chapman, 16 Wash. 568. In Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 45 Pac. 494, the court held that the limitation of indebtedness as imposed by Const. art. 16, §§ 3, 4, applied to all debts whether compulsory obligations imposed by law such as salaries, bounties, etc., or voluntary obligations entered into for other purposes.

[285] Farson, Leach & Co. v. Commissioners of Sinking Fund of Louisville, 97 Ky. 119; Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821. The issue of bonds to redeem outstanding indebtedness not the incurring of a debt within the meaning of the constitutional provision and therefore a submission to the electors not necessary. Palmer v.

gations or liabilities should be considered in determining whether the legal limit has been reached? The decisions generally hold that they must be a legal claim or demand against the corporation and in such condition that they can be enforced through the use of available and proper remedies given by the laws of the state for the enforcement of such demands. Under this rule an unliquidated claim or demand or one unapproved by the proper officials would not be considered "a debt" or "indebtedness," and in computing the total debt of the corporation should be excluded.[286]

City of Helena, 19 Mont. 61. See also the many authorities cited, § 173, post, and 48 L. R. A. 474.

[286] Ashuelot Nat. Bank v. Lyon County, 81 Fed. 127. Bonds in excess of the constitutional limit and therefore void are not to be included as a part of the municipal indebtedness in determining the total outstanding indebtedness with reference to an issue of bonds. The court say: "The constitutional limitation which is relied on as a defense in this case is intended to prevent the overburdening of property within the municipalities of the state by debts created by the corporate authorities, and the prohibition of the constitution extends to all forms of indebtedness and the true inquiry in each case is whether at the given date there exists indebtedness in any form up to the limit for which the municipality can be held liable at law or in equity. Whatever the form of the indebtedness may be if it can be enforced by a court of law or equity, it certainly comes within the constitutional provision; but on the other hand, claims which cannot be thus enforced and which are not binding on the municipality, do not come within the meaning of the term 'indebtedness' as used in the constitution of the state."

Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523. In Lyon County v. Keene Five-Cent Sav. Bank (C. C. A.) 100 Fed. 337, affirming Keene Five-Cent Sav. Bank v. Lyon County, 90 Fed. 523, the court held that illegal non-enforceable warrants outstanding against the county should not be considered in determining the existing indebtedness of the county when the bonds in question were issued. German Ins. Co. v. City of Manning, 95 Fed. 597. The question in this case was the validity of certain bonds as affecting the total valid indebtedness of the corporation, having in view the issue of more bonds. The court held that the test of the validity of corporate bonds for this purpose was not whether they were recognized as valid by the officers of the corporation but whether they were legally enforceable.

City of Chicago v. McDonald, 176 Ill. 404. Bonds issued for the construction of waterworks, similar to other bonds except in the designation as water loan bonds, should be included in the indebtedness as well as a judgment in tort against the municipality. Revenue warrants however should not be included. Thompson v. Independent School Dist., 102 Iowa, 94, 70 N. W. 1093.

§ 154. Debts of territorially co-existing public corporations.

The same territory may often be organized into and included within two or more separate and distinct civil bodies or public corporations. A limitation may be placed upon each of these organizations of the amount of indebtedness it can legally incur. In determining the limit of such indebtedness the total indebtedness of each of the civil bodies or corporations is to be considered and not the aggregate of both or all the corporate organizations which may be wholly or partially co-extensive territorially.[287]

Valid orders subsequently reduced to judgments not considered an indebtedness within the meaning of the constitutional limitation. The court say: "What the indebtedness of the district was when the original orders were issued is not shown; and we must presume it did not exceed the authorized limit and that the orders were valid. If that was the case, the orders issued in lieu of them did not create an indebtedness within the meaning of the constitutional inhibition and none was created by the rendition of the judgment."

[287] Board of Education of Huron v. National Life Ins. Co. (C. C. A.) 94 Fed. 324. Here the claim was made that statutory provisions relating to bonded indebtedness of municipal corporations applied to boards of education. The court said: "We are of opinion that the act under which the plaintiff in error was organized is complete in itself; that its powers and duties as well as the limitations upon its power to issue bonds are contained in the act under which it became a body corporate. * * * In view of this fact, it seems clear that sections 1149 and 1150 were only intended to apply to those municipal corporations such as cities or villages which were governed by common councils or boards of trustees."

Wilcoxon v. City of Bluffton, 153 Ind. 267, 54 N. E. 110. Bonds negotiated by a city to erect school buildings not a debt of the civic organization for school purposes including the same territory. But see Orvis v. City of Des Moines Park Com'rs, 88 Iowa, 674, 56 N. W. 294, where the court held that even though a board of park commissioners was organized under the special authority of an act of the legislature, yet its bonds were to be considered a debt of the city within the meaning of Const. art. 11, § 3, limiting the amount of municipal indebtedness to 5% of the valuation of the taxable property. This it seems should be the true rule rather than the one as stated in the text, which is based upon the weight of authority. Sound reasoning is in favor of the exception not the rule. If territory is permitted under legislative authority to be organized into separate corporations for the purpose of carrying on each one of its distinct functions of government, and each of these organizations is permitted to incur the full amount of indebtedness as permitted by the constitution, the amount of indebtedness which can be placed upon the inhabitants and

The courts in such cases usually consider each of the civic corporations as bodies corporate separate, independent and distinct from each other.

§ 155. Assessment or valuation to be considered.

The percentage limit of indebtedness as suggested in section 153 is usually based upon the assessed valuation of the taxable property within the taxing limits of the corporation. The controlling assessment upon which the computation must be made is usually held to be the one last before the proposed incurring of indebtedness and that which has been acted upon by a final board of equalization in the state.[288]

the taxable property of this territory or district is unlimited. A constitutional limitation prohibits the incurring of debts by a municipality or public corporation, in excess of a certain per cent. Under the rule a park board of that municipality, organized separately, embracing the same territory, may incur indebtedness to five per cent, a police board, coextensive with the city may do likewise, and so on ad infinitum.

Board of Education of Eddy v. Bitting, 9 N. M. 588; Adams v. East River Sav. Inst., 65 Hun, 145, 20 N. Y. Supp. 12; Todd v. City of Laurens, 48 S. C. 395, 26 S. E. 682. The rule applied as to reorganized school district co-extensive with the city, also the bonded debt of a county including within its limits an organized municipality. Wilson v. Board of Education of Huron, 12 S. D. 535; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86.

[288] Rathbone v. Kiowa County Com'rs (C. C. A.) 83 Fed. 125; Board of Education of Huron v. National Life Ins. Co. (C. C. A.) 94 Fed. 324; State v. Babcock, 24 Neb. 640; Chicago, B. & Q. R. Co. v. Village of Wilber, 63 Neb. 624, 88 N. W. 660. The word "assessment" as used in the law relating to the incurring of debts by public corporations is defined as being not only the act of the local assessor but the completed act of all the agencies employed in determining the amount of property available for taxation. The court say: "Besides, in our opinion, the term 'assessment' has a wider signification than simply the listing and valuation of taxable property by the assessor. * * * Under our system of taxation, the listing and estimate are not complete until after the county board has completed its work as a board of equalization. While sitting as such board, they are authorized to assess all the lands that have been listed by the county clerk and not assessed by the assessor and otherwise to change the assessment. A large part of all railroad and telegraph property is assessed, not by the local assessor, but by the state board of equalization and certified to the county clerks in which the same is taxable and thus becomes a part of the basis upon which the levy of taxes is made. The basis for the issuance of bonds is 'the assessed valuation of the tax-

§ 156. Indebtedness further defined; warrants issued in anticipation of taxes levied.

A public corporation may incur a liability for the payment of which there are no funds in the treasury although the taxes when collected will be sufficient to pay such demand. Or again municipal warrants may be drawn anticipating the payment of taxes not then delinquent but levied and due. The courts hold that such warrants or other evidence of indebtedness should not be considered a debt within the meaning of constitutional provisions, for, as said in one case, such "warrants" are drawn against existing values.[289]

able property within said village' and is to be determined by 'the last preceding assessment.' To our minds it is clear that the assessment referred to is the completed act of all the agencies employed in determining the amount and value of property available for taxation. If we are correct in this view, it follows that the validity of the bonds depends not upon the levy of 1894 but upon that of 1893, which is conceded would warrant the issuance of the full amount of the bonds in question."

Fuller v. Heath, 89 Ill. 296; Kingsberry v. Pettis County, 48 Mo. 207; Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243; Wilson v. Board of Education of Huron, 12 S. D. 535; State v. Tolly, 37 S. C. 551, 16 S. E. 195. A second assessment subsequent to the making of the annual assessment made by the city officials as a proposed basis of issuing bonds held unauthorized and void. State v. Common Council of Tomahawk, 96 Wis. 73.

[289] Hockaday v. Chaffee County Com'rs, 1 Colo. 362, 29 Pac. 287; Strodtman v. Menard County, 56 Ill. App. 120; Law v. People, 87 Ill. 385; Fuller v. Heath, 89 Ill. 296; City of Springfield v. Edwards, 84 Ill. 626. "The literal meaning of a prohibition against 'becoming indebted' in any sense, in any manner or for any purpose, would involve a prohibition against a city becoming further indebted even by the accumulation of interest on the bonded debt existing at the adoption of the constitution. It will not be contended that such prohibition was intended; and why not? Simply because such a proposition is absurd." City of Alpena v. Kelley, 97 Mich. 550.

In re State Warrants, 6 S. D. 518, 62 N. W. 101. "At first thought it may seem difficult to maintain that the issuing of an obligation to pay, is not the incurring of an indebtedness. Critically considered, it may constitute the incurring of an indebtedness, * * * but it is not an indebtedness repugnant to the constitution because its payment is legally provided for by funds constructively in the treasury. If the drawing of a warrant upon the state treasury is the incurring of an indebtedness by the state, then the drawing of such warrant would violate the constitution even if there was money in the state treasury to pay it, if the constitutional limit of

§ 157. Expenses incurred in excess of current revenue or income.

Constitutional or other provisions limiting the debt or indebtedness of public corporations may include with their phrases, that the corporation shall not incur in any one year debts in excess of the revenues for that year or a certain percentage upon the assessed valuation for any one year,[290] and still other phrases in which the word "year" is used as one of limitation either as to the amount or the rate per cent of the debt which can be contracted. The word "year" in this connection has been construed as meaning either the fiscal[291] or the calendar year.[292] In the latter case commencing with January first and ending with December thirty-first, and in the former varying with the times of commencement and ending of the fiscal year as established by law. The ordinary current expenses of a public corporation should not be included in a computation for ascertaining its indebtedness considered with reference to a constitutional limitation.[293]

indebtedness had been reached, for there must always be some time intervening between the drawing of the warrant and its payment and during such time the indebtedness of the state would be increased beyond the constitutional limit. Such an interpretation of the constitutional limitation would obviously be too hypercritical to be practicable or reasonable."

Fenton v. Blair, 11 Utah, 78, 39 Pac. 485. In this case the court held that taxes for the current year were in contemplation of law collected as soon as levied and therefore a county had a right to allow claims against it equal to the tax revenue and such claims would not be considered an indebtedness or liability within the meaning of the constitutional limitation. But see Fuller v. City of Chicago, 89 Ill. 282.

Brickwedel, 62 Cal. 641; Weaver v. City & County of San Francisco, 111 Cal. 319; City of Los Angeles v. Teed, 112 Cal. 319; W. W. Montague & Co. v. English, 119 Cal. 225; Perry County Com'rs v. Gardner, 155 Ind. 165; Webb City & C. Waterworks Co. v. City of Carterville, 153 Mo. 128; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188; Putnam v. City of Grand Rapids, 58 Mich. 416; Atlantic City Water-Works Co. v. Read, 50 N. J. Law, 665, 15 Atl. 10; Weston v. City of Syracuse, 17 N. Y. 110; Fenton v. Blair, 11 Utah, 78, 39 Pac. 485.

[291] In re Contracting of State Debt by Loan, 21 Colo. 399, 41 Pac. 1110.

[292] Garfield Tp. v. Samuel Dodsworth Book Co., 9 Kan. App. 752, 58 Pac. 565.

[293] City of Conyers v. Kirk & Co., 78 Ga. 480; City of East St. Louis

[290] San Francisco Gas Co. v.

§ 158. Net debts; deduction of uncollected taxes.

Where the constitutional or other limitation restricts the legal debts to the proceeds of a certain rate of taxation upon taxable property within the district, uncollected taxes and a levy for the current year should not be deducted from the outstanding debt for the purpose of ascertaining the real indebtedness.[294]

v. Flannigan, 26 Ill. App. 449; Law v. People, 87 Ill. 385; Barrett v. City of East St. Louis, 89 Ill. 175; City of Valparaiso v. Gardner, 97 Ind. 1; Brashear v. City of Madison, 142 Ind. 685; Grant v. City of Davenport, 36 Iowa, 396. "When a contract made by a municipal corporation pertains to its ordinary expenses and is together with other like expenses within the limits of its current revenues and such special taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute 'the incurring of indebtedness' within the meaning of the constitutional provision limiting the power of municipal corporations to contract debt."

Laycock v. City of Baton Rouge, 35 La. Ann. 475; Reynolds v. City of Waterville, 92 Me. 292. But under this rule a city hall cannot be purchased on the installment plan. Smith v. Inhabitants of Dedham, 144 Mass. 177; City of Erie's Appeal, 91 Pa. 398. The court in this case said, referring to the case of Grant v. City of Davenport, 36 Iowa, 396: "This we hesitate not to say is a sound constitutional interpretation and in a similar case might well be adopted in the construction of our own constitution. If the contracts and engagements of municipal corporations do not overreach their current revenues, no objections can lawfully be made to them however great the indebtedness of such municipalities may be; for in such case their engagements do not extend beyond their present means of payment and so no debt is created." Ivinson v. Hance, 1 Wyo. 275; Wade v. Oakmont, 165 Pa. 479; City of Terrell v. Dessaint, 71 Tex. 770; McNeal v. City of Waco, 89 Tex. 83. But see Fuller v. Heath, 89 Ill. 296; Prince v. City of Quincy, 105 Ill. 138; City of Chicago v. McDonald, 176 Ill. 404; City of Chicago v. Galpin, 183 Ill. 399; Sackett v. City of New Albany, 88 Ind. 473; and Spilman v. City of Parkersburg, 35 W. Va. 605, which hold that under constitutional provisions prohibiting the incurring of indebtedness in excess of a certain limit, the corporations specified were prohibited from creating an indebtedness even for necessary current expenses.

[294] Soule v. McKibben, 6 Cal. 142; Adams v. East River Sav. Inst., 65 Hun (N. Y.) 145; City of Council Bluffs v. Stewart, 51 Iowa, 385; Dumphy v. Humboldt County Sup'rs, 58 Iowa, 273. The statute controlling this decision was to the effect that "the aggregate amount of tax to be voted or levied under the provisions of this act in any township, incorporated town or city shall not exceed five per centum of the assessed value of the property therein respectively." The words "aggregate amount" were held here

§ 159. Future payments under executory contracts not usually regarded as "debts."

In section 152 attention has been called to the holding on the part of the courts that the execution of a contract by a public corporation binding it to the making of certain payments during the life of the contract is not an "indebtedness,"[295] the courts holding the fixed or definite obligation on the part of the corporation as being not the aggregate of the payments required by the contract but the single payments as they become due.[296] Such contracts are usually made with private corporations or individuals and have for their purpose the supplying of the city with water[297] and light,[298] the public corporation itself not deem-

to mean all the taxes levied, and that after reaching the five per cent total tax levy the power to levy further taxes was exhausted. Bank for Savings v. Grace, 102 N. Y. 313; Brooke v. City of Philadelphia, 162 Pa. 123; Bassett v. City of El Paso (Tex. Civ. App.) 28 S. W. 554. In ascertaining whether a tax levy exceeds the charter limit, the deficit in taxes collected as regards the amount levied should not be considered. But see State v. Hopkins, 13 Wash. 5. The current amount of taxes assessed must be deducted from the outstanding county indebtedness to ascertain whether such indebtedness exceeds the constitutional provision. Austin v. City of Seattle, 2 Wash. St. 667.

[295] See § 152, note 282, ante. McBean v. City of Fresno, 112 Cal. 159. "Although the courts look with disfavor upon contracts by municipalities involving the payment of moneys which extend over a long period of time * * * yet where it appears that at the time such a contract was entered into, it was fair and reasonable and prompted by the necessities of the case or was then advantageous to the municipality, it will be upheld * * * in the absence of express limitation as to the period of time for which a contract may be made." Higgins v. City of San Diego (Cal.) 45 Pac. 824; Crowder v. Town of Sullivan, 128 Ind. 486; Foland v. Town of Frankton, 142 Ind. 546; Grant v. City of Davenport, 36 Iowa, 396; Beard v. City of Hopkinsville, 95 Ky. 239; Niles Waterworks v. City of Niles, 59 Mich. 311; Saleno v. City of Neosho, 127 Mo. 627; Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188; Davenport v. Kleinschmidt, 6 Mont. 502; Read v. Atlantic City, 49 N. J. Law, 558; Ter. v. City of Oklahoma, 2 Okl. 158; Salem Water Co. v. City of Salem, 5 Or. 30; Wade v. Oakmont Borough, 165 Pa. 479; Nankivil v. Yeosock, 7 Kulp (Pa.) 518.

[296] Webb City & C. Waterworks Co. v. City of Carterville, 153 Mo. 128; Saleno v. City of Neosho, 127 Mo. 627; Spangler v. Leitheiser, 182 Pa. 277; Herman v. City of Oconto, 110 Wis. 660. The rule applied to a contract for the construction of a sewage system.

[297] Walla Walla City v. Walla Walla Water Co., 172 U. S. 1; affirm-

ing it expedient or being in a financial condition to undertake the construction of waterworks or lighting plants sufficient for its needs, but leaving this to private enterprise. The obligation

ing 60 Fed. 957. Such a contract does not create a debt except conditionally and the annual payment is dependent upon furnishing the consideration by the other party to the contract from year to year.

Keihl v. City of South Bend (C. C. A.) 76 Fed. 921; Cunningham v. City of Cleveland (C. C. A.) 98 Fed. 657; City of Danville v. Danville Water Co., 180 Ill. 235; Youngerman v. Murphy, 107 Iowa, 686, 76 N. W. 648; Grant v. City of Davenport, 36 Iowa, 396. The court based its decision not upon the principle stated in the text but upon the fact that the supplying of water to the city called for the expenditure of "ordinary expenses." Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, 70 N. W. 739; Beard v. City of Hopkinsville, 95 Ky. 239. The aggregate payment for which the contract in this case provides it is held constitutes the obligation or indebtedness of the city, and therefore if the amount is sufficient it comes within the constitutional limitation.

Mayfield Woolen Mills v. City of Mayfield, 22 Ky. L. R. 1676, 61 S. W. 43. A contract by a city with a water company for the payment of water rent is included within the "indebtedness" as defined in Const. § 157, and therefore if the rate necessary to meet the payments was in excess of the rate specified in the constitution it would be invalid.

Smith v. Inhabitants of Dedham, 144 Mass. 177. The supplying of water by a contract with a private company held to be the making of a contract for current expenses and not coming within the limitation of Pub. St. Mass. c. 29, § 1, relative to municipal indebtedness.

City of Lexington v. Lafayette County Bank, 165 Mo. 671; State v. City of Great Falls, 19 Mont. 518; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898. A contract for the payment of semiannual water rents during a period of twenty-five years does not create an indebtedness for the aggregate of such payments within the meaning of Act of Cong. July 30, 1886, limiting the amount of indebtedness legally incurrable by a municipality.

The same is held in Ter. v. City of Oklahoma, 2 Okl. 158, 37 Pac. 1094. City of Cleburne v. Cleburne Water, Ice & Lighting Co., 14 Tex. Civ. App. 229, 37 S. W. 655. A contract was held valid and as not creating a debt within Const. art. 11, which by its terms provided that the contractor should furnish the city with water free of charge for three years and at an agreed rate for two years thereafter per fire hydrant, although no provision was made as required by the constitution for the purpose of accumulating a sinking fund and the payment of interest. Stedman v. City of Berlin, 97 Wis. 505. An added contract stipulation giving the city an option to purchase the waterworks is not to be considered an obligation binding on the city. Herman v. City of Oconto, 110 Wis. 660.

[208] Crowder v. Town of Sullivan, 128 Ind. 486, 28 N. E. 94, follows the

on the part of the municipality in such case, it has been held repeatedly, is the payment of an annual or other fixed charge at a stated interval for the service performed, this payment contingent upon the rendering of the service by the other party to the contract. The form of the contract may, however, determine the courts to hold otherwise in some cases. Where there is a fixed and definite agreement on the part of the municipality to pay a certain sum from time to time, irrespective of services performed, such obligations have been held to be of a sufficiently fixed and definite character as to come within the meaning of a constitutional limitation prohibiting the incurring of indebtedness beyond a certain sum.[299]

rule stated in the text, the only limitation being that the indebtedness at the time any annual payment becomes due must not exceed with other indebtedness the constitutional limitation. Followed by Foland v. Town of Frankton, 142 Ind. 546, holding that the debt for each year does not come into existence until after the rendition of the service contemplated by the contract, namely, the supplying of water and light.

Lamar Water & Elec. Light Co. v. City of Lamar, 128 Mo. 188. The payment of the annual fixed charge under the contract was contingent on the supply furnished, and the court held that such contract did not create an indebtedness within Const. art. 10, § 12.

Wade v. Oakmont Borough, 165 Pa. 479, holds that an annual sum is not the incurring of a new indebtedness within the meaning of Const. art. 9, § 8, where such sum is to be paid monthly for the lighting of streets during a limited time. Dallas Elec. Co. v. City of Dallas, 23 Tex. Civ. App. 323; Pollok v. City of San Diego, 118 Cal. 593. But see City of Chicago v. Galpin, 183 Ill. 399. The city of Chicago had reached the five per cent limit of indebtedness permitted by Const. 1870, art. 9, § 12, and the court held that a contract providing for the lighting and maintenance of street lamps, the consideration to be paid by the city monthly for the lights furnished at an agreed rate, created a definite debt in excess of the constitutional limitation. Following City of Chicago v. McDonald, 176 Ill. 404; overruling City of East St. Louis v. East St. Louis Gaslight & Coke Co., 98 Ill. 415; City of Carlyle v. Carlyle Water, L. & P. Co., 140 Ill. 445; citing Beard v. City of Hopkinsville, 95 Ky. 239; Lake County v. Rollins, 130 U. S. 662; and Thompson-Houston Elec. Co. v. City of Newton, 42 Fed. 723.

[299] Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 3,275; City of Chicago v. McDonald, 176 Ill. 404. After a municipality has reached its limit of indebtedness it is precluded from making a contract for the removal of garbage, payments to be made by it from month to month as the work progresses. City of Chicago v. Galpin, 183 Ill. 399; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Brown v. City of Corry, 175

§ 160. Unearned interest not considered a "debt."

In determining the total amount of corporate liability for the purpose of ascertaining whether its constitutional limit has been

Pa. 528. The contract in this case required the city to pay the constructor of water works $6,000 annually for twenty years and to deposit $3,000 annually for that time, the deposit at the end of that time to be paid to him with accrued interest. It was held the contract so worded created a debt within the meaning of Const. art. 9, § 8. Keller v. City of Scranton, 200 Pa. 130. The city assumed the damages to abutting property resulting from a construction of a viaduct, though the viaduct was not paid for by it. The court held that such a contract was the incurring of an indebtedness within the meaning of the constitution.

Earles v. Wells, 94 Wis. 285. The court say: "The constitution of this state provides that 'No county, city or town, village, school district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose, to any amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness,' that before 'incurring such indebtedness,' such municipality must 'provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due and also to pay and discharge the principal thereof within twenty years from the time of contracting the same.' It requires the authority of no adjudication to prove that this constitutional limitation means just what it says and is absolutely binding, not only upon every such municipality and its officers but also upon the legislature itself. Nevertheless, we cite a few of the many cases construing similar constitutional provisions: Buchanan v. Litchfield, 102 U. S. 278; Weightman v. Clark, 103 U. S. 256; School District v. Stone, 106 U. S. 183; Litchfield v. Ballou, 114 U. S. 190; Lake County v. Rollins, 130 U. S. 662; Lake County v. Graham, 130 U. S. 674; Doon Tp. v. Cummins, 142 U. S. 366; Nesbit v. Riverside Independent Dist., 144 U. S. 610; Hedges v. Dixon County, 150 U. S. 182." But see Burlington Water Co. v. Woodward, 49 Iowa, 58, where the court said: "The obligation of the city is to levy the tax and see that the amount collected is applied to the specified purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby and there cannot be such an indebtedness. In a constitutional sense, the prohibited indebtedness must be a burden and payable from funds which could not, constitutionally, be appropriated to that purpose. Whether the fund legally provided will be sufficient for the designated purpose, we have no means of knowing. Nor is this regarded as material if no other charge is created on the city by the ordinance."

reached, unearned interest coupons attached to legal and outstanding bonds are not considered a part of its indebtedness within the meaning of a constitutional limitation.[300]

§ 161. Deduction of assets to determine net debt.

Constitutional provisions may limit the amount of indebtedness legally incurrable to a certain rate of taxation or a certain percentage upon the taxable property of the corporation. In determining whether the limitation as thus provided has been reached, municipalities in some cases have computed their debt as their total outstanding obligations, less the value of certain assets.[301] The courts usually hold that warrants or other evidences of indebtedness outstanding at a time as already stated[302] and for the payment of which there is money in the treasury or taxes levied and not collected are not to be considered a part of the indebtedness in such computation, and that cash in the treasury and taxes levied but not collected should be considered an asset of the corporation.[303]

[300] Durant v. Iowa County, 1 Woolw. 69, Fed. Cas. No. 4,189; City of Springfield v. Edwards, 84 Ill. 626; Park v. Candler, 114 Ga. 466, 40 S. E. 523. Interest contracted to be paid is as much a part of the debt for the purpose of payment as the principal named in the bond. Kelly v. Cole, 63 Kan. 385; City of Ashland v. Culbertson, 103 Ky. 161; Finlayson v. Vaughn, 54 Minn. 331. "If the principal alone is considered it is obvious that the total amount of the bonds was within the five per cent limit, but the plaintiff claims that the interest which by the terms of the bonds it was to carry from year to year from the date thereof, must be included in the amount allowed to be issued by the statute. This is clearly erroneous as the court below held. These interest coupons form no part of the principal debt and the bonds when issued represented at that date the indebtedness for the principal sum only." Jones v. Hurlburt, 13 Neb. 125; Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681.

[301] Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367; Davenport v. Kleinschmidt, 6 Mont. 502.

[302] See § 156.

[303] French v. City of Burlington, 42 Iowa, 614. Uncollected taxes considered an asset up to the time of annual tax sale. German Insurance Co. v. City of Manning, 95 Fed. 597. But in the case of City of Chicago v. McDonald, 176 Ill. 404, the court held that cash in the city treasury and uncollected taxes should not be deducted. Maysville & L. Turnpike Road Co. v. Wiggins, 20 Ky. L. R. 724, 47 S. W. 434.

Lovejoy v. Inhabitants of Foxcroft, 91 Me. 367. Uncollected taxes, the town farm and other property owned or held by the town, should not be deducted as assets from the

§ 162. Corporate indebtedness; its payment from a special fund.

Indebtedness legally incurred by a public corporation is often payable not out of the general revenues of the municipality but

total debts or liabilities. In Kelly v. City of Minneapolis, 63 Minn. 125, it was held that the amount of bonds and money in the sinking fund of Minneapolis was to be deducted from the total amount of outstanding bonds of the city in determining whether the indebtedness of the municipality had reached the constitutional limitation, "that all of the bonds held by the sinking fund are the bonds of the city, hence the amount of the bonds and the amount in the fund must necessarily represent an equal amount of the outstanding and uncanceled bonds and indebtedness of the city which has already been realized from taxation to pay the bonds, and to ascertain the further amount to be raised by taxation in order to extinguish the entire indebtedness of the city, it necessarily follows that the amount of the sinking fund is to be deducted from the entire amount of the apparent indebtedness of the city. The balance is its actual debt. The debt limit of the statute has reference to an actual indebtedness for the payment of which a tax must be levied, not to an uncanceled apparent liability."

Bank v. Grace, 102 N. Y. 313. In Webb City & C. Waterworks Co. v. City of Carterville, 142 Mo. 101, the court held that as relating to the power of the city to contract debts in any year in excess of its income, money derived from a sale of bonds was not to be considered a part of such income or revenue.

State v. Hopkins, 14 Wash. 59, 44 Pac. 134. Within the meaning of the constitutional provision limiting indebtedness locally incurrable by counties, the cash assets of the county should be deducted from the outstanding indebtedness to ascertain the actual indebtedness.

See Brooke v. City of Philadelphia, 162 Pa. 123, as following the doctrine held in the case of Kelly v. City of Minneapolis, 63 Minn. 125; Kelley v. Pierce County, 15 Wash. 697; Graham v. City of Spokane, 19 Wash. 447. Assets of the city applicable to the payment of its debts consisting of cash in hand, taxes assessed for the year during which the indebtedness is contracted, and unpaid taxes of prior years, are all to be deducted.

Crogster v. Bayfield County, 99 Wis. 1. The rule as given in the text is followed and the court hold that the amount of cash on hand with the available assets and resources readily convertible into cash should be subtracted from outstanding indebtedness to ascertain the actual debt.

Rice v. City of Milwaukee, 100 Wis. 516, 76 N. W. 341. Prospective revenue indefinite and uncertain in amount should not be included as an asset of the corporation for the purpose of determining whether it has reached the limit of its indebtedness. The court say: "As already noted, the moneys to be derived from these sources (licenses) are entirely indefinite and uncertain. They were not in the process of collection and could be collected only at the will of parties who sought privileges for which license charges were made, and for that reason could not be con-

from some special fund raised through the imposition of taxes or special assessments upon certain property or in a certain manner and having for its purpose the reduction and ultimately the payment of such indebtedness.[304] This is especially true where the debt, whether evidenced by negotiable bonds or other forms, was contracted for the especial purpose of constructing works of internal or local improvement, namely, bridges, highways, and in municipal corporations proper for the grading, paving or general improvement of streets.[305] It seems to be the rule that where

sidered as available assets or resources. * * * It, therefore, seems clear that these unknown and unascertained items of income should not and cannot be considered as offsets against the city's indebtedness. If our conclusions are correct, it is readily apparent that the city had already pledged its credit to an amount exceeding the debt limit and had no right to make the proposed bond issue." In Herman v. City of Oconto, 110 Wis. 660, the court held that taxes which had been apportioned by the secretary of the state but which were not payable until the following December, the contract in this case being made in October, could not be considered as an asset of the city for the purpose of deduction under the rule stated in the text.

[304] Santa Ana Water Co. v. San Buenaventura, 56 Fed. 339; Smith Canal or Ditch Co. v. City of Denver, 20 Colo. 84; State v. Bell, 9 Ga. 334; City of Chicago v. Shober & C. Lithographing Co., 6 Ill. App. 560; Dehm v. City of Havana, 28 Ill. App. 520; Carlyle Water, L. & P. Co. v. City of Carlyle, 31 Ill. App. 325; Second Nat. Bank v. Town of Danville, 60 Ind. 504; City of Indianapolis v. Wann, 144 Ind. 175; Wilson v. City of Shreveport, 29 La. Ann. 673; Mister v. City of Kansas, 18 Mo. App. 217; Kingsland v. City of New York, 5 Daly (N. Y.) 448; Blair v. Lantry, 21 Neb. 247; McElhinney v. City of Superior, 32 Neb. 744; Winston v. City of Ft. Worth (Tex. Civ. App.) 47 S. W. 740; Kaufle v. Delaney, 25 W. Va. 410.

[305] Monroe County Com'rs v. Harrell, 147 Ind. 500, 46 N. E. 124; Affeld v. City of Detroit, 112 Mich. 560. Detroit Charter Local Laws 1883, p. 629, § 8, provide that no public work shall be paid for except by a special assessment to be made upon the property benefited. The court held that such work could not be paid from funds raised for a different purpose and say, "Apparently, the city has had the benefit of the plaintiff's labor, under circumstances which made it inequitable that he should not be paid for it. As before stated, whether the law will now permit an assessment to raise the money to pay him, we have no means of knowing; but we feel constrained to hold that, whether it will or not, the work cannot be paid for from any other fund than that raised for the purpose according to law."

Kelly v. City of Minneapolis, 63 Minn. 125. Certificates calling for the payment of money and issued by the park board of the city of Minneapolis are not an indebtedness of the city within the meaning of Laws

indebtedness is thus to be paid from a special fund created in the manner suggested, its legality will not be affected by the diversion of moneys from such funds or the failure to levy and collect the taxes which the corporation may be legally authorized to do in this behalf. Creditors who are entitled to have the amounts owing them paid from revenues collected in this way, usually

1893, c. 204, § 2, limiting the indebtedness of cities. The court in its opinion by Start, Chief Justice, say: "The certificates in question were given for the purchase price of land for park purposes, and their payment secured by a mortgage on the land purchased. Each certificate states that the city of Minneapolis is indebted to the payee in the sum therein named, and recites that the consideration therefor is the conveyance to the city by the payee of land for park purposes, and that the certificate is secured by a mortgage on the land sold, and that it is payable out of the funds arising from assessments made upon real estate specially benefited by the park established on the land, and concludes with these words: 'It being expressly nuderstood and agreed that there is no liability on the part of said city to pay the amount evidenced by this certificate and secured by the above described mortgage out of any other fund than the fund above specified.' No certificates issued or contracts made by the park board can be given any legal effect contrary to or in excess of the powers conferred upon the board by the statute we have quoted, and they are, in fact, substantially in accordance with its provisions. The board has no power to make these certificates a lien generally upon all the parks of the city, and the record shows that no attempt has been made to secure their payment by the creation of such a lien. * * * The debt of the city is neither increased nor diminished by the transaction. No revenues of the city which must be raised or replaced by taxation are pledged for the payment of the certificates. The statute expressly provides that the park board cannot create any personal or general liability on the part of the city by any certificates they may issue, except to pay such amounts as may be realized from assessments on property benefited on account of the acquisition of the land purchased for park purposes. In no event, nor under any circumstances, is the city liable, except as a trustee, to pay over to the certificate holder the amount actually realized from the assessments. * * * How, then, can it be said that these certificates, for the payment of which the city is not liable, and for which no tax can be levied, are an indebtedness of the city, within the meaning of the statute fixing the debt limit?"

Queens County Sup'rs v. Phipps, 35 App. Div. 350, 54 N. Y. Supp. 946. Under Laws 1898, c. 614, the county commissioners it was decided could apply the balance of a fund raised in the manner indicated in the text for the improvement of highways but not needed for its original purpose to pay a debt contracted in constructing a jail. Baker v. City of Seattle, 2 Wash. St. 576. See also many authorities cited § 152, notes 278 and 279.

have the right to compel an accounting of the funds in the case of a wrongful diversion and to maintain proceedings against the city or public officials where through such action they have suffered an injury.[306] Their rights cannot be defeated by illegal acts of public officials appropriating and using these funds for other purposes.[307] Neither can they be affected or destroyed by the failure of the municipal officers to levy the tax authorized by law for the purpose of making the payment due. If the proper officials fail in this regard those to whom the contract obligation is due can by writ of mandamus or proper proceeding compel the levying of a sufficient tax to make such payment. This principle is especially applicable where under a contract for the furnishing of light or water the municipality has failed to make its contract payments but still insists on using and does use light and water thus supplied.[308] If there is no provision by which such indebtedness is to be paid through the imposition of assessments or taxes, but it is specially charged upon the general revenues of the corporation, it seems to be the rule that these general revenues must be applied first to the payment of the current or running expenses and the surplus income, if any, used in the payment of the principal or interest of such bonded or other indebtedness.[309]

[306] City of New Orleans v. Fisher, (C. C. A.) 91 Fed. 574; Village of Kent v. United States (C. C. A.) 113 Fed. 232; Bates v. Porter, 74 Cal. 224, 15 Pac. 732; Leonard v. Long Island City, 65 Hun (N. Y.) 621; McGlue v. City of Philadelphia, 32 Leg. Int. 188; Gate v. City of Philadelphia, 14 Wkly. Notes Cas. 274.

[307] Cooke v. Village of Saratoga Springs, 23 Hun (N. Y.) 55; People v. City of Cairo, 50 Ill. 154; State v. McCrillus, 4 Kan. 250. The court in speaking of the control of the county board over bonds say: "The bonds are ascertained claims not in any wise depending on the action of the board for their validity. They have no power to audit or allow them or to disallow them. This power over them was ended when they passed into other hands for a valid consideration."

[308] Elliott County v. Kitchen, 14 Bush (Ky.) 289. The rule stated in the text applied to the payment of an issue of bonds authorized by law. State v. City of Great Falls, 19 Mont. 518; City of Wilkesbarre's Appeal, 116 Pa. 246. Municipal corporations under Pa. Const. art. 15, § 3, are authorized, in addition to the powers of taxation they may possess, to levy a tax for the creation of a sinking fund having for its purpose the ultimate payment of their indebtedness.

[309] White v. City of Decatur, 119 Ala. 476, 23 So. 999; City of East St. Louis v. Flannigen, 34 Ill. App. 596;

§ 163. Its payment through the levy of taxes.

Corporate indebtedness legally incurred for a public purpose by the corporation in its capacity as a public or governmental agent is generally paid through the imposition and collection of taxes, and, as will be noted in a succeeding section,[810] the payment of a valid indebtedness is considered a public purpose and one authorizing such action. In the absence of a constitutional or statutory limitation upon the power to tax, the granting of the authority to incur an indebtedness impliedly authorizes the levy of taxes sufficient to pay the debt and the interest as it becomes due.[811] Though some few cases hold to the contrary,

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532.

[810] City of Guthrie v. Ter., 1 Okl. 188, 31 Pac. 190. The legislature has the authority to provide for the payment by a village corporation of the debts of a prior provisional government embracing the same territory. The court say: "It is a fundamental rule that a legislature may, by a retroactive statute cure or ratify any defect which it might have in the first instance, authorized unless prohibited by some constitutional or organic provision; or it may by a retroactive statute, legalize any proceedings that it might have authorized. It can hardly be contended that the legislature could not have authorized the creation of the debts of the provisional government had there been a legislature prior to their organization."

[811] Simonton Mun. Bonds, § 133. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655. "But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose. It is therefore to be inferred that when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

United States v. City of New Orleans, 98 U. S. 381; Ralls County Court v. United States, 105 U. S. 735; City of Quincy v. Jackson, 113 U. S. 335; United States v. Justices

the weight of authority is sustained by the better reason.[312] Where the limit of indebtedness is based upon a percentage of taxes levied on taxable property within the jurisdiction of the corporation, indebtedness created, and which will necessitate for its payment, as stated in preceding sections,[313] the levy of a tax in excess of the constitutional or other amount, becomes void or invalid in respect to the excess.

§ 164. Manner of levying taxes.

The taxing power of a public corporation can be exercised legally only in the manner prescribed by law and with the formalities required. The sovereign undoubtedly has the right to compel, restricted only by constitutional limitations, the payment of taxes sufficient to meet all public expenditures it deems expedient to make. The power necessarily, like all corporate powers, must be exercised through agents, and in order to control and limit their action for the protection of taxable interests, the law, in the imposition and collection of taxes, adheres rigidly to this strict rule of construction. It is necessary therefore that a tax levied for the payment of a debt, to be valid, must be imposed with the formalities required by the charter of a municipality or the statutory and constitutional provisions of the state, and this is true although the indebtedness which the tax is designed to liquidate was legal and binding in its original incurment.

§ 165. Provision for payment at time debt was incurred.

In a preceding section discussing the various charter, statutory and constitutional restrictions upon the power of a public corporation to incur indebtedness,[314] reference has been made to phraseology similar to that of the Illinois Const. 1870, art. 9, § 12, that any municipal corporation incurring indebtedness shall "provide for the collection of a direct annual tax sufficient to pay" the interest as it falls due and the principal within a cer-

of the County Court of Lincoln County, 5 Dill. 184, Fed. Cas. No. 15,503; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; Feldman & Co. v. City Council of Charleston, 23 S. C. 62.

[312] Shackelton v. Town of Guttenberg, 39 N. J. Law, 660.

[313] See §§ 151 et seq.

[314] See § 151.

tain number of years. In the case there cited the indebtedness was held legal only when its incurment was accompanied by a provision looking to its ultimate payment in the manner required by law.[315] And the courts have held further in construing such provisions that their existence gives to the public corporation an implied power to levy taxes for such purpose without further legislative action.[316] Where a sinking fund is created by law at the time of the incurment of an indebtedness through the levy and collection of a certain tax, the payment of

[315] United States v. City of New Orleans, 98 U. S. 381. But a subsequent statute authorizing the incurring of a special obligation will be valid with such a provision omitted. City of East St. Louis v. United States, 120 U. S. 600, 7 Sup. Ct. 739. The court here held a provision of the charter of East St. Louis limiting the rate of taxation, in existence prior to the adoption of the constitution, unaffected by it.

Smith Canal Co. v. City of Denver, 20 Colo. 84; City of Chicago v. Shober & C. Lithographing Co., 6 Ill. App. 560; Dehm v. City of Havana, 28 Ill. App. 520; Second Nat. Bank v. Town of Danville, 60 Ind. 504; City of Richmond v. McGirr, 78 Ind. 192; City of Indianapolis v. Wann, 144 Ind. 175. Under Ind. Rev. St., 1894, § 3822, requiring an appropriation necessary as to the validity of a debt incurred, a five-year lighting contract is void when the appropriation for the purpose is available only for the current month and the one following.

Carleton & Co. v. City of Washington, 38 Kan. 726; Wilson v. City of Shreveport, 29 La. Ann. 673. New Orleans Gaslight Co. v. City of New Orleans, 42 La. Ann. 188, holds contrary to City of Indianapolis v. Wann, 144 Ind. 175. Kiichli v. Brush Elec. Co., 58 Minn. 418; Mister v. City of Kansas, 18 Mo. App. 217; City of Blair v. Lantry, 21 Neb. 247; McElhinney v. City of Superior, 32 Neb. 744.

Cooke v. Village of Saratoga Springs, 23 Hun (N. Y.) 55. The wrongful diversion of moneys raised by a tax levied for the purpose of paying certain indebtedness will not render void such indebtedness. Mingay v. Hanson, 102 N. Y. 695. Special authority may be granted by special legislation. Appeal of Tatham, 80 Pa. 465. Such a statutory provision applies only to a funded debt or loan of a city; not to a contract. City of Dallas v. Miller, 7 Tex. Civ. App. 503. The constitutional provision does not apply to an obligation arising from a tort. Noel v. City of San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263. Tex. Const. art. 11, § 5, provides that no debt shall be created by any city unless at the same time provision is made to collect annually a sufficient sum to pay the interest and create a sinking fund of at least 2% of the face of such indebtedness. It was held in this case that a contract was void executed without such provision, the obligation consisting of notes payable for a series of years.

Dwyer v. City of Brenham, 65 Tex. 526. Tex. Const. art. 11, § 5, does not apply to a debt contracted by a city

the indebtedness from the sinking fund necessarily deprives public officials of the power to thereafter insert in the tax levy an item for this purpose.[317] Where the statutes provide, using the phraseology "may levy taxes annually" for the creation of such a sinking fund, the courts will usually hold the power as not a discretionary one but a provision mandatory in its nature, and creditors dependent upon such taxes for the payment of the interest or a part of the principal of their debt can compel the proper officials to levy this tax.[318]

for current expenses, viz., the printing and binding of city ordinances. City of Terrell v. Dessaint, 71 Tex. 770; McNeal v. City of Waco, 89 Tex. 83.

[316] Cooley, Tax'n (2d Ed.) p. 685, and authorities cited. See § 168 supra.

[317] Newark Aqueduct Board v. City of Newark, 50 N. J. Law, 10 Atl. 881; Chicago & N. W. R. Co. v. Faulk County, 15 S. D. 501, 90 N. W. 149. A sinking fund tax levied to pay an outstanding debt consisting of ordinary county warrants is void.

[318] Rock Island County Sup'rs v. United States, 72 U. S. (4 Wall.) 435, where the court said in speaking of phraseology similar to that used in Village of Kent v. United States (C. C. A.) 113 Fed. 232, affirming United States v. Village of Kent, 107 Fed. 190: "The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.' The line which separates this class of cases from those which involve the exercise of a discretion judicial in its nature, which courts cannot control, is too obvious to require remark. This case, clearly, does not fall within the latter category." City of Galena v. Amy, 73 U. S. (5 Wall.) 705.

Village of Kent v. United States (C. C. A.) 113 Fed. 232; affirming United States v. Village of Kent, 107 Fed. 190. "But it is well settled in statutory interpretation that the word 'may' may be read 'shall.' * * * This language seems to us applicable to the statute under consideration. The power to levy this tax is given for the benefit of the creditors in this case to meet a demand adjudicated to be right and proper after full trial. It imposes a duty upon the council which, in our judgment, they are required to exercise so long as they are able to do so within the limit imposed by the law upon the amount of taxation for any given year. We therefore construe this

§ 166. Debt; mode of payment.

There will also be found constitutional provisions to the effect that a public corporation cannot incur indebtedness in excess of the current or actual revenues and income of the corporation for that year. These provisions also determine the mode of payment of such corporate indebtedness.[819]

section as though it read, 'the council *shall* levy a sum sufficient to pay the interest on the public debt to be applied for no other purpose.' * * * Where a city has a discretion to levy a tax yet where that tax is required for the payment of a public debt, the city may be required to levy a tax if it refuses to do so." United States v. Sterling, 2 Biss. 408, Fed. Cas. No. 16,388. "The duty of paying municipal debts is as obligatory upon the citizens as upon the officers of the city. Indeed, the city authorities are only the agents of the citizens. Besides, what right had the city officers to expend the entire income of the city from the one per cent. tax in payment of current expenses, and leave this indebtedness unprovided for? Why did they not from the proceeds of this one per cent. tax, pay the bonds and coupons on which this judgment was rendered, and take a vote as to the expediency of raising a further tax to defray current expenses? The proceeds of this one per cent. tax are not especially set apart and dedicated to the payment of current expenses. The bonds for which this judgment was rendered had been legally issued, and the city authorities and voters were all chargeable with notice that they were due and ought to be paid. They should then have levied and collected an adequate tax in apt time to have the money ready when their obligations matured, and, having failed to do so, are guilty of a breach of duty which the writ of mandamus will compel them to perform." State v. McCrillus, 4 Kan. 250. Taxes lawfully levied and collected for the purpose of paying a certain debt must be applied to that purpose. See also Berlin Iron Bridge Co. v. City of San Antonio, 92 Tex. 388, 50 S. W. 408.

[819] United States v. City of New Orleans, 44 Fed. 590; Siegel v. City of New Orleans (C. C. A.) 81 Fed. 522. Surplus revenues for paying the indebtedness or current expenses of the year are not to be considered a trust fund to be applied in a reduction or payment of indebtedness contracted or assumed during preceding years.

McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358. Any portion of the amount payable in any one year on a contract extending over a series of years can be paid from the amount of taxes levied to meet such payment for succeeding years. Webb City & C. Waterworks Co. v. City of Carterville, 142 Mo. 101. In construing the term "current expenses" to ascertain whether a city has exceeded its current income for the year, the court defines these as including the "reasonable salary allowed by law to mayor, council, assessor, marshal, constable, attorney and a reasonable police force." McNeal v. City of Waco, 89 Tex. 83, 33 S. W. 322; Mason v. Purdy, 11 Wash. 591.

§ 167. Time and place of payment.

The ordinary rule applies to the payment of indebtedness of a public corporation in regard to the manner and time of its payments. The current and running expenses of the government and its indebtedness as well are payable at the office of the public treasury, unless otherwise specified,[320] and at the time indicated by the evidence of indebtedness.[321] If no time is set for the payment, the debt is payable on demand. However, if the obligation is payable from a certain fund, the exhaustion of this fund necessarily postpones a payment. Interest can be collected on indebtedness payable at a certain time but not then paid by default of the debtor whether it consists of the principal of the debt or periodical installments of interest. Where an obligation has no fixed time for its payment either of principal or interest, a Louisiana case held that the holder of such an obligation was not bound by an advertisement of the city that it was ready to pay such indebtedness and that he could collect interest after the time fixed by the city for the payment of this obligation.[322] In a New York case it was decided that a public debt payable at any time after twenty years at the pleasure of the legislature was not payable until after legislative action providing for its payment.[323] Interest can usually be collected upon deferred obligations.[324]

[320] Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Enfield v. Jordan, 119 U. S. 680; Stewart v. Henry County, 66 Fed. 127; People v. Tazewell County, 22 Ill. 147; Johnson v. Stark County, 24 Ill. 75; City of Pekin v. Reynolds, 31 Ill. 529; Sherlock v. Village of Winnetka, 68 Ill. 530; Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 395; Skinker v. Butler County, 112 Mo. 332; Friend v. City of Pittsburgh, 131 Pa. 305.

[321] National Bank of Republic v. City of St. Joseph, 31 Fed. 216; Davis v. Yuba County, 75 Cal. 452; Brown v. Johnson County Com'rs, 1 G. Greene (Iowa) 486. A county order payable out of a special fund to be created in the future held not due until the fund was created; and further that such order would not draw interest before the fund was created nor until it had been presented and refused payment. Klaer v. Ridgway, 86 Pa. 529; Allentown School Dist. v. Derr, 115 Pa. 439. Bonds payable "in twenty-five years after date with interest" and giving the option to the holder to pay if desired after twelve years from date, the court held were not payable before twenty-five years except at the election of the holder.

[322] Keith v. City of New Orleans, 10 La. Ann. 423.

[323] People v. Denniston, 23 N. Y. 247.

[324] Neosho City Water Co. v. City

§ 168. Enforcement of a debt by action.

A right possessed by the owner of an obligation existing as an ordinary contract or in the form of a negotiable bond or other evidence of indebtedness can usually be enforced through an action or other proper proceeding against the debtor. They are governed by the usual rules of practice enforcing rights through the application of remedies offered by a state and will be considered later in this work.[325]

IV. The Power of Public Corporations to Incur Indebtedness Through the Issue of Negotiable Securities.

§ 169. Power to issue negotiable securities.

(a) Must be expressly given. In preceding sections the power of the public corporation to incur a legal indebtedness as evidenced by instruments or obligations other than negotiable bonds has been generally considered. The subject of limitations, however, as discussed, has dealt with restrictions upon the power to incur indebtedness of all forms as found in charter, statutory or constitutional provisions. It is impossible in considering this subject to separate those restrictions affecting the right of a public corporation to incur an indebtedness in the form of a negotiable bond and those involving its right to incur that indebtedness evidenced in some other manner, the limitations usually applying in general terms to the incurring of a debt or indebtedness, without specifying its form, in excess of a certain amount, either a percentage of its taxable property or a fixed and definite gross sum. In the succeeding sections will be con-

of Neosho, 136 Mo. 498. The legal rate of interest allowed in this case on accounts after demand. Southern R. Co. v. City Council of Greeneville, 49 S. C. 449, 27 S. E. 652. The municipal liability for interest held a legal incident of the obligation to return money illegally collected and retained.

[325] See post "Actions." Donnelly v. District of Columbia, 119 U. S. 339, 7 Sup. Ct. 276. A public contractor selling auditor's certificates at a discount because of an insufficiency of funds at the time they were presented for payment, can not hold the District of Columbia liable for the loss. Morton v. City of Nevada, 41 Fed. 582. There exists no implied promise for the return of money obtained for an illegal purpose by the issue of bonds in violation of law. Harris County v. Brady, 115 Ga. 767, 42 S. E. 71; Elliott County v. Kitchen, 77 Ky. (14 Bush) 289.

sidered especially the power of a public corporation to incur indebtedness by the issue of negotiable bonds,[326] which it is held must be expressly given and can never be implied. As said by a writer on this question: "There is a marked legal distinction between the power to give a note to a lender for the amount of money borrowed or to a creditor for the amount due, and the power to issue for sale in open market a bond as a commercial security with immunity in the hands of a bona fide holder for value, from equitable defenses."[327] This rule is not always applied in the incurring of other indebtedness by a public corporation. Very frequently the courts have decided that such a corporation may have the implied power to incur an obligation under certain circumstances especially for the purpose of maintaining the corporate organization and paying or meeting ordinary and current running expenses of the government, anticipating a current levy of taxes or present revenues. The power to issue bonds is usually conferred by statutory[328] or char-

[326] See comments on Merrill v. Town of Monticello, 138 U. S. 673, in 5 Harv. Law Rev. 157, dealing with the subject of municipal bonds. Kennard v. Cass County, 3 Dill. 147, Fed. Cas. No. 7,697; Francis v. Howard County, 50 Fed. 44; Dent v. Cook, 45 Ga. 323; Holliday v. Hildebrandt, 97 Iowa, 177. Refunding bonds issued in excess of the debt limit prescribed by constitution held void.

Jacobson v. Cary, 51 Neb. 762. Money raised for the purpose of paying bonds lost through insolvency of bank. Loss held not to fall upon bondholder, and tax levied upon property of school district to pay balance due on such bonds valid.

Livingston v. School Dist. No. 7, 9 S. D. 345. Bonds issued in a manner unauthorized by special act, void in hands of innocent purchasers.

[327] Smith, Mun. Corp. § 955.

[328] Scotland County v. Hill, 132 U. S. 107; Francis v. Howard County, 50 Fed. 44; Washington Tp. v. Coler (C. C. A.) 51 Fed. 362; Chilton v. Town of Gratton, 82 Fed. 873; Lehman v. City of San Diego (C. C. A.) 83 Fed. 669. The power conferred to "borrow money upon the faith and credit of the city," the court held in this case did not imply a power to issue negotiable bonds.

Waite v. City of Santa Cruz, 89 Fed. 619; German Ins. Co. v. City of Manning, 95 Fed. 597. The court held here that loans negotiated under authority of law in anticipation of uncollected revenue could not be subsequently refunded by the issuing of negotiable bonds. Corning v. Meade County Com'rs (C. C. A.) 102 Fed. 57; City of Pierre v. Dunscomb, 106 Fed. 611; People v. Burr, 13 Cal. 343, construing act of April 20, 1858, as authorizing the issue of bonds by the city and county of San Francisco.

Sawyer v. Colgan (Cal.) 33 Pac. 911; Dougherty County v. Boyt, 71

ter[329] provisions limited by constitutional measures.[330] The power thus granted must in its exercise be strictly followed,

Ga. 484; Neel v. Bartow County Com'rs, 94 Ga. 216; Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544. Bonds issued for "corporate purposes" in this case by the Sanitary Dist. of Chicago were held sufficiently definite as to purpose.

Young v. Tipton County Com'rs, 137 Ind. 323; Crittenden County Ct. v. Shanks, 88 Ky. 475, 4 L. R. A. 265; State v. Board of Liquidation, 27 La. Ann. 577; McCormick v. Village of West Duluth, 47 Minn. 272, construing Gen. Laws Minn. 1891, c. 146, authorizing the issuance of improvement bonds by villages of over 3,000 inhabitants.

Mittag v. Borough of Park Ridge, 61 N. J. Law, 151, 38 Atl. 750; State v. Holladay, 72 Mo. 499; State v. Babcock, 25 Neb. 709; Colburn v. Chattanooga W. R. Co., 94 Tenn. 43; Robertson v. Breedlove, 61 Tex. 316; Nolan County v. State, 83 Tex. 182; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042; Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 879; Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536. The court held that bonds issued in excess of the statutory limit were void only as to the excess.

Darke v. Salt Lake County Com'rs, 15 Utah, 467, 49 Pac. 257. See, also, Post v. Supervisors, 105 U. S. 667; Lewis v. City of Shreveport, 3 Woods, 205, Fed. Cas. No. 8,331; Clark v. City of Des Moines, 19 Iowa, 199; State v. Moore, 45 Neb. 12; Bunch's Ex'r v. Fluvanna County, 86 Va. 452, 10 S. E. 532; Luling v. City of Racine, 1 Biss. 314, Fed. Cas. No. 8,603.

[329] Hitchcock & Co. v. City of Galveston, 2 Woods, 272, Fed. Cas. No. 6,532; Milner's Adm'r v. City of Pensacola, 2 Woods, 632, Fed. Cas. No. 9,619; Judson v. Plattsburg, 3 Dill. 181, Fed. Cas. No. 7,570; City of Brenham v. German-American Bank, 144 U. S. 173, reversing 35 Fed. 185. The authority given to issue bonds redeemable five years from date confers no authority to issue them redeemable after the expiration of ten years.

City of Evansville v. Woodbury (C. C. A.) 60 Fed. 718; Lehman v. City of San Diego, 73 Fed. 105; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 49 L. R. A. 534. Where a charter gives discretionary powers for the appropriation of money and the levy of taxes to pay indebtedness, after the discretion has been exercised and bonds issued to pay a certain indebtedness, sold and bought by bona fide purchasers, it is then too late for the courts to review this discretion.

City of Griffin v. Inman, 57 Ga. 370. The power given in the charter of a city to borrow money, subscribe for stock, etc., is sufficiently broad to imply the power to employ the usual and appropriate means for engaging municipal credit, namely, the issue and sale of corporate bonds bearing interest and negotiable by delivery.

Heilbron v. City of Cuthbert, 96 Ga. 312. In the case of Law v. People, 87 Ill. 385, the court said: "The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the

assuming the existence of all other conditions necessary to make it legal, in order to support an issue of bonds of this character, and if the right to issue bonds for a special purpose is given, in an action upon them, the authority relied on to support their

body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. Hence, power to borrow money or create indebtedness is not an incident to such local governments and the power cannot be exercised unless it is conferred by their charter and no one has the right to presume the existence of such a power and persons proposing to loan money to these bodies must see that the power exists."

Town of Windsor v. Hallett, 97 Ill. 204; Wilson v. City of Shreveport, 29 La. Ann. 673. The power to give bonds, necessary in the conduct of litigation, does not include the power to issue bonds for the purpose of raising money.

Naegely v. City of Saginaw, 101 Mich. 532. The issue of a less number of bonds than authorized by law does not invalidate those issued.

City of Cumberland v. Magruder, 34 Md. 381; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; People v. Livingston County Sup'rs, 43 Barb. (N. Y.) 298; Town of Klamath Falls v. Sachs, 35 Or. 325, 57 Pac. 329; City of Williamsport v. Com., 84 Pa. 487; City of Memphis v. Bethel (Tenn.) 17 S. W. 191; Wilson v. Florence, 40 S. C. 290; Winston v. City of Ft. Worth (Tex. Civ. App.) 47 S. W. 740; City of Radford v. Heth, 100 Va. 16, 40 S. E. 99; State v. City of Madison, 7 Wis. 688.

[330] Read v. City of Plattsmouth, 107 U. S. 568. The court held the provision of the Neb. Const. forbidding the passage of a special act conferring corporate powers not violated by an act legalizing municipal bonds issued without authority. Board of Liquidation of New Orleans v. State, 179 U. S. 622.

In City of Litchfield v. Ballou, 114 U. S. 190, where it was sought to have money, received on bonds void because in excess of constitutional limitation and used for construction of waterworks, made a lien upon said works, Justice Miller said: "The language of the constitution is that 'no city shall be allowed to become *indebted in any manner or for any purpose* to an amount, * * * exceeding five per centum on the value of its taxable property.' It shall not *become indebted;* shall not incur any pecuniary liability; it shall not do this in *any manner*, neither by bonds nor notes, nor by express or implied promises; nor shall it be done for any *purpose*, no matter how urgent, how useful, how unanimous the wish * * * the prohibition is as effectual against the implied as the express promise and is as binding in a court of chancery as a court of law."

John Hancock Mut. Life Ins. Co. v. City of Huron, 80 Fed. 652; Brattleboro Sav. Bank v. Trustees of Hardy Tp., 98 Fed. 524. A township in Ohio is not a corporation within the meaning of that clause of the Constitution providing that the legislature "shall pass no special act conferring corporate pow-

validity must be specially pleaded.[331] The courts adhere so strictly to the rule that the power to issue negotiable bonds must be expressly given, that every person dealing with a corporation, it has been held many times, must at his peril take notice of the authority of the corporation and its power and the terms of the law by which the power is supposed to be granted, even though such person be a bona fide holder for value of such securities.[332] In considering further this rule as to the

ers" and therefore an act authorizing a township to issue bonds is not invalid.

City of Los Angeles v. Hance, 122 Cal. 77, 54 Pac. 387; Bannock County v. C. Bunting & Co., 4 Idaho, 156, 37 Pac. 277; Cairo & St. L. R. Co. v. City of Sparta, 77 Ill. 505. The legislature cannot compel a municipal corporation to incur a debt providing for the issue of bonds for local purposes against its wishes. Clegg v. Richardson County School Dist., 8 Neb. 178, construing Neb. Act 1875, p. 281, as limited by Neb. Const. art. 8, § 1. Dundy v. Richardson County Com'rs, 8 Neb. 508, construing Neb. Act 1873, p. 80, as limited by the same constitutional provision cited in the preceding case.

Borough of Rainsburg v. Ryan, 127 Pa. 74, 4 L. R. A. 336. When bonds are void because of failure to comply with some provision of the constitution and the money received therefor has been applied to an existing valid indebtedness, thus merely exchanging one creditor for another, the borough is liable for the money and recovery may be had against it upon a simple contract on a count for money loaned.

Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871; Farquharson v. Yeargin, 24 Wash. 549, 64 Pac. 717. The passage of an act giving a county the right to issue bonds under constitutional provisions held a legislative determination of the sufficiency of its population.

[331] Kennard v. Cass County, 3 Dill. 147, Fed. Cas. No. 7,697; Thayer v. Montgomery County, 3 Dill. 389, Fed. Cas. No. 13,870; Hopper v. Town of Covington, 118 U. S. 148. In this case Mr. Justice Gray said: "The town having but a limited authority to issue bonds for certain purposes, it is not enough for the plaintiff to aver in general terms that the town was authorized to issue the bonds in suit, but he must state the facts which bring the case within the special authority."

[332] Nesbit v. Riverside Independent School-Dist., 144 U. S. 610, affirming 25 Fed. 635; National Bank of Republic v. City of St. Joseph, 31 Fed. 216; United States v. Town of Cicero, 41 Fed. 83. Recitals in municipal bonds are binding only in respect to matters of fact not in respect to matters of law of which all are bound to take cognizance.

National Bank of Commerce v. Town of Granada, 54 Fed. 100, affirming 48 Fed. 278. In Travelers' Ins. Co. v. Township of Oswego, 55 Fed. 361, it was held that the purchasers of municipal bonds are conclusively presumed to know the law of the state, both constitutional and statutory, bearing upon the power

power to issue negotiable bonds we have a difference between a public and a private corporation. The power of a private corporation to issue negotiable instruments or commercial paper is implied so long as the proceeds are to be used in the carrying on of its legitimate business. Borrowing money and issuing bonds, notes and bills as a rule are acts germane to the carrying on of the business of a private corporation. This is not true of public corporations. The ends for which they are organized or created are essentially different and in a broad sense the power to issue bonds for moneys borrowed is not included among the ordinary powers of such organizations.[333] They are governmental agents or bodies of limited powers and the rule of strict construc-

of the municipality to issue the bonds, and the municipality cannot be estopped by recitals in the bonds to deny even as against bona fide purchasers, the power of commissioners appointed by the legislature to issue them.

Rathbone v. Kiowa County Com'rs, 83 Fed. 125, reversing 73 Fed. 395; Dunbar v. Canyon County Com'rs, 5 Idaho, 407, 49 Pac. 409; Lippincott v. Town of Pana, 92 Ill. 24. Where there is an entire absence of power as distinguished from a defective execution of power, the recitals of those invested with the ministerial duty of issuing municipal bonds will afford no protection to even a bona fide holder for value of such bonds and such holders are bound to take notice of the want of authority to issue them.

Wilson v. City of Shreveport, 29 La. Ann. 673; Goodnow v. Ramsey County Com'rs, 11 Minn. 31 (Gil. 12). The power to issue county orders grants no authority to issue bonds payable at a future day with interest coupons attached.

Ruohs v. Town of Athens, 91 Tenn. 20, 18 S. W. 400. The fact that a town has no valid organization, the court held here could be urged as a successful defense in an action brought on its bonds.

Bona fide purchasers must take notice of power to issue. Thomas v. Town of Lansing, 14 Fed. 618; Coffin v. Kearney County Com'rs, 57 Fed. 137; Risley v. Village of Howell, 57 Fed. 544. A mere recital in a bond of the act of the legislature conferring authority is notice to every purchaser to see at his own peril that the statute has been complied with.

Quaker City Nat. Bank v. Nolan County, 66 Fed. 137; Town of South Ottawa v. Perkins, 94 U. S. 260; McClure v. Township of Oxford, 94 U. S. 429; Inhabitants of Pompton v. Cooper Union, 101 U. S. 196; City of Aurora v. West, 22 Ind. 89; Gaddis v. Richland County, 92 Ill. 119; Silliman v. Fredericksburg, 27 Grat. (Va.) 119.

[333] City of Evansville v. Woodbury (C. C. A.) 60 Fed. 718; State v. City of Newark, 54 N. J. Law, 62, 23 Atl. 129. The implied right of municipal corporations to give sealed evidence of indebtedness for debts legally incurred is unquestionable. It is only when these evidences of

tion withholds a right or denies a power when it does not clearly exist or is not expressly given. The power to borrow money and to issue bonds by the state or any of its political subdivisions is a legislative one. It can be exercised by the proper legislative body of the state, or if that body so elects, delegated in its performance to such subordinate agencies as it may select, but limited by constitutional provisions if such exist.[334]

(b) De facto corporate existence necessary. A public corporation must have, at least, a de facto existence that negotiable bonds issued by it under constitutional or statutory authority, be valid. Bonds issued by corporations organized under a law afterwards held void or unconstitutional are not regarded as legal outstanding obligations because their maker as an artificial person could not and therefore did not exist; this rule, however, does not necessarily invalidate, in the hands of bona fide purchasers, bonds issued for a public purpose. Such obligations may be enforceable against legal organizations embracing the territory and people voting upon or authorizing the issue of the bonds originally.[335]

§ 170. The power to issue must be expressly given; it cannot be implied.

The cases are uniform in holding that a public corporation does not possess as one of its incidental or implied powers[336] the

debt are to be rendered commercially negotiable that express authority, to that end, must be granted.

City of Williamsport v. Com., 84 Pa. 487. This case also holds that where a debt has been lawfully created, a public corporation has the implied power unless restrained by some constitutional provision to issue the proper acknowledgment whether such be a bond, bill or note. See, also, Com. v. City of Pittsburgh, 88 Pa. 66.

[334] Seward County Com'rs v. Aetna Life Ins. Co. (C. C. A.) 90 Fed. 222.

[335] Oswego Tp. v. Anderson, 44 Kan. 214, 24 Pac. 486; School Dist. No. 25 v. State, 29 Kan. 57; Riley v. Garfield Tp., 54 Kan. 463; Morton v. Carlin, 51 Neb. 202, 70 N. W. 966.

[336] Simonton, Mun. Bonds, § 14. "Almost all of the elementary writers are of the opinion that the practice of issuing negotiable paper by a municipal corporation, unless power to borrow be expressly conferred, is wrong, and condemn the practice in vigorous language and some claim that a municipal corporation cannot issue its negotiable paper without legislative authority and that where the corporation is authorized to execute some powers requiring a large expendi-

ture of money, while they admit that under such circumstances the corporation may issue its evidence of debt to its creditors who may be engaged to do the public work, deny that in order to obtain the money therefor, it has the implied authority to issue negotiable paper, which will be free from equities in the hands of third persons, or which it may sell in order to obtain the means to do the public work. While it must be conceded that the above views are wiser and safer than the opposite doctrine and if followed by all the state courts, would doubtless, to a very great extent, act as a check upon municipal extravagance and compel them to a 'pay as you go' policy which would make them careful in their expenditures and prevent the incurring of debt to be paid by future generations yet it must be confessed that the doctrine of most of the state courts is favorable to the opposite view, while the Federal courts are more conservative and adopt the view that the power to issue negotiable instruments by municipal corporations must be expressed, and is not to be implied and if issued under an implied authority are void in all hands." Citing Jones, R. Secur. § 283; Burrough, Pub. Secur. p. 185.

But Daniels in his work on Negotiable Instruments, § 1531, says: "When the power to borrow the money is clear it necessarily involves in its exercise the execution of a security for its repayment; and negotiable coupon bonds being the common and most acceptable form of municipal securities when given for money legitimately borrowed would, undoubtedly, be valid."

Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 220; Police Jury v. Britton, 82 U. S. (15 Wall.) 566. The court said that public officials possessing all the necessary authority to levy taxes and incur ordinary expenses would still possess no implied power to issue negotiable securities payable in the future of such a character as to be unimpeachable in the hands of bona fide holders for the purpose of raising money or funding previous indebtedness.

City of Nashville v. Ray, 86 U. S. (19 Wall.) 468. "This charge was excepted to in all its parts, and upon these exceptions the case was argued before this court in reference to the following points: 1. Has a municipal corporation the power, without express legislative authority, to borrow money for any of the purposes of its incorporation? 2. Has it the power, without express legislative authority, to issue its paper clothed with all the attributes of negotiability? 3. Conceding the affirmative of these two queries, can the executive officers of a municipal corporation borrow money or issue negotiable securities for the corporation, so as to bind it without 'ordinance'; that is to say, without express authority from the legislative department of the corporate government in its collective official capacity * * *

"A municipal corporation is a subordinate branch of a domestic government of a State. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers, are different. As a local governmental institution, it exists for the benefit of the people within its cor-

porate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation.

"Our system of local and municipal government is copied, in its general features, from that of England. No evidence is adduced to show that the practice of borrowing money has been used by the cities and towns of that country without an Act of Parliament authorizing it. We believe no such practice has ever obtained.

"Much less can any precedent be found (except of modern date and in this country) for the issue, by local civil authorities, of promissory notes, bills of exchange, and other commercial paper. At a period within the memory of man, the proposal of such a thing would have been met with astonishment. The making of such paper was originally confined to merchants. But its great convenience was the means of extending its use, first to all individuals and afterwards to private corporations having occasion to make promises to pay money. Being only themselves responsible for the paper they issue, no evil consequences can follow sufficient to counterbalance the conveniences and benefits derived from its use. They know its immunity, in the hands of a bona fide holder, from all defenses and equities. Knowing this, if they choose to issue it, no one is injured but themselves. But if city and town officials should have the power thus to bind their constituencies, it is easy to see what abuses might and probably would ensue. We know from experience what abuses have been practiced where the power has been conferred. Fraudulent issues, speculations and embezzlements, and the accumulation of vast amounts of indebtedness, without any corresponding public benefit, have been rendered easy and secure from merited punishment. The purpose and object of a municipal corporation do not ordinarily require the exercise of any

such power. They are not trading corporations and ought not to become such. They are invested with public trusts of a governmental and administrative character; they are the local governments of the people, established by them as their representatives in the management and administration of municipal affairs affecting the peace, good order and general well being of the community as a political society and district; and invested with power by taxation to raise the revenues necessary for those purposes. The idea that they have the incidental power to issue an unlimited amount of obligations of such a character as to be irretrievably binding on the people, without a shadow of consideration in return, is the growth of a modern misconception of their true object and character. If in the exercise of their important trusts the power to borrow money and to issue bonds or other commercial securities is needed, the legislature can easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake.

"Vouchers for money due, certificates of indebtedness for services rendered or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind, used for liquidating the amounts legitimately due to public creditors, are of course necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose. It has the effect of converting a municipal organization into a trading company, and puts it in the power of corrupt officials to involve a political community in irretrievable bankruptcy. No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by legislative enactment, either express or clearly implied."

Comanche County v. Lewis, 133 U. S. 198. Here the authority was given to borrow upon the credit of the county a sum sufficient for the erection of county buildings and the court held that the authority to borrow this money carried with it the power to issue negotiable bonds as evidences of such indebtedness.

City of Brenham v. German-American Bank, 144 U. S. 173, holds, Justices Harlan, Brewer and Brown dissenting, that the charter power of the city of Brenham, Texas, to borrow money "for general purposes not exceeding $15,000 on the credit of such city" carried with it no power to issue and sell negotiable bonds. Overruling Rogers v. City of Burlington, 70 U. S. (3 Wall.) 654, and Mitchell v. City of Burlington, 71 U. S. (4 Wall.) 270. The court said: "That in exercising its power to borrow, not exceeding $15,000 on its credit, for general purposes, the city could give to the lender as a voucher for the repayment of the money, evidence of indebtedness in the shape of non-negotiable paper is quite

power to issue evidences of indebtedness in the form of negotiable bonds. It must be expressly given or it does not exist.[337]

clear, but that does not cover the right to issue negotiable paper or bonds unimpeachable in the hands of a bona fide holder. * * * It is easy for the legislature to confer upon a municipality when it is constitutional to do so the power to issue negotiable bonds and under the well settled rule that any doubt as to the existence of such power ought to be determined against its existence it ought not to be held to exist in the present case."

Milner v. City of Pensacola, 2 Woods, 632, Fed. Cas. No. 9,619; Wilson v. Neal, 23 Fed. 129; Hill v. City of Memphis, 23 Fed. 872.

City of Griffin v. Inman, 57 Ga. 370. The charter power in this case given to "borrow money and impose future taxes" held to include the power to issue negotiable bonds as a usual means for securing public credit.

Wiggin v. City of Lewiston (Idaho) 69 Pac. 286; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660; Witter v. Polk County Sup'rs, 112 Iowa, 380. The power to incur a certain indebtedness carries with it only the implied power to evidence the same by some form of non-negotiable instrument.

City of Vicksburg v. Lombard, 51 Miss. 111. Where power granted to issue municipal securities, the implied power is conferred to give them a negotiable and commercial form and character.

Hubbard v. Sadler, 104 N. Y. 223. The power to issue bonds in payment for a public improvement is implied from the power expressly given to borrow money and make the improvement

Tucker v. City of Raleigh, 75 N. C. 267. The power to contract debts it was held here also carried with it the implied power to issue bonds, they being as the court said "the usual and proper evidence and security for such debts."

Town of Klamath Falls v. Sachs, 35 Or. 325, 57 Pac. 329. Where the power to issue bonds is given, authority is conferred to issue "negotiable bonds."

Com. v. City of Pittsburgh, 34 Pa. 496. The power to borrow money held includes the power to issue the usual evidences of such indebtedness.

City of Williamsport v. Com., 84 Pa. 487. The court here said that "where a municipality has lawfully created a debt" it has the implied power, unless restrained by its charter or statute, to evidence the same by bill, bond or other instrument. A power to contract a debt implies the right to issue the proper acknowledgment therefor.

[337] See also authorities cited in preceding notes. Merrill v. Town of Monticello, 138 U. S. 673. The power to borrow money held not to include the power to issue bonds. See, also, Id., 22 Fed. 589; Brenham v. German American Bank, 144 U. S. 173; Union Pac. R. Co. v. Lincoln County, 3 Dill. 300, Fed. Cas. No. 14,380; Francis v. Howard County, 50 Fed. 44.

Ashuelot Nat. Bank v. School Dist. No. 7 (C. C. A.) 56 Fed. 197. The court after referring to the rule laid down in Merrill v. Town of Monticello, 138 U. S. 673, and Brenham v. German American Bank, 144 U. S. 173, said: "We think, how-

The capacity of public corporations to incur indebtedness is restricted through the application of every possible rule. The implied power is sometimes assumed as belonging to them of incurring indebtedness to pay current expenses or anticipating for a brief period only uncollected taxes. The burden of paying obligations thus assumed is sustained by those incurring or authorizing the incurment of them, and to maintain the corporate organization or pay the wages of corporate employes depending on their daily earnings for a living, the courts have recognized the existence of the right suggested. The burden of paying negotiable bonds with interest coupons issued as evidences of indebtedness for other purposes than those suggested is usually not felt by those authorizing the issue or in-

ever, that we may fairly affirm that the two authorities heretofore cited do establish the following propositions: First, that an express power conferred upon a municipal corporation to *borrow money* for corporate purposes does not, in itself, carry with it an authority to issue negotiable securities: Second, that the latter power will never be implied in favor of a municipal corporation, unless such implication is necessary to prevent some express corporate power from becoming utterly nugatory; and Third, that in every case where a doubt arises as to the right of a municipal corporation to execute negotiable securities, the doubt should be resolved against the existence of any such right."

Rathbone v. Kiowa County Com'rs, 73 Fed. 395. Here the court said: "The rule of law in relation to the issue of negotiable bonds is that whenever the power to issue is called in question, the authority to issue must be clearly shown and will not be deduced from uncertain inferences and can only be conferred by language which leaves no reasonable doubt of an intention to confer it." See C. C. A. decision 83 Fed. 125.

Lehman v. City of San Diego (C. C. A.) 83 Fed. 669. Act March 7th, 1872, conferring upon the city of San Diego the power "to borrow money upon the faith and credit of the city" does not confer any power to issue negotiable bonds.

English v. Chicot County, 26 Ark. 454; Hardin County v. McFarlan, 82 Ill. 138; State v. Moore, 45 Neb. 12, 63 N. W. 130; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; Morrison v. Inhabitants of Bernards, 36 N. J. Law, 219; Ghiglione v. Marsh, 23 App. Div. 61, 48 N. Y. Supp. 604. The authority to incur a given indebtedness the court also confers the power to issue bonds for the full amount at par.

Smathers v. Madison County Com'rs, 125 N. C. 480. A county can issue bonds for an indebtedness incurred for its necessary running expenses. See, also, as holding the same, Murry v. Fay, 2 Wash. St. 352, and as holding to the contrary, Claiborne County v. Brooks, 111 U. S. 400; Mauldin v. City Council of Greeneville, 33 S. C. 1; Daggett v. Lynch, 18 Utah, 49.

curring such indebtedness. They are generally issued payable after the lapse of long periods of time, the payment of the annual interest charges alone resting upon those immediately incurring the debt, the principal payment falling upon taxable interests many years in the future. It is a comparatively easy matter for extravagant officials or even the people themselves to incur indebtedness payable by negotiable bonds without regard to the burdens that may thus be placed upon posterity. Men are prone to be generous or even extravagant with the moneys of others and indifferent to their burdens. Where the task of paying a debt falls upon the one creating it, he will exercise greater care and more conservatism. Expenditures will be considered not only with reference to their results and expediency but also to tax levies. It is these considerations largely which have induced the courts to adopt and adhere to the rule stated at the beginning of this section, and we find repeated iterations in the decisions of all courts, state as well as Federal.[338]

[338] Police Jury v. Britton, 82 U. S. (15 Wall.) 566. In this case the court in denying the implied power of a municipal corporation to issue corporate bonds, say: "It thus appears that the police jury had no express authority to issue the bonds in question, and that if they had any authority it must be implied from the general powers of administration with which they were invested. We have, therefore, the question directly presented in this case whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of bona fide holders, for the purpose of raising money or funding a previous indebtedness.

"This subject, as applied to various municipal bodies, has been much discussed in the courts of this country, and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of the corporation, sometimes upon the character of the objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. * * * That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any

§ 171. Ratification of void issue of negotiable bonds.

The common principle of law that an unauthorized act may be subsequently ratified does not apply to the issue of negotiable

modification, abatement or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. Such instruments transferred before maturity to a bona fide purchaser leave behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. This characteristic of commercial paper, which no court has more faithfully enforced than this, raises the doubt whether the power to issue it can be implied from the ordinary powers of local administration and police which are conferred upon the boards and trustees of political districts. The power to issue such paper has been the means in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of bona fide holders. As such we have been reluctantly compelled to sustain them, but only on the ground that the power to issue them had been expressly, or by necessary implication, conferred by the legislature. The power to issue such obligations and thus irretrievably to entail upon counties, parishes and townships a burden for which perhaps they have received no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated.

"We do not mean to be understood that it requires in all cases express

bonds by a public corporation. If such bonds are illegal or void because issued in excess of the original grant of power, or be-

authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds payable in future. So the power to subscribe for stock in a railroad, or to purchase property for a market house, and other like powers which cannot be carried into execution without borrowing money, or giving obligations payable in the future, have been held sufficient to raise the implied power to issue such obligations. But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities."

In Gause v. City of Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276, it was said: "It is a non sequitur, as applied to municipal and public corporations, to affirm that this power to create debts implies the power to give a negotiable bill, bond or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logically nor legally sound. But if it be conceded that, as respects private corporations, the American doctrine is otherwise, and that is rightly so, still it does not follow that the same rule does not apply, or ought to apply, to municipal corporations. They are not created for trading, commercial, or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice, ought to weigh with decisive force against its unnecessary judicial entertainment."

In New York it has been held that the implied authority is only to issue bonds directly to the creditor in payment of the debt, not to sell the bonds in order to raise money to pay the debt. In Ketchum v. Buffalo, 14 N. Y. (4 Kern.) 356, Justice Seldon said: "It is true that the power to contract to pay A $10,000 at the end of a year for doing certain work and the power to borrow $10,000 of B upon a credit of a year, for the purpose of paying A for doing the work, might seem at first view to be substantially identical. The amount is the same and the time of payment the same; the creditor only is different. A little examination, however, will show that there is a very material difference between

cause it is lacking, it is clear that unless the power is subsequently given the corporation itself cannot by any act of its own ratify such issue, making that which was before illegal and void, legal and enforceable. The act of ratification cannot create the power where it never existed.[339]

the two. If the power of the corporation to use its credit is limited to contracting directly for the accomplishment of the object authorized by law, then the avails or consideration of the debt created cannot be diverted to any illegitimate purpose. The contract not only creates the fund, but secures its just appropriation. On the contrary, if the money may be borrowed, the corporation will be liable to repay it, although not a cent may ever be applied to the object for which it was avowedly obtained. It may be borrowed to build a market and appropriated to build a theater and yet the corporation would be responsible for the debt. The lender is in no way accountable for the use made of the money. It is plain, therefore, that if the policy of limiting the powers and expenditures of corporations to the objects contemplated by their charters is to be carried out, their right to incur debts for those objects must be strictly confined to contracts which tend to their direct accomplishment. * * * No one can fail to see that to concede to corporations the power to borrow money for any purpose would be entirely subversive of the principle which would limit their operations to legitimate objects."

In City of Williamsport v. Com., 84 Pa. 487, 495, the court say: "The question for our consideration is whether the power to issue bonds is one of the inherent powers of a municipal corporation in a limited sense, that is to say, for the purpose of providing for such expenditure as is strictly germane to the object for which such corporations are created, we are not without authorities that question if they do not deny this power. Judge Dillon, one of the ablest writers upon this branch of the law, says, in his treatise on the law of municipal bonds, p. 13: 'We regard as alike unsound and dangerous that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes and as incidental to that the power to issue commercial securities. * * *' The ground principally relied upon by that learned author and others who take this view of the question, is that the power is a dangerous one. But showing that the power is dangerous does not prove that it does not exist."

[339] See authorities cited in § 200, post. Norton v. Shelby County, 118 U. S. 425; Katzenberger v. City of Aberdeen, 121 U. S. 172. In Kelley v. Milan, 127 U. S. 139-159, Blatchford, Judge, says: "The declaration of the validity of the bonds contained in the decree was made solely in pursuance of the consent to that effect contained in the agreement signed by the mayor of the town and the officer of the New Orleans, St. Louis & Chicago railroad company. The act of the mayor in signing that agreement could give no validity to the bonds if they had

§ 172. The issue of bonds; their purpose.

A public corporation in its capacity as such is restricted in all its actions by the principle that being a subordinate agent of government such acts to be valid must be done in furtherance of some well-recognized and legitimate aim or end of government,

none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The mayor had no such authority. * * * The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds. This was not the case of a submission to the court of a question for its decision on the merits, but it was a consent in advance to a particular decision by a person who had no right to bind the town by such a consent because it gave life to invalid bonds and the authorities of the town had no more power to do so than they had to issue the bonds originally."

Doon Tp. v. Cummins, 142 U. S. 366; Thomas v. Town of Lansing, 14 Fed. 619; Town of Oxford Com'rs v. Union Bank of Richmond (C. C. A.) 96 Fed. 293; Sage v. Fargo Tp., 107 Fed. 383; Lewis v. City of Shreveport, 3 Woods, 205, Fed. Cas. No. 8,331, affirmed in 108 U. S. 282; Town of Pana v. Lippincott, 2 Ill. App. 466; Ryan v. Lynch, 68 Ill. 160; Herwig v. Richardson, 44 La. Ann. 703, 11 So. 135; Young v. Board of Education of Independent School Dist., 54 Minn. 385; State v. Getchell, 3 N. D. 243, 55 N. W. 585. Bonds authorized to be issued upon a vote of the electors but issued without such authority by corporate officials can be subsequently ratified by the vote of the people.

Hodges v. City of Buffalo, 2 Denio (N. Y.) 110. See Halstead v. City of New York, 3 N. Y. (3 Comst.) 430. But compare Peterson v. City of New York, 17 N. Y. 449, and Grogan v. City of San Francisco, 18 Cal. 590.

Union Bank v. Town of Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487; Bell v. Waynesboro Borough, 195 Pa. 299; Daggett v. Lynch, 18 Utah, 49, where the legislature possesses the power to raise the debt limit of a county, it can subsequently validate debts issued by a county in excess of the legal limit. Clark v. City of Janesville, 13 Wis. 414; Town of Rochester v. Alfred Bank, 13 Wis. 432.

See Hunt v. Fawcett, 8 Wash. 396, where special legislative authority was granted authorizing counties to ratify void indebtedness created prior to the taking of effect of the act. De Mattos v. City of New Whatcom, 4 Wash. 127, 29 Pac. 933; Simonton, Mun. Bonds, § 247. p. 344. However, the legislature may ratify such debts or authorize the municipality to do so if not prohibited by the constitution.

Grenada County Sup'rs v. Brogden, 112 U. S. 261; Bolles v. Town of Brimfield, 120 U. S. 759; Simonton, Mun. Bonds, § 247, p. 345. If prohibited by constitution, the debt cannot be ratified. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; McPherson v. Foster Bros., 43 Iowa, 48; Simonton, Mun. Bonds, § 247, p. 345.

or, as has been frequently said, the corporation being public in its nature its expenditures especially must have for their end the advancement or execution of some public purpose. This principle of law is applicable in all its force to the issue of negotiable bonds by public corporations. As was said in a preceding section,[340] the appropriation of moneys raised through the levy and collection of public taxes upon taxable interests for private purposes amounts to confiscation and cannot be considered under any circumstances a legitimate use of such fund. However, the courts in construing the phraseology "a private purpose" have been influenced by the public policy of the particular locality or a statutory or constitutional provision that concedes the authority to make an expenditure which under ordinary circumstances would not be considered a use of public moneys for a public purpose. If there is any doubt as to the right of a public corporation to expend moneys in its treasury for a use which cannot be characterized clearly as a public one, most emphatically there does not exist any doubt that a public corporation cannot incur an indebtedness evidenced by negotiable bonds for the purpose of aiding an enterprise or contracting an improvement the character of which is not clearly established as coming within the rule laid down in this section.[341]

[340] See § 148. See, also, many authorities cited under sections 145-148 upon the question of public purpose.

[341] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; City of Parkersburg v. Brown, 106 U. S. 487. The legislature of West Virginia authorized the city of Parkersburg to issue its bonds in aid of a manufacturing company. Blatchford, J., in holding the bonds thus issued void, said: "There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with the prescribed requirements or conditions, the case is not one for applying to the city under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some instalments of interest on the bonds, or by reason of any of the acts of its officers or agents in dealing with the property covered by the deed of trust, no such acts can give validity to the statute or to the bonds. However, they may affect the *status* of the property dealt with, or the relation of the city to such property."

City of Ottawa v. Carey, 108 U. S. 110; Cole v. City of La Grange, 113 U. S. 1; Commercial Nat. Bank v. City of Iola, 2 Dill. 353, Fed. Cas. No. 3,061, where Judge Dillon then on the Federal bench said in the opinion holding bonds void issued by the city of Iola as a donation or bonus to aid in the erection of a private manufacturing plant, "Taxation is a mode of raising revenue

§ 173. Refunding bonds.

A public corporation during the course of its corporate existence may have incurred an authorized debt represented by nego-

for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. * * * All persons must, at their peril, take notice of the power of municipal corporations or officers to issue securities and especially is this so where the want of power results from constitutional prohibitions or provisions."

Coulson v. City of Portland, Deady, 481, Fed. Cas. No. 3,275. Where the municipality ostensibly issues the bonds for a public purpose under lawful authority although the real purpose was the aiding of a private enterprise, the court held it could not be enjoined.

Osborn v. Adams County Com'rs, 2 McCrary, 97, 7 Fed. 441; Bragg v. Tuffts, 49 Ark. 554. The issue of so-called "Arkansas war bonds" was held in this case void as contracts in aid of the Civil War.

Bartow County Com'rs v. Conyers, 108 Ga. 559; Bissell v. City of Kankakee, 64 Ill. 249; State v. Neely, 30 S. C. 587, 3 L. R. A. 672; Doty v. Ellsbree, 11 Kan. 209. See, also, as holding the same, Smathers v. Madison County Com'rs, 125 N. C. 480. Where indebtedness incurred for necessary expenses was held a public purpose and one authorizing an issue of bonds; and Murry v. Fay, 2 Wash. St. 352; Claiborne County v. Brooks, 111 U. S. 400, however, holds to the contrary. Central Branch U. P. R. Co. v. Smith, 23 Kan. 745.

Allen v. Inhabitants of Jay, 60 Me. 124. The court here said: "If there is any proposition about which there is an entire and uniform weight of judicial authority, it is that taxes are to be imposed for the use of the people of the state in the varied and manifold purposes of government and not for private objects or the special benefit of individuals. Taxation originates from and is imposed by and for the state. * * * The town of Jay stands in precisely the same relation to it as other towns to new or old mills within their limits, so far as regards any public benefit to be derived therefrom. * * * But because all useful labor, all productive industry conduces to the public benefit, does it follow that the people are to be taxed for the benefit of one man or of one special kind of manufacturing? * * * The sailor, the farmer, the mechanic, the lumberman are equally entitled to the aid of coerced loans to enable them to carry on their business with Messrs. H. and L. (the persons aided). Our government is based on equality of right; the state cannot discriminate among occupations, for a discrimination in favor of one is a discrimination adverse to all others. * * * But whether the money raised is to be distributed per capita or loaned, can make no difference in principle. If towns can assess and collect money to be again loaned to such persons as the majority may select for such purposes as it may favor, with such security, or without security, as it may elect, property ceases to be protected in

tiable bonds or other evidences of indebtedness. Such debt may consist of purchases made, obligations contracted, or moneys bor-

its acquisition or enjoyment. * * * If the loan be made to one or more for a particular object, it is favoritism. It is a discrimination in favor of the particular individual, and a particular industry thereby aided, and is one adverse to and against all individuals, all industries not thus aided. If it is to be loaned to all, then it is practically a division of property under the name of a loan. It is communism incipient, if not perfected."

Lowell v. City of Boston, 111 Mass. 454. The city of Boston not authorized to issue bonds for the purpose of aiding those whose homes had been destroyed in the great Boston fire of 1872 by loaning to them the proceeds of such bonds. The court said that the "power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare," and further, that although remotely a public benefit would result, yet it was so remote that the purpose contemplated could not be considered, especially in the manner in which the moneys were designed to be expended, as a public one.

Spitzer v. Village of Blanchard, 82 Mich. 234. A village not authorized to issue bonds for the purpose of buying fire apparatus.

Sweet v. Hulbert, 51 Barb. (N. Y.) 312. The legislature has no power to confer authority upon a public corporation either absolute or conditional to issue bonds and donate the proceeds to a private corporation.

City of Cincinnati v. Trustees of Cincinnati Hospital, 66 Ohio St. 440, 64 N. E. 420. The court held the power to issue bonds for the repair and extension of city hospital a corporate one, within the meaning of Ohio Const. art. 13, § 1.

State v. Whitesides, 30 S. C. 579, 3 L. R. A. 777; State v. Harper, 30 S. C. 586, 3 L. R. A. 111; Ohio Valley Iron Works v. Town of Moundsville, 11 W. Va. 1; State v. Common Council of Madison, 7 Wis. 688. In the absence of a charter prohibition, the court held that the council could issue bonds for the purchase of a cemetery.

Simonton, Mun. Bonds, § 40, p. 45, and cases cited. "The policy of the law is against the support of private enterprises by the state, or any of its component parts, and prohibits the aid of municipalities as a partner or otherwise in purely private ventures."

In Hackett v. Ottawa, 99 U. S. 86, bonds although issued to aid a private enterprise were held valid because they appeared on their face to have been issued for a municipal purpose, and passed into the hands of innocent purchasers for value without notice of their true object. See, also, Ottawa v. Carey, 108 U. S. 110, which holds such bonds void in the hands of one who is not an innocent bona fide holder without notice.

Feldman & Co. v. City Council of

rowed from time to time at varying rates of interest and payable at different times. In the administration of the corporate finances, it becomes good business policy and therefore expedient to

Charleston, 23 S. C. 57. Even where there are no express restrictions on the taxing powers of the legislature, it cannot authorize a city to issue bonds to persons whose property has been burned, to enable them to rebuild. See, also, the following cases relative to the validity of bonds issued for various relief purposes where, in the absence of some statutory provision authorizing them, they are held void.

Leavenworth County Com'rs v. Miller, 7 Kan. 479; State v. Osawkee Tp., 14 Kan. 418. The court in its opinion by Justice Brewer, then a member of the supreme court of Kansas say: "It taxes the whole community to assist one class and that not for the purpose of relieving actual want, but to assist them in their regular occupations. These people are engaged in the business of farming. This business cannot be successfully carried on without seed, nor without stock strong enough to do ordinary work. They are destitute of seed, and their stock require grain. Hence, the tax upon the community. The principle would be the same if their supply of grain was insufficient, but through the prevalence of epizooty, or some other disease, their stock had all died. Could a tax be sustained to purchase stock for their ordinary farm work? Or, again, suppose some prairie fire, driven by a fearful wind, sweeps through a country, consuming its fences, and farming tools, can a tax be sustained to supply this loss, and enable the farmers to prosecute their labors? Nor need the inquiry be limited to a single class. Were the carpenters or shoemakers, or any other industrial class, located in a separate quarter of a city, and their tools and stock in trade swept away by fire, could a tax be sustained to purchase new sets of tools and new stock in trade to enable them to re-prosecute their business and secure support for themselves and families? No distinction in principle can be made between these different supposed cases and the case at bar. They all rest upon this proposition, that a tax is laid upon the public to furnish to one class the means of carrying on its regular occupation."

McConnell v. Hamm, 16 Kan. 228; Lowell v. City of Boston, 111 Mass. 454; Powell v. Heisler, 45 Minn. 549. Bonds issued under a special act to supply seed wheat to sufferers from ravages of grasshoppers are void.

In re House Row No. 284, 31 Neb. 505. The legislature can authorize the issue of bonds under a vote of the people of the county to purchase grain for settlers where a number of counties have been stricken by drouth, but this must be done by general law.

State v. Nelson County, 1 N. D. 88, 8 L. R. A. 283. N. D. Const. § 185, prohibits any county in the state from loaning or giving its credit to "any individual association or corporation except for the necessary support of the poor." An act authorizing the issue of bonds for the purpose of supplying seed wheat to farmers residing in counties suffering from crop failure is valid and not in violation of the provision quoted. Public corpora-

fund or refund, as it is technically termed, such indebtedness, securing for the new debt as evidenced by an issue of negotiable bonds a uniform and usually lower rate of interest with provisions for the partial payment of the principal at times optional with the maker. This may be done owing either to the improved financial credit of the corporation or a lowering of the rate of interest received by lenders on such investments.

The issue of the new or refunding bonds have for their purpose with their proceeds the payment of the outstanding and floating corporate indebtedness. The objection has been raised that their issue creates an "indebtedness" or a "debt" within the meaning of a constitutional or other limitation and being in excess of the limit fixed by such provision therefore void. This objection has been repeatedly decided by the courts as not well taken, for the reason that the proceeds of such bonds are used not for the purpose of adding to the indebtedness or the obligations of the corporation but of paying outstanding ones, which immediately upon the exchange become canceled and not capable of enforcement as corporate obligations, the only legal indebtedness existing against the corporation as a result of the exchange consisting of the new refunding bonds.[342]

tions have no power to issue bonds or give aid to private sectarian schools, colleges or charitable institutions. See County of Cook v. Chicago Industrial School for Girls, 125 Ill. 540, 1 L. R. A. 437; Stevens v. St. Mary's Training School, 144 Ill. 336, 18 L. R. A. 832; Atchison, T. & S. F. R. Co. v. City of Atchison, 47 Kan. 712; State v. Hallock, 16 Nev. 373.

City of Waxahachie v. Brown, 67 Tex. 519. The general authority to pass ordinances, not inconsistent with the state constitution or general laws, establishing and maintaining free schools, constructing school houses and purchasing sites does not authorize a town to issue bonds in payment of school buildings constructed. But see City of Emporia v. Partch, 21 Kan. 202, where the city of Emporia was authorized to issue bonds for the purpose of erecting boarding houses for the use of students at the state normal schools. The use of public moneys for the erection and maintenance of public educational institutions is unquestionably proper and an issue of bonds for such a purpose when authorized by the legislature will be sustained. Wetmore v. City of Oakland, 99 Cal. 146; Williams v. Town of Albion, 58 Ind. 329.

Gardner v. Haney, 86 Ind. 17. The fact that the school house when built is not within the corporate limits will not render void bonds issued for its construction. State v. Babcock, 25 Neb. 278.

[342] Gunnison County Com'rs v. E. H. Rollins & Sons, 173 U. S. 255. In the case of Aetna Life Ins. Co. v.

The power to issue refunding bonds is not ordinarily impliedly possessed, especially where the original authority to con-

Lyon County, 44 Fed. 329, affirmed in 82 Fed. 929, which arose upon a suit to collect bonds issued to refund other bonds which were in part in excess of constitutional limit of indebtedness, the court said, "In suits therefore upon refunding bonds representing prior indebtedness, it is necessary in order to sustain the defense of invalidity to show that the indebtedness represented by the refunding bonds was itself invalid and nonenforceable either in whole or in part."

Fisher v. Board of Liquidation of New Orleans, 56 Fed. 49; United States v. Board of Liquidation of City Debt of New Orleans (C. C. A.) 60 Fed. 387; McLean v. Valley County, 74 Fed. 389, affirmed in (C. C. A.) 79 Fed. 728. Waite v. City of Santa Cruz, 75 Fed. 967. The California Act, March 1, 1893, authorizing towns and cities to refund their indebtedness and issue bonds therefor, is not unconstitutional as special and local legislation merely because it excludes cities of the first class from its privileges.

Lake County Com'rs v. Platt (C. C. A.) 79 Fed. 567. The issue of bonds in satisfaction of a valid judgment does not create a debt but merely extends the time for its payment.

Aetna Life Ins. Co. v. Lyon County, 82 Fed. 929, affirming 44 Fed. 329; City of Huron v. Second Ward Sav. Bank (C. C. A.) 86 Fed. 272, 49 L. R. A. 534. The court applies the principle given to an issue of refunding bonds exceeding the constitutional limitation. In the opinion by Sanborn, J., it is said that "bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness." Citing Lake County Com'rs v. Platt, 79 Fed. 567; E. H. Rollins & Sons v. Gunnison County Com'rs, 80 Fed. 692; City of Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580; Powell v. City of Madison, 107 Ind. 110; Marion County Com'rs v. Harvey County Com'rs, 26 Kan. 181, 201; In re State Bonds (Me.) 18 Atl. 291; Hotchkiss v. Marion, 12 Mont. 218; Miller v. School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879. And the court further say: "Another objection to these bonds is that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general, not special. It was not limited to specified purposes, but was 'to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed seven per cent. per annum, as the city council may deem best.' The whole is greater than any of its parts, and includes them all. The power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund the indebtedness of the municipality. Portland Sav. Bank v. City of Evansville, 25 Fed. 389; Simonton, Mun. Bonds, § 126; City of Quincy v. Warfield, 25 Ill. 317; Morris v. Taylor, 31 Or. 62, 49 Pac. 660; City

tract the indebtedness was not sufficiently broad to authorize the issue of bonds. If, however, the original bonded debt was legally

of Galena v. Corwith, 48 Ill. 423; Village of Hyde Park v. Ingalls, 87 Ill. 13; Rogan v. City of Watertown, 30 Wis. 259, 268. There is nothing in the cases of Police Jury v. Britton, 82 U. S. (15 Wall.) 566; Merrill v. Monticello, 138 U. S. 673, 684; Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189, 191; City of New Orleans v. Clark, 95 U. S. 644; City of Waxahachie v. Brown, 67 Tex. 519; State v. Board of Liquidation of City Debt, 40 La. Ann. 398; Middleport v. Aetna Life Ins. Co., 82 Ill. 565; Bogart v. Lamotte Tp., 79 Mich. 294, 44 N. W. 612; Brenham v. German American Bank, 144 U S. 173, 182; Coffin v. Kearney County Com'rs, 57 Fed. 137; or Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598, in conflict with this conclusion. No court has held in any of these cases that the unlimited power to borrow money and issue bonds for all municipal purposes excludes the power to do so to fund or pay municipal debts. In Police Jury v. Britton, 82 U. S. (15 Wall.) 566, no power to issue bonds was granted to the parish, and the court simply held that this power was not to be inferred from the grant of general powers of administration. In Merrill v. Monticello, 138 U. S. 673, a power was given to issue bonds for specified purposes, and the court held that this was not a grant of power to issue them for purposes not specified, on the familiar principle, 'Expressio unius est exclusio alterius.' In Brenham v. German American Bank, 144 U. S. 173, and Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189, it was held that a mere power to borrow money without authority to issue bonds did not include the power to emit negotiable securities to evidence the debt. In Coffin v. Kearney County Com'rs, 57 Fed. 137, the statute expressly forbade the issue of bonds at the time when they were put forth; and in Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598, the power to issue bonds was not under discussion at all. The other cases cited are as wide of the mark."

This case also held that "the fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action upon them by an innocent purchaser who had no knowledge of or part in the diversion or waste." Citing National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778; West Plains Tp. v. Sage (C. C. A.) 69 Fed. 943; Anderson County Com'rs v. Beal, 113 U. S. 227; Cairo v. Zane, 149 U. S. 122; Maxcy v. Williamson County Ct., 72 Ill. 207.

Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505. The court held here, following City of Huron v. Second Ward Sav. Bank (C. C. A.) 86 Fed. 272, 49 L. R. A. 534, that funding bonds neither created nor increased a debt but simply changed its form.

Independent School Dist. v. Rew, 111 Fed. 1, 55 L. R. A. 364; Chapman v. Morris, 28 Cal. 393; Sharp v. Contra Costa County, 34 Cal. 284; California University v. Bernard, 57 Cal. 612; Bates v. Gregory (Cal.) 22 Pac. 683; In re Contracting of

incurred, some courts hold that the power to issue refunding bonds may be fairly inferable or implied from the original grant

State Debt by Loan, 21 Colo. 399, 41 Pac. 1110; Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 23; Riley v. Garfield Tp., 54 Kan. 463. The authority given "every county to refund its maturing and matured indebtedness of every kind and description whatsoever" it was held included all indebtedness whether created subsequent or prior to the passage of the act.

Woods v. Board of Education of Covington, 21 Ky. L. R. 941, 53 S. W. 517. An act giving public corporations the "right to refund any debt" by the issue of bonds was held a remedial one and should be applied to a debt created subsequent to the passage of the statute.

State v. Board of Liquidators, 27 La. Ann. 660; State v. Board of Liquidation of City Debt, 51 La. Ann. 1142. A judgment in an action based upon tort held not a "floating debt" within the provisions of Act No. 67, 1884, touching the funding of the indebtedness of the city of New Orleans.

Smith v. Stephan, 66 Md. 381; City of Port Huron v. McCall, 46 Mich. 565; Jefferson County Com'rs v. People, 5 Neb. 127; Anderson v. City of Trenton, 42 N. J. Law, 486. A statute authorizing the refunding of indebtedness by cities having a population of not less than 25,000 people held a violation of that constitutional amendment which forbids the passage of special laws to regulate the internal affairs of a town.

Hermann v. Town of Guttenberg, 63 N. J. Law, 616, 44 Atl. 758, Laws 1898, c. 40, providing for the funding of existing debts for street improvements and incorporated towns is a general law and therefore held constitutional.

City of Poughkeepsie v. Quintard, 136 N. Y. 275; Odd Fellows' Sav. & Commercial Bank v. Quillen, 11 Nev. 109; Erskine v. Nelson County, 4 N. D. 339, 58 N. W. 348; Birkholz v. Dinnie, 6 N. D. 511. The limit of indebtedness as determined by State Const. § 183 cannot be increased even by the issue of refunding bonds.

Ter. v. Hopkins, 9 Okl. 133; Morris v. Taylor, 31 Or. 62, 49 Pac. 660; Snyder v. Kantner, 190 Pa. 440; Hirt v. City of Erie, 200 Pa. 223, 49 Atl. 796. Refunding bonds not a new indebtedness within prohibition of Const. art. 9, § 8.

Cass County v. Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988; Baker v. City of Seattle, 2 Wash. St. 576; De Mattos v. City of New Whatcom, 4 Wash. 127, 29 Pac. 933. Refunding bonds as to a certain excess held invalid.

Richards v. Klickitat County, 13 Wash. 509. An indebtedness capable of refundment may consist of that incurred either prior or subsequent to legal authority for the issue of refunding bonds. Miller v. School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879; Carbon County Com'rs v. Rollins, 9 Wyo. 281.

In Deyo v. Otoe County, 37 Fed. 246, it is held that if the holder of valid municipal bonds surrenders them to the municipality and receives in exchange therefor other bonds which the municipality has not the lawful right to issue, he is not thereby divested of his title to the bonds so surrendered; and

of authority.[343] There are also decisions to the effect that the power to borrow money carries with it the implied power to give as security or as evidence of such indebtedness the usual and necessary certificates or commercial instruments which enable the corporation to exercise the power expressly granted "to borrow money." An application of the principle that the granting of a power carries with it the right to use all necessary, usual and appropriate means in its execution to the issue of negotiable bonds and that stamps them with validity.[344] It must not be

such owner and holder of the bonds so surrendered may maintain an action thereon after the same nature. Daily v. City of Columbus, 49 Ind. 169. Where the proceeds of bonds are misapplied, a city can issue other bonds in their stead. Portland Sav. Bank v. City of Evansville, 25 Fed. 389. A city authorized "to borrow money for the use of the city" may issue renewal bonds.

New bonds are valid although old ones are void, where recitals would tend to mislead a bona fide purchaser. See Cadillac v. Woonsocket Inst. for Savings, 58 Fed. 935. The court said: "The recitals in the new bonds, as to the fact of 'old bonds falling due,' and that the new bonds were issued to take up the old, would well lull an intending purchaser into security. The defense it might have made against the old bonds it elected not to make. It should not now be permitted to set it up as against a bona fide holder of its refunding bonds." See, also, Ashley v. Presque Isle County Sup'rs, 60 Fed. 55; Mutual Ben. Life Ins. Co. v. City of Elizabeth, 42 N. J. Law, 235; Hills v. Peekskill Sav. Bank, 101 N. Y. 490.

[343] Whitwell v. Pulaski County, 2 *Dill. 249*, Fed. Cas. No. 17,605. A county court has no implied authority to fund outstanding warrants by the issue of negotiable bonds payable at a fixed future time and which would, if valid, change and enlarge the liability of the county.

City of Galena v. Corwith, 48 Ill. 423. "A city being in debt which is evidenced by script or by promissory notes may surely change the form of the indebtedness to interest bearing bonds and this, without express authority in its charter. It is an inherent power and vital without which such organizations could not live."

Hull v. Marshall County, 12 Iowa, 142; Myers v. City of Jeffersonville, 145 Ind. 431; Goodnow v. Ramsey County Com'rs, 11 Minn. 31 (Gil. 12); Morris v. Taylor, 31 Or. 62, 49 Pac. 660. Where on the maturity of valid municipal bonds, a municipality, without legislative authority, takes them up and issues others in their stead, such second issues are void for want of authority but the original debt is still good, for valid bonds cannot be paid by void ones. Jefferson County v. Hawkins, 23 Fla. 223; Hardin County v. McFarlan, 82 Ill. 138; Town of Solon v. Williamsburg Sav. Bank, 114 N. Y. 122; Rogan v. City of Watertown, 30 Wis. 259; Simonton, Mun. Bonds, § 125, p. 165.

[344] Portland Sav. Bank v. City of Evansville, 25 Fed. 389. In this

understood, however, from the statements contained in the preceding sentences that the right to issue refunding bonds exists independent of an original grant of power or that they can be issued without regard to the formalities required by law in the making of negotiable bonds by such corporations. The power to issue negotiable bonds must have been given either directly in a specific instance or as derived from a prior general grant of authority limited in the manner and extent of its exercise by constitutional provisions.[345] The conditions precedent must be performed and the agencies designated by law used to the same extent and in the same manner as in an issue of bonds not characterized by the term funding or refunding.[346]

The original grant of authority for the issue of negotiable bonds may make their validity contingent upon an affirmative vote of the electors of the taxing districts issuing them. That an issue of refunding bonds be valid, if an election was necessary to the validity of the original bonds, the cases quite uniformly hold this action unnecessary where the proper authorities refund the corporate indebtedness. There is no necessity for referring the question of issue to the people unless required by law.[347] This

case the common council of the city was authorized "to borrow money for the use of the city" and under this authority it issued its renewal bonds, which were held valid. City of Huron v. Second Ward Sav. Bank (C. C. A.) 86 Fed. 272, 49 L. R. A. 534; City of Pierre v. Dunscomb (C. C. A.) 106 Fed. 611; City of Galena v. Corwith, 48 Ill. 423.

[345] Merrill v. Town of Monticello, 138 U. S. 673; Fisher v. Board of Liquidation of New Orleans, 56 Fed. 49; Coffin v. City of Indianapolis, 59 Fed. 221; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660. The power to issue refunding bonds cannot be implied merely from the power originally conferred authorizing a former issue. In Bogart v. Lamotte Tp., 79 Mich. 294, where bonds wore issued in lieu of township orders, the bonds were held void as neither the townships of the state nor their officers had any power to borrow money or to issue bonds, except as conferred by the legislature.

[346] Brown v. Ingalls Tp., 81 Fed. 485. An unauthorized board has no authority to issue refunding bonds. Roberts v. City of Paducah, 95 Fed. 62; Coffin v. Richards, 6 Idaho, 741, 59 Pac. 562. An ordinance providing for "the funding of outstanding indebtedness other than municipal bonds" was held invalid where the statute authorizing such action provided that the indebtedness to be refunded must be described in the ordinance.

Edminson v. City of Abilene, 7 Kan. App. 305, 54 Pac. 568. A resolution not sufficient where the charter requires enactment of an ordinance as necessary to the issue of

is especialy true where statutes authorize public corporations to refund all matured and maturing indebtedness. There can be no question as to the validity of refunding bonds where the authority to issue them has been specially granted. In such case so far as their issue is concerned they will be deemed original bonds and the required legal conditions and formalities must be performed and complied with.[348]

refunding bonds. City of Cincinnati v. Guckenberger, 60 Ohio St. 353.

[347] Howard v. Kiowa County, 73 Fed. 406; Society for Savings v. Pratt County Com'rs, 82 Fed. 573; City of Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 580, disproving Doon Tp. v. Cummins, 142 U. S. 366; Bannock County v. C. Bunting & Co., 4 Idaho, 156, 37 Pac. 277. Authority granted by Rev. St. § 3602, to refund indebtedness by issue of bonds, when authorized by a vote of two-thirds of the electors of the county.

Locke v. Davison, 111 Ill. 19. Where, however, the law provides that the legal electors of the county shall pass upon the issue of refunding bonds, the public officials have no power, without such vote, to issue them.

Riley v. Garfield Tp., 58 Kan. 299, 49 Pac. 85; Boyce v. Auditor General, 90 Mich. 314, 51 N. W. 457; Boyce v. Auditor General, 90 Mich. 326, 52 N. W. 754; State v. Cornell, 54 Neb. 72, 74 N. W. 432. The statutes require a majority of the electors to authorize the issuance of funding bonds. An original issue of bonds requires two-thirds of all the votes cast. McCless v. Meekins, 117 N. C. 34.

[348] Merrill v. Town of Monticello, 138 U. S. 673; Kiowa County Com'rs v. Howard (C. C. A.) 83 Fed. 296. In Waite v. City of Santa Cruz, 98 Fed. 387, it was held that a city has no power to issue refunding bonds for the purpose of paying bonds issued by a private corporation upon a waterworks plant purchased by the city. But this decision was reversed in Waite v. City of Santa Cruz, 184 U. S. 302, the court holding that the city was estopped by recitals in the refunding bonds to the effect that the bonds were issued for the purpose of refunding "outstanding indebtedness evidenced by bonds and warrants thereof" from denying that such waterworks bonds were a part of the outstanding indebtedness of the city.

Seward County Com'rs v. Aetna Life Ins. Co. (C. C. A.) 90 Fed. 222; Haskell County Com'rs v. National Life Ins. Co. (C. C. A.) 90 Fed. 228; Pratt County Com'rs v. Society for Savings (C. C. A.) 90 Fed. 233; Brattleboro Sav. Bank v. Board of Trustees of Hardy Tp., 98 Fed. 524. An act of the Ohio legislature authorizing a township to issue bonds for the purpose of refunding its indebtedness not void as in contravention of the State Constitution, art. 2, § 26, requiring that all laws of a general nature shall have a uniform operation throughout the state. The decision on this point was considered from the legal status of a bona fide purchaser for value of negotiable bonds issued under authority of the refunding act. Cit-

§ 174. Obligations issued for the purpose of funding a bonded indebtedness.

The indebtedness of a public corporation may consist of different issues of negotiable bonds with varying dates of maturity. The debt considered in the preceding section includes the total corporate obligations whether evidenced by negotiable bonds or otherwise. The power may exist, implied or granted by statute, to refund the total bonded debt of the corporation, when it does not exist to fund or refund the total outstanding corporate obligations consisting of negotiable bonds and miscellaneous forms of debt. If, however, any doubt exists in either case, the power will be denied. The issue of negotiable bonds payable in the distant future incurred generally for the construction of unnecessary or extravagant public improvements is not regarded by the courts with favor. The power to issue refunding bonds for the purpose of funding bonded indebtedness of a public corporation must be derived from express legislative authority,[349] and this is

ing, with many Ohio cases, Douglas v. Pike County, 101 U. S. 677, and Loeb v. Trustees of Columbia Tp., 91 Fed. 37.

Hughes County v. Livingston (C. C. A.) 104 Fed. 306. Though warrants in place of which funding bonds were issued were fraudulent and their proceeds were diverted from the lawful purpose specified in the bonds, yet such facts constitute no defense in an action by a bona fide purchaser of such refunding negotiable bonds.

Yavapai County v. McCord (Ariz.) 59 Pac. 99; Smith v. Morse, 2 Cal. 524; People v. Woods, 7 Cal. 579; Board of Education of San Francisco v. Fowler, 19 Cal. 11; Babcock v. Middleton, 20 Cal. 644. Construing the constitutionality of the act of May 1st, 1851, to fund the indebtedness of San Francisco, and its effect as impairing the obligation of the contract entered into originally with the creditors of that city.

Carpenter v. Hindman, 32 Kan. 601; State v. Flanders, 24 La. Ann. 57; City of New Orleans v. Southern Bank, 31 La. Ann. 560; Jardet v. Board of Liquidation of Public Debt, 40 La. Ann. 379, 3 So. 893. An obligation must be a legal and enforceable one in order to be included within "floating indebtedness" as affected by legislation providing for the issue of refunding bonds.

Alexander v. City of Duluth, 77 Minn. 445, 80 N. W. 623. Laws 1899, c. 50, held to have a temporary and remedial purpose only so as to come within the exception to the rule that a law to be legal must be general and not based on existing circumstances or those of limited duration. State v. Moore, 45 Neb. 12, 63 N. W. 130. Act 1887, c. 9, held not to include within the term "indebtedness" school district warrants or bonds.

[349] Board of Liquidation v. McComb, 92 U. S. 531, determining the

true although such transactions usually result in a benefit or an advantage to the community, and do not, as repeatedly held, in-

legality of the Louisiana funding act of Jan. 24, 1874; Hartman v. Greenhow, 102 U. S. 672; New York Guaranty & Indemnity Co. v. Board of Liquidation, 105 U. S. 622; Doon Tp. v. Cummins, 142 U. S. 366. The court here held that refunding bonds issued under authority of law for the purpose of funding the outstanding bonded indebtedness of the corporation and which were devoted in a large measure to the payment of miscellaneous obligations, not to the payment of outstanding bonds as designed, were not enforceable even in the hands of a bona fide holder where the total indebtedness of the corporation including such refunding bonds exceeded the constitutional limit. Justices Brown, Harlan and Brewer dissenting. This case, however, has been so distinguished and criticised in respect to the point suggested that its value as authority has been much modified if not entirely destroyed. It has been cited with approval in Shaw v. Independent School Dist. of Riverside, 77 Fed. 277, and disapproved in City of Los Angeles v. Teed, 112 Cal. 319, 44 Pac. 582, and City of Huron v. Second Ward Sav. Bank, 86 Fed. 278, 49 L. R. A. 534. In this latter case in an able opinion by Judge Sanborn, the court said: "In Doon Tp. v. Cummins, 142 U. S. 367, 372, 378, 12 Sup. Ct. 220, the plaintiff did not buy the bonds for value, in good faith, and without notice of any defect from one to whom they had been issued by the corporation, as the bank did in this case; but he was himself the person to whom they were originally issued, and he knew when he took the first ten bonds that the district exceeded the constitutional limit of its indebtedness in issuing them, and that it intended to exceed that limit still more. The opinion of the majority of the court in that case was that, where the debt of a municipal corporation already exceeded the constitutional limitation, the exchange of new bonds for old, bond for bond, would not increase the debt of the corporation, and would not be inconsistent with the constitutional limitation, but that if the new bonds were sold, and their proceeds were subsequently used to pay the old bonds, there would be a temporary increase of the debt, which would violate the limitation and invalidate the new securities. The distinction seems to be more nice than real, and, in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it will ever be made again."

Waite v. City of Santa Cruz, 184 U. S. 302; City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.) 58 Fed. 935; distinguishing Barnett v. Denison, 145 U. S. 135; Ashley v. Presque Isle County Sup'rs (C. C. A.) 60 Fed. 55. The court in this case, as well as the one last cited, held that a purchaser is not bound to investigate the nature of the refunded indebtedness where refunding bonds recite upon their face that they are issued in conformity to law.

Village of Oquawka v. Graves (C. C. A.) 82 Fed. 568. Merely because a corporation is indebted, the pow-

crease or add to the debt of the corporation but merely change its form. Where such authority can be shown the power clearly exists.[350]

er does not exist as a matter of course to issue a renewal or refunding bond.

Seward County Com'rs v. Aetna Life Ins. Co. (C. C. A.) 90 Fed. 222; Geer v. Ouray County Com'rs (C. C. A.) 97 Fed. 435; Farmers' Nat. Bank v. Jones, 105 Fed. 459. A state debt board have no power to exchange new refunding bonds for old bonds lost or destroyed.

Board of Liquidation of New Orleans v. United States, 108 Fed. 689; Schuerman v. Ter. (Ariz.) 60 Pac. 895; Kane v. City of Charleston, 161 Ill. 179; Coquard v. Village of Oquawka, 192 Ill. 355, 61 N. E. 660. Act of Feb. 13, 1865, § 1, providing for the funding or refunding of outstanding bonds or securities applies to public corporations incurring indebtedness before the passage of the act.

Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89. To sustain the validity of refunding bonds it must be shown that the proceeds were used to pay the indebtedness they were designed to refund.

Kelly v. Cole, 63 Kan. 385, 65 Pac. 672. The amount of refunding bonds authorized under the laws of Kansas, 1901, c. 288, § 1, is limited to the amount of the bonded indebtedness actually existing at the time the act of refunding occurs. Smith v. Mercer County, 104 Ky. 596, 47 S. W. 596; Richmond Cemetery Co. v. Sullivan, 104 Ky. 723, 47 S. W. 1079; State v. Babcock, 23 Neb. 802, 37 N. W. 645; State v. Benton, 33 Neb. 823, 51 N. W. 140.

[350] Maish v. Ter. of Arizona, 164 U. S. 599. Utter v. Franklin, 172 U. S. 416. Outstanding legal indebtedness includes bonds issued under authority of the legislature and purporting on their face to be legal obligations of a public corporation irrespective of their true character.

Faure v. Sinking Fund Com'rs, 25 Fed. 641; Gorman v. Sinking Fund Com'rs, 25 Fed. 647; West Plains Tp. v. Sage (C. C. A.) 69 Fed. 943. Refunding bonds need not be made payable to the holders of the refunded indebtedness.

Shaw v. Independent School Dist. of Riverside, 77 Fed. 277. Refunding bonds issued to fund an outstanding indebtedness void because in excess of a constitutional limit are void without regard to their recitals.

Hobart v. Butte County Sup'rs, 17 Cal. 23; Sullivan v. Walton, 20 Fla. 552; Myers v. City of Jeffersonville, 145 Ind. 431, 44 N. E. 452. Funding bonds which have passed into the hands of a bona fide holder can be enforced without regard to the legal character of the indebtedness which they refunded.

Heins v. Lincoln, 102 Iowa, 69, 71 N. W. 189; Farson, Leach & Co. v. Sinking Fund Com'rs of Louisville, 97 Ky. 119, 30 S. W. 17. In ascertaining a city's debt to determine whether the limit of indebtedness had been reached as fixed by the constitution, refunding bonds should not be included as a part of said indebtedness, since they neither increase nor add to the debt of the municipality but merely change its form. Sparks v. Bohannon, 22 Ky. L. R. 1710, 61 S. W. 260. Hope v. Board of Liquidation,

§ 175. The issue of negotiable securities for the construction or improvement of highways.

The construction and improvement of highways is without doubt a governmental purpose, and the expenditure of public moneys therefor is considered a public use and one authorizing not only the expenditure of public moneys but the incurrment of a debt, when specially given the right, by a public corporation through the issue of negotiable bonds.[351] The highways contem-

43 La. Ann. 738, 9 So. 754; Opinion of Justices, 81 Me. 602. Refunding bonds issued under authority of law are valid, being in substitution and not in payment of the old bonds.

Palmer v. City of Helena, 19 Mont. 61, 47 Pac. 209; City of Poughkeepsie v. Quintard, 65 Hun, 141, 19 N. Y. Supp. 944; Lloyd v. City of Altoona, 134 Pa. 545, 19 Atl. 675. Where bonds are refunded the holder cannot be compelled to take new bonds at a premium.

Jones v. City of Camden, 44 S. C. 319, 23 S. E. 141; Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 879; Branch v. Sinking Fund Com'rs, 80 Va. 427. Stolen redeemed state bonds coming into the hands of a bona fide holder for value without notice of theft, should be replaced by refunding bonds authorized by law.

[351] Chilton v. Gratton, 82 Fed. 873; Devine v. Sacramento County Sup'rs, 121 Cal. 670; State v. Kansas City, 60 Kan. 518; Catron v. La Fayette County, 106 Mo. 659. Act 1868 recognizes a bridge as part of a road and the county court had authority to issue bonds for "repairing" roads.

Ghiglione v. Marsh, 23 App. Div. 61, 48 N. Y. Supp. 604; Queens County Sup'rs v. Phipps, 28 App. Div. 521, 51 N. Y. Supp. 203; State v. Warren County Com'rs, 17 Ohio St. 558; Jones v. City of Camden, 44 S. C. 319. A debt contracted for paving streets is for a municipal purpose and bonds may be issued in payment when express legislative authority is conferred.

Bonds issued for improvement of streets and highways. Gause v. City of Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276; Hitchcock v. City of Galveston, 2 Woods, 272, Fed. Cas. No. 6,532; Sturtevant v. City of Alton, 3 McLean, 393, Fed. Cas. No. 13,580; Greeley v. City of Jacksonville, 17 Fla. 174; People v. Brislin, 80 Ill. 423—parks; Mullarky v. Town of Cedar Falls, 19 Iowa, 21; Town of Parkland v. Gaines, 88 Ky. 562; Catron v. La Fayette County, 106 Mo. 659; Mutual Ben. Life Ins. Co. v. City of Elizabeth, 42 N. J. Law, 235; Mittag v. Borough of Park Ridge, 61 N. J. Law, 151; State v. Babcock, 22 Neb. 614. In State v. Babcock, 23 Neb. 179, it was held that a bridge on a public highway leading into a city though outside the city limits is an internal improvement within the meaning of a statute providing that cities may issue bonds in aid of certain internal improvements.

State v. Benton, 25 Neb. 756; State v. Benton, 26 Neb. 154. But special district bonds cannot be issued for the curbing and guttering

plated by such principle, however, include the ordinary means of communication and usually exclude plank roads, toll roads and others similar in character which it is deemed expedient should be constructed and operated by private enterprise rather than by public moneys.[352]

Bonds issued for the construction or the improvement of such highways as come within the proper use of the term are not ordinarily considered an original and general obligation of the corporation issuing them, and this is especially true where the holders are limited in their recovery both as to the payment of the principal and interest to special taxes or assessments levied against property benefited by the improvement.[353] Here the ob-

of street intersections. Hubbard v. Sadler, 104 N. Y. 223; State v. Fayette County Com'rs, 37 Ohio St. 526; Mall v. City of Portland, 35 Or. 89; City of Williamsport v. Com., 84 Pa. 487; Com. v. Councils of Pittsburgh, 88 Pa. 66; Neely v. Town Council of Yorkville, 10 S. C. 141; Jones v. City of Camden, 44 S. C. 319.

[352] In Dodge County Com'rs v. Chandler, 96 U. S. 205, a bridge is held a work of public internal improvement for which a city may be authorized to issue bonds notwithstanding it is to be maintained as a toll bridge.

Rozier v. St. Francois County, 34 Mo. 395. Under a general law, a county court has no authority to apply any part of the road and canal funds to the purchase of a plank road already made by a corporation or individuals; it can apply the funds only to the construction and improvement of roads, bridges, or canals, and to no other object, and it exceeded its authority when it assigned a bond appearing upon its face to have been given for money borrowed of the road and canal fund in payment of an interest purchased in such a plank road. But the case of Mitchell v. City of Burlington, 71 U. S. (4 Wall.) 270, holds that money borrowed by a city to construct a plank road, if the road leads from, extends to, or passes through, the limits of the city, is borrowed for a public purpose, and the bonds given as a means of raising the money are valid. This case also holds that where, by a series of decisions, the highest court of a state have held coupon bonds valid, this court will not follow subsequent decisions of the same courts holding the same bonds invalid. See, also, on this point, the authorities cited in section 202, and Ohio Life Ins. & T. Co. v. Debolt, 16 How. (U. S.) 432; Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175; Havemeyer v. Iowa County, 70 U. S. (3 Wall.) 294; Thomson v. Lee County, 70 U. S. (3 Wall.) 327; Campbell v. City of Kenosha, 72 U. S. (5 Wall.) 194; Larned v. City of Burlington, 71 U. S. (4 Wall.) 275; Lee County v. Rogers, 74 U. S. (7 Wall.) 181; City of Kenosha v. Lamson, 76 U. S. (9 Wall.) 477.

[353] Braun v. Benton County Com'rs

ligation of the corporation seems to be limited to the proper collection and application of the special taxes or assessments pledged for the payment of the principal and interest of such bonds.[354]

§ 176. The construction of municipal lighting plants.

The supplying of the inhabitants of a municipality with light has been held a public purpose for the appropriation or expenditure of public moneys, and though its expediency and legality is doubtful, the expenditure of public moneys for the purpose of constructing a lighting plant for supplying the city itself and public places with light is a public one within the recently accepted definitions of such term. We therefore find cases holding that a public corporation may, if it deems this course expedient, assuming legislative authority, issue long-term negotiable bonds for the construction of a lighting plant.[355]

(C. C. A.) 70 Fed. 369, following Strieb v. Cox, 111 Ind. 299. See, also, Walker v. Monroe County Com'rs, 11 Ind. App. 285; Vickrey v. Sioux City, 115 Fed. 437; Davis v. County of Yuba (Cal.) 13 Pac. 874; Tate v. Town of Parkland, 11 Ky. L. R. 838, 13 S. W. 443. The issue of bonds for the purpose of constructing certain streets held unconstitutional on the ground that the creation of the fund for their payment subjects agricultural land to unequal taxation.

[354] Vickrey v. Sioux City, 115 Fed. 437; Devine v. Sacramento County Sup'rs, 121 Cal. 670; Kirsch v. Braun, 153 Ind. 247, 53 N. E. 1082.

[355] Fellows v. Walker, 39 Fed. 651; Jacksonville Elec. Light Co. v. City of Jacksonville, 36 Fla. 229, 30 L. R. A. 540; Middleton v. City of St. Augustine, 42 Fla. 287, 29 So. 421; Heilbron v. City of Cuthbert, 96 Ga. 312; Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 6 L. R. A. 315. "We have no doubt that the common council had power to contract for lighting the city or to furnish light from works of which it is, or may become, the owner. The power exists under the general act of incorporation."

Humphries v. Davis, 100 Ind. 274; Robinson v. Rippey, 111 Ind. 112; Morrison v. Jacoby, 114 Ind. 84; Bradley v. Thixton, 117 Ind. 255; City of Newport v. Newport Light Co., 84 Ky. 167; Janeway v. City of Duluth, 65 Minn. 292; Jersey City Gaslight Co. v. Consumers' Gas Co. of Jersey City, 40 N. J. Law (13 Stew.) 427; but Biddle v. Borough of Riverton, 58 N. J. Law, 289, 33 Atl. 279 holds to the contrary. Mason v. Cranbury Tp., 68 N. J. Law, 149, 52 Atl. 568; Hequembourg v. City of Dunkirk, 2 N. Y. Supp. 447.

Mayo v. Town of Washington, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163. Where the state constitution prohibited a municipal corporation from contracting a debt or levying taxes except for necessary expenses unless by a majority vote of the qualified voters, it requires special legislative authority to authorize the issuing of bonds for the erec-

§ 177. To secure a water supply.

It has already been stated in a preceding section[356] that for the proper preservation of the public health a public corporation has the power to incur indebtedness for the purpose of constructing and operating a plant supplying water to the corporation itself for its necessary municipal purposes, and possibly to its inhabitants.[357] The power thus conferred includes the right to con-

tion of an electric light plant for the lighting of its streets.

Town of Klamath Falls v. Sachs, 35 Or. 325; Todd v. City of Laurens, 48 S. C. 395; Lewis v. City of Port Angeles, 7 Wash. 190; State v. Milwaukee Gaslight Co., 29 Wis. 454; Ellinwood v. City of Reedsburg, 91 Wis. 131; Parkersburg Gas Co. v. City of Parkersburg, 30 W. Va. 435; Petros v. City of Vancouver, 13 Wash. 423. The issue of bonds for the construction of a lighting plant held within the term "general municipal purposes" as used in the constitution. See, also, 30 Am. St. Rep. 225-226.

[356] Section 146.

[357] National Foundry & Pipe Works v. Oconto Water Co., 52 Fed. 29; Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586; Derby v. Modesto, 104 Cal. 515; Thomas v. City of Grand Junction, 13 Colo. App. 80; City of Rome v. Cabot, 28 Ga. 50; Gold v. City of Peoria, 65 Ill. App. 602. The court in speaking of the contention that the debt was for expenses incurred in protecting the municipal health and property said: "It matters not that it was providing for a necessary protection to health and property and a current expense; the city could not override the constitutional barrier under the claim of meeting current expenses any more than it could create a debt payable in the future." Citing City of Springfield v. Edwards, 84 Ill. 626, and Prince v. City of Quincy, 105 Ill. 138, 128 Ill. 443.

Dutton v. City of Aurora, 114 Ill. 138; Culbertson v. City of Fulton, 127 Ill. 30; Daily v. City of Columbus, 49 Ind. 169; Smalley v. Yates, 36 Kan. 519; Daniels v. Long, 111 Mich. 562; Truelsen v. City of Duluth, 61 Minn. 48; Janeway v. City of Duluth, 65 Minn. 292, 33 L. R. A. 511; State v. Babcock, 25 Neb. 500; Sweet v. City of Syracuse, 129 N. Y. 316, reversing 60 Hun, 28, 14 N. Y. Supp. 421; Village of Ft. Edward v. Fish, 156 N. Y. 363; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374; Ackerman v. Buchman, 109 Pa. 254; Todd v. City of Laurens, 48 S. C. 395, 26 S. E. 682; State v. Town of Newberry, 47 S. C. 418; Winston v. Ft. Worth (Tex. Civ. App.) 47 S. W. 740.

City of Austin v. Nalle, 85 Tex. 520. The size of the plant is not necessarily limited to the wants of the municipality at the time of its construction, and where one was built largely in excess of such present needs, the issue of bonds, it was held, would not be restrained. Seymour v. City of Tacoma, 6 Wash. 138; Faulkner v. City of Seattle, 19 Wash. 320; Ellinwood v. City of Reedsburg, 91 Wis. 131. Where authority is granted a city council to build waterworks and issue bonds

tract a floating debt or when specially authorized to issue negotiable bonds. The manner of the exercise of such power is usually discretionary,[358] and the only restriction upon it seems to be the limitation found in a constitutional or statutory provision fixing the amount of debt or indebtedness that a public corporation can legally incur.[359] In some states, however, special provisions are

therefor, the manner of the exercise of such authority is discretionary.

[358] Thomas v. City of Grand Junction, 13 Colo. App. 80. In this case the statute gave the municipality power "to purchase or erect waterworks," etc., and the claim was made that the use of the word "or" precluded a city from doing more than one of the things granted; the court said: "The primary object of the statute was to permit the inhabitants of towns and cities to secure an adequate supply of pure water, a paramount necessity more important than all other public utilities and absolutely necessary for the sustenance of life, the preservation of health and the protection of property. This being the case, it is to be presumed that the legislature desired to invest the people who were themselves to bear the burdens of the expense with every power necessary to supply this imperative want. The legislature itself could not determine and fix upon some one invariable mode or manner by which this supply was to be obtained for the obvious reasons that too many conditions were to be considered; that what would be proper, necessary and entirely satisfactory at one town would be entirely impracticable in another. * * * If it were the intent of the legislature to give to the word 'or' the meaning contended for by plaintiff, then it would in many instances open the door to results which would be disastrous." Citizens' Water Company v. Bridgeport Hydraulic Co., 55 Conn. 1; Daily v. City of Columbus, 49 Ind. 169; State v. Caffery, 49 La. Ann. 1152, 22 So. 756; Moore v. City of Duluth, 74 Minn. 105, the power, however, limited by subsequent election. State v. Babcock, 25 Neb. 709.

Painter v. City of Norfolk, 62 Neb. 330, 87 N. W. 31. A contract by ordinance with a waterworks company for the construction of a waterworks plant with the reserved right on the part of the municipality to purchase it assuming the bonded indebtedness of the company, was held void as incurring a bonded debt in violation of that provision of the statute prohibiting the incurrment of a bonded debt without popular vote.

New York & R. Cement Co. v. Davis, 62 App. Div. 577, 71 N. Y. Supp. 185; Town of Klamath Falls v. Sachs, 35 Or. 325; Ackerman v. Buchman, 109 Pa. 254; Duncan v. City of Charleston, 60 S. C. 532. The increase of bonded indebtedness without submission of the question to the electors of the city held illegal as in contravention of constitutional provision art. 8, § 7. City of Brenham v. Brenham Water Co., 67 Tex. 542.

[359] Buchanan v. City of Litchfield, 102 U. S. 278. The interpretation of the Illinois Const. art. 9, § 12, "No county, city, township, school

to be found dividing indebtedness legally incurrable into classes, one of which is the contracting of obligations for the especial purpose of supplying a public corporation and its inhabitants with both water and light. Here the power to issue negotiable bonds is limited by these special provisions.[360]

district or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness," was at issue and Justice Harlan speaking for the court said: "The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers beyond all question was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority therefore, conferred by the act of April 15th, 1873, to incur indebtedness in the construction and maintenance of a system of waterworks could have been lawfully exercised by a city, incorporated town or village, only when its liabilities increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur." Citing, Law v. People, 87 Ill. 385, and Fuller v. City of Chicago, 89 Ill. 282.

In City of Litchfield v. Ballou, 114 U. S. 190, the court in construing the same provision of the Illinois constitution use the following language which is strongly approved and commended in the Ironwood Waterworks case, post: "It (the city) shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner, neither by bonds nor notes nor by express or implied promises. Nor shall it be done for any purpose no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner or for any purpose whatever. If this prohibition is worth anything, it is as effectual against the implied as the express promise and is as binding in a court of chancery as a court of law."

Ironwood Water Works Co. v. City of Ironwood, 99 Mich. 454, 58 N. W. 371; State v. Town of Columbia, 111 Mo. 365, 20 S. W. 90; Village of Hempstead v. Seymour, 34 Misc. 92, 69 N. Y. Supp. 462; Southerland v. Town of Goldsboro, 96 N. C. 49; Duke v. Brown, 96 N. C. 127; Bassett v. City of El Paso (Tex. Civ. App.) 28 S. W. 554.

[360] National Bank of Commerce v. Town of Grenada, 41 Fed. 87. "It is finally insisted by the learned counsel for the defendant that section 1, art. 2, of the state constitution prohibits in strong terms such

§ 178. Railway aid securities.

The reasons and the principle stated in a preceding section[361] in regard to the incurrment of indebtedness or the granting of aid by public corporations for this purpose, apply to the issue of negotiable bonds. The principle is clearly established that where the legal authority exists public corporations may issue negotiable bonds for the purpose of constructing or aiding in the construction of lines of railway through or adjacent to them. A few of the many authorities will be cited in the note.[362] Such use of public

municipal corporations from lending their credit in any form in aid of any individual, association or corporation whatsoever; but by section 8 of the said article special exception is made in favor of the power by such corporations to create debts for the purpose of supplying themselves with water for irrigation, for suppressing fires, and for domestic use. There seems to be no limit to the extent of the debts which may be incurred for such purposes."

Grace v. Town of Hawkinsville, 101 Ga. 553, 28 S. E. 1021; State v. Caffery, 49 La. Ann. 1152, 22 So. 756; Woodbridge v. City of Duluth, 57 Minn. 256, construing Sp. Laws 1891, c. 55, § 35; Sweet v. City of Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289, reversing 60 Hun, 28, 14 N. Y. Supp. 421; Faulkner v. City of Seattle, 19 Wash. 320.

[361] Section 147.

[362] Town of Queensbury v. Culver, 86 U. S. (19 Wall.) 83; Nugent v. Putnam County Sup'rs, 86 U. S. (19 Wall.) 241; Cass County v. Gillett, 100 U. S. 585; Bates County v. Winters, 112 U. S. 325.

Barnum v. Town of Okolona, 148 U. S. 393, where the court said, "that municipal corporations have no power to issue bonds in aid of a railroad, except by legislative permission; that the legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act."

Provident Life & Trust Co. v. Mercer County, 170 U. S. 593; Wilkes County Com'rs v. Coler, 113 Fed. 725; Ex parte Selma & G. R. Co., 45 Ala. 696; Hancock v. Chicot County, 32 Ark. 575; Higgins v. City of San Diego (Cal.) 45 Pac. 824; Society for Savings v. City of New London, 29 Conn. 174; Columbia County Com'rs v. King, 13 Fla. 451; Powers v. Inferior Ct. of Dougherty County, 23 Ga. 65; Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562; Hutchinson v. Self, 153 Ill. 542; Delaware County Com'rs v. McClintock, 51 Ind. 325; Dubuque County v. Dubuque & P. R. Co., 4 G. Greene (Iowa) 1; Chicago, K. & W. R. Co. v. Osage County Com'rs, 38 Kan. 597, 16 Pac. 828; Daviess County Ct. v. Howard, 13 Bush (Ky.) 101; Sparks v. Bohannon, 22 Ky. L. R. 1710, 61 S. W. 260; Knox v. City of Baton Rouge, 36 La. Ann. 427; Stevens v. Inhabitants of Anson, 73 Me. 489; Baltimore & D. P.

moneys is held a public purpose within the meaning of that phrase as applied to the expenditure of moneys raised through the imposition of taxes upon taxable interests. It is useless in view of the settled law to discuss the advisability or expediency of this rule. Public corporations certainly have legitimate purposes sufficient to employ all their available means without resorting to such questionable uses. The consolidation or reorganization of the railway company originally intended by the public corporation as the party to whom bonds or aid was to be given or the fact of its reorganization does not usually affect the validity of railway aid bonds issued under legal authority.[363]

§ 179. Construction of drains and sewers.

The construction of a system of ditches as a means of drainage or as affording facilities for a supply of water for domestic uses or the irrigation of lands, or the construction of a sewage system, is considered such a public use of funds as to authorize the issue of negotiable bonds,[364] the purpose being either to pre-

R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; Portage County Sup'rs v. Wisconsin Cent. R. Co., 121 Mass. 460; State v. Town of Clark, 23 Minn. 422; New Orleans, St. L. & C. R. Co. v. McDonald, 53 Miss. 240; State v. Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592; Hallenbeck v. Hahn, 2 Neb. 377; Midland Tp. v. Gage County Board, 37 Neb. 582; Gibson v. Mason, 5 Nev. 283; Perry v. Keene, 56 N. H. 514; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; People v. Henshaw, 61 Barb. (N. Y.) 409; Wilkes County Com'rs v. Call, 123 N. C. 308; Glenn v. Wray, 126 N. C. 730; State v. Village of Perrysburg, 14 Ohio St. 472; Pittsburg & S. R. Co. v. Allegheny County, 79 Pa. 210; Coleman v. Broad River Tp., 50 S. C. 321; Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648; Austin v. Gulf, C. & S. F. R. Co., 45 Tex. 234; First Nat. Bank of St. Johnsbury v. Town of Concord, 50 Vt. 257; Powell v. Brunswick County Sup'rs, 88 Va. 707, 14 S. E. 543; West Virginia & P. R. Co. v. Harrison County Ct., 47 W. Va. 273, 34 S. E. 786; Bushnell v. Beloit, 10 Wis. 195; Crogster v. Bayfield County, 99 Wis. 1. Decisions collected in 31 Am. & Eng. Corp. Cas. 661, 669 and 682, 59 Am. Dec. 782-790, and 68 Am. Dec. 694-696.

[363] Ray County v. Vansycle, 96 U. S. 675; City of Columbus v. Dennison, 69 Fed. 58; Morrill v. Smith County, 89 Tex. 529, 36 S. W. 56. But see to the contrary, Harshman v. Bates County, 3 Dill. 150, Fed. Cas. No. 6,148.

[364] Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56; Shelley v. St. Charles County, 17 Fed. 909; Perkins County v. Graff, 114 Fed. 441; Murphy v. City of Wilmington, 6 Houst. (Del.) 108; Kim-

serve the health of the people by supplying proper sewerage and drainage systems or to increase the area of tillable and arable lands, both considered governmental ends.

§ 180. The construction of bridges.

By many authorities it is considered an end or aim of government to furnish facilities for economical and rapid communication between the different parts of a state. This would include the power to construct or aid in the construction of highways, and, as a part of such highways, bridges crossing streams or other impassable places. The authority is generally derived from some constitutional provision authorizing the state or its subordinate agencies within prescribed limitations to construct works of "internal improvement." The question whether a certain enterprise or the construction of a certain improvement is a work of "internal improvement" such as to justify the expenditure of public moneys is generally decided by the benefit or advantage to be derived by the people or the public at large from such enterprise or improvement. The question of its cost or extent does not determine its nature. If the work is designed to effect the end suggested above and results in a benefit or advantage to the community at large without regard to the benefits accruing to individuals it will be clearly characterized as a work of "internal improvement" within the meaning of the constitutional phrase. The construction of a bridge being thus a public use of public moneys so far as the purpose of such use is concerned, a public corporation possesses the legal right to issue

ball v. Reclamation Fund Com'rs, 45 Cal. 344; Hughson v. Crane, 115 Cal. 404; Clapp v. City of Hartford, 35 Conn. 66; Greeley v. City of Jacksonville, 17 Fla. 174; Lussem v. Sanitary Dist. of Chicago, 192 Ill. 404, 61 N. E. 544; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605; City of Louisville v. Board of Park Com'rs, 112 Ky. 409, 65 S. W. 860; Town of New Iberia v. New Iberia & B. C. Drainage Dist., 106 La. 651; State v. Babcock, 25 Neb. 709; Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798; Paxton & H. Irr. Canal & Land Co. v. Farmers' & M. Irr. & Land Co., 45 Neb. 884, 29 L. R. A. 853; Alfalfa Irr. Dist. v. Collins, 46 Neb. 411; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Tidewater Co. v. Coster, 18 N. J. Eq. (3 C. E. Greene) 519; Robinson v. City of Goldsboro, 122 N. C. 211; Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871; Moller v. City of Galveston, 23 Tex. Civ. App. 693; Johnson v. City of Milwaukee, 88 Wis. 383.

negotiable bonds where the cost of construction is in excess of the funds immediately available in the corporate treasury for such purpose controlled by constitutional provision relative to incurring debts.[365] The authority in common with the issue of negotiable bonds for other purposes must, however, expressly exist in order to be available, and all of the formalities and limitations as required by law must be complied with to render them valid.[366]

[365] Ritchie v. Franklin County, 89 U. S. (22 Wall.) 67; Dodge County Com'rs v. Chandler, 96 U. S. 205. A bridge considered a work of "internal improvement" even though tolls be charged for its use. "The bridge being an internal improvement the precinct had the power to aid in its construction. This it resolved to do and on this resolve it founded the issue of the bonds. Whether it should get any consideration from the public in return was a question in which the purchaser of the bond is not concerned. * * * The toll question was an incidental one * * * and cannot affect the issue of the bonds."

United States v. Dodge County Com'rs, 110 U. S. 156; Comanche County v. Lewis, 133 U. S. 198; City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449; City Council of Montgomery v. Montgomery & W. Plank-Road Co., 31 Ala. 76; Town of Stites v. Wiggins Ferry Co., 97 Ill. App. 157. Where statutory authority authorizes the issue of bonds to build bridges, public officials cannot issue them for the construction of a road. Mullarky v. Town of Cedar Falls, 19 Iowa, 21; Barber County Com'rs v. Smith, 48 Kan. 331, 29 Pac. 565; Salt Creek Tp. v. King Iron Bridge & Mfg. Co., 51 Kan. 520.

City of Cumberland v. Magruder, 34 Md. 381. The power given to issue bonds for the building of a bridge should be construed in subordination to a provision of the city charter, and where this restricts the power of the municipality to pledge its credit beyond a limited sum the act authorizing the construction of a bridge through the issue of bonds will not be held to repeal the charter provision.

Tillotson v. City of Saginaw, 94 Mich. 240; Naegely v. City of Saginaw, 101 Mich. 532; Bradley v. Franklin County, 65 Mo. 638, following Steines v. Franklin County, 48 Mo. 167, and Ritchie v. Franklin County, 89 U. S. (22 Wall.) 67; Union Pac. R. Co. v. Colfax County Com'rs, 4 Neb. 450; Clark v. Dayton, 6 Neb. 192; Follmer v. Nuckolls County Com'rs, 6 Neb. 204; State v. Keith County, 16 Neb. 508; State v. Babcock, 23 Neb. 179, 36 N. W. 474.

Fremont Bldg. Ass'n v. Sherwin, 6 Neb. 48. An issue of bonds authorized although the bridge to be constructed can be used only on the payment of tolls. Town of Kirkwood v. Newburg, 45 Hun, 323, 122 N. Y. 571; People v. Kelly, 5 Abb. N. C. (N. Y.) 383; McKethan v. Cumberland County Com'rs, 92 N. C. 243; Burnett v. Maloney, 97 Tenn. 697, 34 L. R. A. 541; Mitchell County v. City Nat. Bank, 91 Tex. 361.

[366] Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882. Where

§ 181. The erection of public buildings.

To carry on the various branches of government, public buildings are necessary for use by public officials in performing their duties and in caring for and preserving the public records. Public buildings are also necessary to house and properly care for the indigent, infirm and defective, and control the criminal classes, each proper functions of government. A system of public education is universally conceded to be one of the fundamental aims of government, and structures are necessary that this be properly accomplished. Buildings for all these purposes are indispensable that the ends for which government is organized be successfully carried out. The power of the state may go farther and authorize the construction of buildings for use in the education and development of the mechanical, literary and artistic tendencies of a community. The power therefore clearly exists in a public corporation when specially authorized by law to issue negotiable bonds for the construction of state capitols, county or public buildings,[367] court houses, jails and penitentiaries,[368] poorhous-

no provision was made as required by the Const. of Tex. art. 11, §§ 5 and 7, for a sinking fund at the time of the creation of the debt, the issue of bonds considered void. Brazoria County v. Youngstown Bridge Co. (C. C. A.) 80 Fed. 10; Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202, and cases cited in opinion of Mr. Justice Taft; State v. Williams, 68 Conn. 131, 48 L. R. A. 465; Berlin Iron Bridge Co. v. Wagner, 57 Hun, 346, 10 N. Y. Supp. 840; Mitchell County v. City Nat. Bank, 91 Tex. 361, 43 S. W. 880, reversing 15 Tex. Civ. App. 172, 39 S. W. 628; State v. Wood County, 72 Wis. 629, 40 N. W. 381.

Wagner v. Milwaukee County, 112 Wis. 601, 88 N. W. 577. An act authorizing the building of viaducts which applies to but one county in the state was held local and special in this case and in violation of Const. art. 4, § 18.

[367] McHugh v. City & County of San Francisco, 132 Cal. 381, 64 Pac. 570; State v. Callehan, 1 Ind. 147; Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212; Myers v. City of Jeffersonville, 145 Ind. 431, 44 N. E. 452. Bonds issued to secure moneys borrowed for the purpose of defraying the expenses of litigation involving the removal of a county seat held invalid.

Taggart v. City of Detroit, 71 Mich. 92, citing with approval Fazende v. City of Houston, 34 Fed. 95. Bonds in this case used for the construction of a central public market. In a lengthy and exceedingly well written opinion in which there is much law relating to markets in general the court said: "It may be true that the city would be obliged at maturity to pay the bonds at all events whether receiving income enough or not. But it is equally true that

es, institutions for the feeble-minded or the insane,[369] school buildings, universities[370] and libraries. It is as true with bonds issued

it would be a fraud on the taxpayers and a violation of the act of the legislature, to relinquish the fund set apart for that purpose which was made a trust fund and charge its value as a general city charge. The power to pay these bonds by taxation was not meant to be granted unless the other means failed. * * * The argument that the bonds are actually paid is fallacious. The city sinking fund is in law a fund which has value in securities and the market bonds are as much property as if they were government bonds. They can only be exchanged for actual money equivalents. A cancellation of these bonds would be a withdrawal for market purposes of the same amount of funds belonging to other purposes. * * * Unless the legislature shall see fit to provide otherwise there can be no step taken to use the trust property for other purposes, without a direct violation of legal duty and it cannot be allowed." See, also, authorities cited 21 Am. & Eng. Enc. of Law (2d Ed.) 40.

[368] Alabama G. S. R. Co. v. Reed, 124 Ala. 253, 27 So. 19; Linn County Com'rs v. Snyder, 45 Kan. 636, and cases cited in opinion of Judge Green; Chaska Co. v. Carver County Sup'rs, 6 Minn. 204 (Gil. 130); Nininger v. Carver County Com'rs, 10 Minn. 133 (Gil. 106); Goodnow v. Ramsey County Com'rs, 11 Minn. 31 (Gil. 12); Cushman v. Carver County Com'rs, 19 Minn. 295 (Gil. 252); Rogers v. Le Sueur County, 57 Minn. 434; Catron v. La Fayette County, 106 Mo. 659, 17 S. W. 577; Dawson County Com'rs v. McNamar, 10 Neb. 276; State v. Lincoln County Com'rs, 18 Neb. 283; People v. Oneida County Sup'rs, 68 App. Div. 650, 74 N. Y. Supp. 1142; Robertson v. Breedlove, 61 Tex. 316.

[369] Keyes v. St. Croix County, 108 Wis. 136, 83 N. W. 637. The court say: "The situation is not different in principle from that presented to this court in Oconto City Water Supply Co. v. City of Oconto, 105 Wis. 76, where it was held that subsequent authority to a city to contract for a water supply was not restrained by the pre-existing limitation in its charter upon taxation. We conclude therefore, that the bonds issued for a county insane asylum are not to be considered within the limitation of 1½ per cent prescribed by section 658." (This section of the statute limits the issuing of bonds for county buildings to 1½ per cent of the assessed valuation.)

[370] Board of Education of Pierre v. McLean, 106 Fed. 817; Wetmore v. City of Oakland, 99 Cal. 146. Sherlock v. Village of Winnetka, 68 Ill. 530. Bonds issued for the purpose of building dormitory or boarding house for use in connection with public school buildings held not authorized by law. But see City of Emporia v. Partch, 21 Kan. 202.

State v. City of Terre Haute, 87 Ind. 212; Williams v. Town of Albion, 58 Ind. 329; Taylor v. Brownfield, 41 Iowa, 264; School Dist. No. 39 v. Sullivan, 48 Kan. 624; Board of Education of Topeka v. Welch, 51 Kan. 792, 33 Pac. 654; Com. v. Louisville & N. R. Co., 17 Ky. L. R. 991, 33 S. W. 204; Revell v. City of

for the purposes above stated as those issued for other purposes that special authority must exist for the incurring of indebtedness in this precise manner. The application of the principle stated in the preceding sections that the power to issue bonds must be expressly given and never implied is not relaxed, and we consequently find in the cases many instances of bonds being held invalid or void not because of the contemplated use of their proceeds but on account of the absence of authority or the failure to follow the conditions precedent to a valid issue as plainly expressed in the written law.[871]

§ 182. For making local improvements.

The use of public moneys for the laying out or improvement of streets[872] and parks,[873] or the construction of public works not

Annapolis, 81 Md. 1, 31 Atl. 695; State v. School Dist. No. 9, 10 Neb. 544; Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn, 131 N. Y. 570; State v. Bacon, 31 S. C. 120, 9 S. E. 765.

City of Waxahachie v. Brown, 67 Tex. 519, 4 S. W. 207. Tex. Rev. St. art. 3783, authorizes the board of aldermen to pass such ordinances as may be necessary to establish and maintain free schools, purchase building sites and construct school houses. The court held that this authority was not sufficiently broad to warrant the purchase of school buildings and issue bonds in payment. Lafebre v. Board of Education of Superior, 81 Wis. 660.

[871] Francis v. Howard County, 50 Fed. 44, where the cases are examined and many of them discussed by Judge Maxey; Ashuelot Nat. Bank v. School Dist. No. 7 (C. C. A.) 56 Fed. 197, affirming 41 Fed. 514, and following Brenham v. German American Bank, 144 U. S. 173; Mcmullen v. Ingham Circuuit Judge, 102 Mich. 608, 61 N. W. 260; Richardson v. McReynolds, 114 Mo. 641, 21 S. W. 901; State v. Sherman County Com'rs, 31 Neb. 465, 48 N. W. 146, following State v. School Dist. No. 4, 16 Neb. 182; Tukey v. City of Omaha, 54 Neb. 370, 74 N. W. 613. Field v. City of Bayonne, 49 N. J. Law, 308, 8 Atl. 114. School houses not included in the expression "public buildings." Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Noel Young Bond & Stock Co. v. Mitchell County, 21 Tex. 638, 54 S. W. 284; Burnham v. City of Milwaukee, 98 Wis. 128, 73 N. W. 1018.

[872] Hitchcock v. City of Galveston, 96 U. S. 341. "The learned (trial) judge held the contract inoperative because by it the city agreed to pay for the work to be done and the contractors agreed to receive in payment at par, bonds of the city denominated 'Galveston city bonds for sidewalk improvement.' * * * The issue of such bonds was held by the court to be transgressive of the power of the city and the ruling was thought to be supported by the decision of this court in the case of Police Jury v. Britton, 82

coming within the classes noted in the preceding section,[874] is considered a public use for which public corporations may when authorized by the legislature loan their credit or issue negotiable bonds for the immediate payment of their cost. The question of including such bonds as a part of the corporate indebtedness in determining whether this has exceeded the legal limitation has been considered in a preceding section, as well as the manner of their payment.

U. S. (15 Wall.) 566, and The Mayor v. Ray, 86 U. S. (19 Wall.) 468. In the view we shall take of the present case, it is, perhaps, not necessary to inquire whether those cases justify the court's conclusion for if it were conceded that the city had no lawful authority to issue the bonds described in the ordinance and mentioned in the contract it does not follow that the contract was wholly illegal and void or that the plaintiffs have no right under it. * * * It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful. * * * At most the issue was unauthorized. At most there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest only ultra vires; and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return in the mode in which it promised to perform." Burlington Sav. Bank v. City of Clinton, 111 Fed. 439; City of Redondo Beach v. Cate, 136 Cal. 146, 68 Pac. 586; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Porter v. City of Tipton, 141 Ind. 347, 40 N. E. 802; City of Covington v. Nadaud, 20 Ky. L. R. 151, 45 S. W. 498; State v. Benton, 25 Neb. 756, 41 N. W. 953, 1068; Mittag v. Borough of Park Ridge, 61 N. J. Law, 151, 38 Atl. 750; Foley v. City of Hoboken, 61 N. J. Law, 478, 38 Atl. 833; Moses v. City of Key West, 157 N. Y. 689.

[873] Fritz v. City & County of San Francisco, 132 Cal. 373, 64 Pac. 566, followed in McHugh v. City & County of San Francisco, 132 Cal. 381, 64 Pac. 570; People v. Brislin, 80 Ill. 423; Boston Water-Power Co. v. City of Boston, 143 Mass. 546, 10 N. E. 318; Choate v. City of Buffalo, 167 N. Y. 597, 60 N. E. 1108, affirming 39 App. Div. 379, 57 N. Y. Supp. 383; Johnson v. City of Milwaukee, 88 Wis. 383.

[874] City of Gladstone v. Throop (C. C. A.) 71 Fed. 341; McHugh v. City & County of San Francisco, 132 Cal. 381, 64 Pac. 570; State v. Ames, 87 Minn. 23, 91 N. W. 18; Wheeler v. City of Plattsmouth, 7

The rule seems to be clearly established that where the statute provides for the issuing of bonds for a specified purpose the proceeds cannot be used for any other, though closely related or connected in its nature.[375]

§ 183. Internal improvements.

As distinguished from the making of local improvements, which is the term usually applied to improvements made by municipal corporations proper, we have the construction or the aiding in the construction of works of internal improvement, the phrase usually applied to those works of general improvement made by the state itself or public quasi corporations in the exercise under lawful authority of their governmental duties.

In pursuing a broad and liberal policy, the legislature or the people of the state acting in constitutional convention may declare certain enterprises works of internal improvement which without such characterization would ordinarily be deemed private enterprises. Where the business carried on by such enterprises is of a public necessity or results in a greater advantage or benefit to the public than ordinary commercial or industrial enterprises, the courts will sustain the character given to them by legislative or constitutional enactment. Under this principle we have the declaration that water grist-mills are to be regarded as works of internal improvement for the aiding or construction of which the public corporation may issue negotiable bonds.[376]

Neb. 270; People v. Gravesend Sup'rs, 154 N. Y. 381; Hooker v. Town of Greenville, 131 N. C. 472, 42 S. E. 141. In this case the statute giving a municipality authority to issue bonds for improvement purposes was held unconstitutional as having been passed without recording of the yeas and nays on either the second or third reading in the house.

[375] State v. Benton, 25 Neb. 756, 41 N. W. 953, 1068. District bonds authorized for curbing and guttering streets cannot be issued for the guttering and curbing of street intersections.

[376] Burlington Tp. v. Beasley, 94 U. S. 310. Mr. Justice Hunt discusses what are internal improvements for which bonds may be issued by a municipality. In part he says: "A state house is an internal improvement as is a county court house, a jail or a penitentiary (Leavenworth County Com'rs v. Miller, 7 Kan. 479) as much as a railroad, a canal or a bridge. A mill run by water is declared to be an internal improvement by the statute we are considering. A ferry falls within the same principle, and so does a steam-mill. It would require great nicety of reasoning to

This is given as an illustration of that class of enterprises ordinarily deemed private but which may be given, although the policy is questionable, a quasi public character. For all works of internal improvement as thus authorized by statute or constitution, the public corporation may be authorized to incur an indebtedness consisting of an issue of negotiable bonds.[877]

give a definition of the expression 'internal improvement,' which should include a grist-mill run by water and exclude one operated by steam; or which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be poor consolation to the people of this town to give them the power of going in and out of the town upon a railroad while they were refused the means of grinding their wheat."

Dodge County Com'rs v. Chandler, 96 U. S. 205. Toll bridge held work of internal improvement.

In Osborne v. Adams County, 109 U. S. 1, affirming 106 U. S. 181, and distinguishing this case from Burlington Tp. v. Beasley, supra, a steam grist-mill is held not a work of internal improvement under the Nebraska statute permitting counties to borrow money for such purposes. United States v. Dodge County Com'rs, 110 U. S. 156. But in Blair v. Cuming County, 111 U. S. 363, it is held that the improving of the water power of a river was such a work of internal improvement.

City of Wetumpka v. Winter, 29 Ala. 651. Where internal improvements under state authority are spoken of, it is universally understood that works within the state by which the public are supposed to be benefited are intended such as improvements of highways, and channels of travel and commerce.

Carter v. Cambridge & B. B. Proprietors, 104 Mass. 235; Union Pac. R. Co. v. Colfax County Com'rs, 4 Neb. 450; State v. Thorne, 9 Neb. 458; Dawson County Com'rs v. McNamar, 10 Neb. 276. In Traver v. Merrick County Com'rs, 14 Neb. 327, a water grist-mill is held a work of internal improvement under act of 1869 providing for the issue of bonds for such purposes.

State v. Adams County, 15 Neb. 568; Getchell v. Benton, 30 Neb. 870, 47 N. W. 468. A mill for the manufacture of beet sugar not subject to public control or making sugar for toll is not an internal improvement. Thomas v. Leland, 24 Wend. (N. Y.) 65; Weismer v. Village of Douglas, 64 N. Y. 91.

[877] Perkins County v. Graff, 114 Fed. 441. A canal constructed for the purpose of irrigating lands held a work of internal improvement under the Neb. Stat. City of Kearney v. Woodruff (C. C. A.) 115 Fed. 90, construing Comp. St. Neb. § 5491, which declares that "canals and other works constructed for irrigation or water power purposes or both, are hereby declared to be works of internal improvement."

Hughson v. Crane, 115 Cal. 404; Greeley v. City of Jacksonville, 17 Fla. 174. The drainage of swamps, creeks and ponds around a city and the construction of sewers and wa-

§ 184. The power to issue and the conditions precedent to its exercise.

The issue of negotiable bonds by a public corporation is not considered one of its implied or incidental powers. The authority must be expressly conferred by statutory or constitutional provision. In order to limit the powers of public corporations in this respect even when the authority may be expressly granted, such authority usually confers the right only upon the performance by the corporation of certain conditions before such an issue can be lawfully made and therefore considered valid. These conditions ordinarily consist of prescribed formalities attending the issue. The legal authority as granted may give the right to corporate officials directly to be exercised through resolution or ordinance,[378] or certain acts may be required of them as neces-

ter works held to be municipal purposes within charter provisions authorizing the issue of bonds for such purposes.

Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411. Irrigation ditches or canals held "works of improvement" authorizing the issue of bonds in aid of corporations constructing such ditches or canals. People v. Green, 65 Barb. (N. Y.) 505. Expenditure of public moneys for the construction and maintenance of dykes, piers, etc., held authorized by the provisions of a municipal charter. State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Redd v. Henry County Sup'rs, 31 Grat. (Va.) 695.

[378] Lehman v. City of San Diego, 73 Fed. 105. See, also, McCoy v. Briant, 53 Cal. 250, where the court said: "The ordinances as ratified by the act of the legislature prescribed definitely and precisely the mode, and the only mode in which the bonds could be issued and delivered, to-wit: By a resolution of the board of trustees, directing when and to whom the bonds were to be issued and delivered nor can this requirement be regarded as merely directory, a violation of which would not impair the validity of the bonds. On the contrary it was intended as a precaution against an abuse of its power by the board of trustees and to prevent a fraudulent or unauthorized delivery by the clerk to a person not entitled to receive the bonds. Under the terms of the ordinance no bond could be issued or delivered except upon a resolution of the board appearing upon its minutes or the record of its proceedings thus furnishing a most important safeguard against fraud and an abuse of power." Naegely v. City of Saginaw, 101 Mich. 532; Town of Ontario v. Hill, 99 N. Y. 324.

[379] People v. Pueblo County Com'rs, 2 Colo. 360, but see Maddox v. Graham, 59 Ky. (2 Metc.) 56.

Wilmington, O. & E. C. R. Co. v. Onslow County Com'rs, 116 N. C. 563, 21 S. E. 205, holds that a substantial compliance only is necessary by public officials with the

sary to set in motion the agency of a general or special election. Without this preliminary official action the authority may be considered as lacking even though an election is held resulting in the required affirmative vote.[879] Or, as usually the case, the right is granted the public corporation contingent upon consent of the people,[880] thus giving an opportunity to the tax-paying interests to pass upon the question of incurring or an increase of indebtedness. The consent to be expressed at an election held especially for this purpose or through a majority of votes cast at a general election voting upon the question submitted. The strict performance of all such conditions precedent is considered necessary to the validity of the bonds,[881] unless the corporation is estopped through the operation of principles of law to be considered in subsequent sections.[882]

§ 185. Performance of conditions precedent required of railway companies.

The issue of negotiable bonds by public corporations to aid in the construction of railway lines through, into or adjoining them, has been of frequent occurrence under lawful authority, the basis

provisions of a statute requiring certain action on their part to preserve the integrity of bonds issued through the authority of a subsequent election. Schultze v. Manchester Tp., 61 N. J. Law, 513, 40 Atl. 589.

[880] Kelley v. Milan, 127 U. S. 139; Young v. Clarendon Tp., 132 U. S. 340; Hill v. City of Memphis, 134 U. S. 198; Ter. v. Steele, 4 Dak. 78; Dunbar v. Canyon County Com'rs, 5 Idaho, 407, 49 Pac. 409; Locke v. Davison, 111 Ill. 19; Hull v. Marshall County, 12 Iowa, 142; Casady v. Woodbury County, 13 Iowa, 113; Steines v. Franklin County, 48 Mo. 167; Cotton v. Inhabitants of New Providence, 47 N. J. Law, 401; McCless v. Meekins, 117 N. C. 34; Trustees of Goldsboro Graded School v. Broadhurst, 109 N. C. 228; Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260; State v. Tolly, 37 S. C. 551. See, also, cases cited under § 188.

[881] Douglas v. Town of Chatham, 41 Conn. 211; Winn v. City Council of Macon, 21 Ga. 275; Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562; Town of Eagle v. Kohn, 84 Ill. 292; Hutchinson & S. R. Co. v. Kingman County Com'rs, 48 Kan. 70, 15 L. R. A. 401; Schultze v. Manchester Tp., 61 N. J. Law, 513, 40 Atl. 589; Clarke v. City of Rochester, 24 Barb. (N. Y.) 446; Town of Duanesburgh v. Jenkins, 46 Barb. (N. Y.) 294. See, also, Id., 40 Barb. (N. Y.) 574; Starin v. Town of Genoa, 23 N. Y. 439; Simpson County v. Louisville & N. R. Co., 14 Ky. L. R. 673, 19 S. W. 665; Ball v. Presidio County, 88 Tex. 60.

[882] See post, §§ 206-212.

of the legality of such issue being the supposed public advantage and benefit derived by the community issuing such bonds from the construction of such enterprises.[383] Railway lines are broadly regarded by the courts quasi public highways affording facilities for the rapid and economical transportation of the products of the country and its inhabitants. They are considered works of internal improvement of such a character and of such public utility and advantage as to authorize the issue of negotiable bonds considered with reference to use of public funds,[384] but this fact of itself does not create such legal right. Legislative or constitutional authority must exist, and when this is wanting, aid granted in the form of a negotiable bond will be regarded illegal and therefore void.[385] The basis of the issue being as suggested it follows that if there is a failure to perform the conditions required by the act giving authority, the bonds may be regarded illegally issued and therefore void even in the hands of bona fide purchasers.[386] They may be issued when specially

[383] Massachusetts & S. Const. Co. v. Cherokee Tp., 42 Fed. 750; Chilton v. Town of Gratton, 82 Fed. 873; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194. See §§ 147, 178, supra, and also Elliott, Railroads, c. 4, where the subject is thoroughly and exhaustively treated.

[384] City of Macon v. East Tennessee, V. & G. R. Co., 82 Ga. 501. See cases cited § 147.

[385] City of San Diego v. Higgins, 115 Cal. 170, following the principle laid down in People v. Hulbert, 71 Cal. 72.

[386] Aspinwall v. Daviess County Com'rs, 22 How. (U. S.) 364; Gunn v. Barry, 82 U. S. (15 Wall.) 610, 623; Harshman v. Bates County, 92 U. S. 569, and German Sav. Bank v. Franklin County, 128 U. S. 526; Green v. Dyersburg, 2 Flip. 477, Fed. Cas. No. 5,756; Mercer County v. Provident Life & Trust Co. (C. C. A.) 72 Fed. 623; Commissioners Ct. of Limestone County v. Rather, 48 Ala. 433; Alley v. Adams County Sup'rs, 76 Ill. 101.

Chiniquy v. People, 78 Ill. 570. Where bonds are issued and delivered before the performance of required conditions, this will be considered a waiver by the county.

Land Grant R. & T. Co. v. Davis County Com'rs, 6 Kan. 256. A vote by a county to subscribe for stock of the railway company and to issue bonds in payment therefor does not create a contract between the county and the railway company enforceable by a delivery of the bonds even when all the conditions required had been performed by the railway company. Harrington v. Town of Plainview, 27 Minn. 224; Bound v. Wisconsin Cent. R. Co., 45 Wis. 543; Town of Duanesburgh v. Jenkins, 40 Barb. (N. Y.) 574; Cumberland & O. R. Co. v. Barren County Ct., 73 Ky. (10 Bush) 604.

authorized not only for aiding in the construction of the line,[387] but for the purpose of constructing within corporate limits terminal yards and facilities consisting of engine houses, shops, or general office buildings,[388] or the purchase of ground upon which to locate them.[389] The extent of aid granted may be dependent on mileage constructed[390] or upon the maintenance of terminal facilities within the corporate limits.[391] The condition most fre-

[387] Rogers v. Runyan, 9 How. Pr. (N. Y.) 248; Coleman v. Marin County Sup'rs, 50 Cal. 493. It is not necessary to construct a line upon the route selected at the time the aid was granted. Com. v. Chesapeake & O. R. Co., 12 Ky. L. R. 709, 15 S. W. 53; Oldtown & L. R. Co. v. Veazie, 39 Me. 571; Penobscot & K. R. Co. v. Dunn, 39 Me. 587.

Smith v. County of Clark, 54 Mo. 58. The question of the legal existence of the railroad corporation to which aid had been granted cannot be raised in a suit on aid bonds.

Lynch v. Eastern, L. & M. R. Co., 57 Wis. 430. Aid may be granted to that railway company which shall first complete its line to a given point. The court said: "The town was clearly authorized to aid either of the companies in the construction of its road from Monroe to Gratiot and it was undoubtedly competent for the electors of the town to make it conditioned upon the event that the company receiving its aid should build its road from Monroe to Gratiot before a road should be built over the same line by the other company. * * * The only object of the electors of the town of Gratiot was to procure the construction of a line of railway from Monroe to Gratiot; they had no peculiar interest in the construction of the line west of the village of Gratiot, and consequently it was a matter of indifference to them which of the two railway companies constructed such line. The object of the taxpayers of Gratiot would be as well accomplished by its construction by one as by the other of said companies." People v. Schenectady County Sup'rs, 35 Barb. (N. Y.) 415.

[388] Trustees of Elizabethtown v. Chesapeake, O. & S. W. R. Co., 94 Ky. 377, 22 S. W. 609; Echols v. City of Bristol, 90 Va. 165, 17 S. E. 943.

[389] Converse v. City of Ft. Scott, 92 U. S. 503.

[390] Nevada Bank v. Steinmitz, 64 Cal. 301; Casady v. Lowry, 49 Iowa, 523; Atchison, C. & P. R. Co. v. Phillips County Com'rs, 25 Kan. 261.

[391] Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399, 30 Pac. 456; Coe v. Caledonia & M. R. Co., 27 Minn. 197. The condition here being the location of a station within the town, the court say: "The construction of a railway into a town or village always and inevitably operates to the peculiar advantage of some, over and above the general advantage, as well as to the peculiar disadvantage of some. Yet, considerations of this kind have not prevented the legislature of this and other states, in a vast number of instances from authorizing municipal subscriptions and bonds in aid of such construction. This settles the question of public policy. It shows that the legislature has not regarded the existence of motives of

quently to be found in acts authorizing the issue of bonds for this purpose are those fixing the time[392] and the manner[393] of the construction and use of the line or the terminal facilities upon which the issue is conditioned. Both of these elements may be regarded as the consideration of the transaction granting aid. A speedy or proper completion of the enterprise may be necessary in order that the public corporation reap the advantage and bene-

personal and private advantage of the kinds mentioned as furnishing any reason why such subscriptions and bonds should not be authorized and voted. In our opinion the condition as to the location of the depot was a proper condition, and in no way invalidated the petition or the vote. It may be added that there is nothing in this condition which binds the company to refrain from locating such other depots in, or in the vicinity of the village as the convenience of the public may require." State v. City of Minneapolis, 32 Minn. 501.

[392] Buffalo & J. R. Co. v. Falconer, 103 U. S. 821; German Sav. Bank v. Franklin County, 128 U. S. 526, and cases cited by counsel on both sides. The time originally fixed for the completion of the road and which was made a condition precedent was held to control the validity of the bonds issued, and the fact that an extension of this time was made by certain public officials could not change this. Grattan Tp. v. Chilton (C. C. A.) 97 Fed. 145, and cases cited in majority opinion.

Eddy v. People, 127 Ill. 428. The power to extend the time originally fixed for the completion of the road in this case it was held did not exist.

Tipton County Com'rs v. Indianapolis, P. & C. R. Co., 89 Ind. 101; Nixon v. Campbell, 106 Ind. 47; State v. Wheadon, 39 Ind. 520. The time required by Ind. St. within which a railway company to which aid has been granted by a public corporation shall begin work, commences with the date of the order by the county commissioners for the levying of the aid tax.

McManus v. Duluth, C. & N. R. Co., 51 Minn. 30. A delay in this case, caused by the neglect of the railway company to secure the right to cross another railroad, held not excusable. Sawyer v. Manchester & K. R. Co., 62 N. H. 135. Where the record failed to show the time within which the road should be completed, its subsequent amendment, it was held, could not defeat the claim of the road to the aid granted, although it was not completed within the time as originally intended. West Virginia & P. R. Co. v. Harrison County Ct., 47 W. Va. 273, 34 S. E. 786. The right to make a subscription conditional discussed and determined.

[393] Taylor v. City of Ypsilanti, 105 U. S. 60; Purdy v. Town of Lansing, 128 U. S. 557. The adoption of an entire route held necessary. Mercer County v. Provident Life & Trust Co. (C. C. A.) 72 Fed. 623; Grattan Tp. v. Chilton (C. C. A.) 97 Fed. 145; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290; Falconer v. Buffalo & J. R. Co., 69 N. Y. 491; Oswego County Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786.

fits supposedly derived,[394] and if the railway company fails in either of these respects the courts have generally held that there exists such a failure to perform the conditions precedent prescribed as will render void the bonds issued. The validity of these bonds, however, may be sustained through the doctrine of estoppel or recitals to be subsequently considered. The courts do not generally require more than a substantial compliance with such conditions. If by the act the railway is required to be built and in use by a certain date, such result at approximately that time will be considered sufficient, and the same principle will apply so far as the manner of the construction of the road is concerned. The law in this respect looks to the fact that there has been a substantial compliance with required conditions; that the public corporation has received the benefits it expected and, therefore, although there may be a failure to technically comply with conditions precedent, yet such failure should not be available to the public corporation as a defense in an action brought to enforce the payment of either the principal or interest of such bonds in the hands of bona fide holders.[395]

[394] City of Macon v. East Tennessee, V. & G. R. Co., 82 Ga. 501; Thomas v. County of Morgan, 59 Ill. 479; Chicago, P. & S. W. R. Co. v. Town of Marseilles, 84 Ill. 145; Cantillon v. Dubuque & N. W. R. Co. (Iowa) 35 N. W. 620; Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer, 84 Iowa, 510, 51 N. W. 27; Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559; Town of Birch Cooley v. First Nat. Bank, 86 Minn. 385; Clark v. Town of Rosedale, 70 Miss. 542; Midland Tp. v. County Board of Gage County, 37 Neb. 582; Oswego County Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786; Murfreesboro R. Co. v. Hertford County Com'rs, 108 N. C. 56, 12 S. E. 952; State v. City of Morristown, 93 Tenn. 239, 24 S. W. 13; Ravenswood, S. & G. R. Co. v. Town of Ravenswood, 41 W. Va. 732, 32 L. R. A. 416; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370. Conditions as approved by popular vote cannot be subsequently changed.

West Virginia & P. R. Co. v. Harrison County Ct., 47 W. Va. 273, 34 S. E. 786; Town of Platteville v. Galena & S. W. R. Co., 43 Wis. 493; State v. Common Council of Tomahawk, 96 Wis. 73, 71 N. W. 86. Railroad aid bonds held in escrow awaiting the completion of a line of road in aid of which they were granted should not be considered an indebtedness of the city until after their delivery.

[395] Coleman v. Marin County Sup'rs, 50 Cal. 493; Stockton & V. R. Co. v. City of Stockton, 51 Cal. 334; Nevada Bank v. Steinmitz, 64 Cal. 301; People v. Holden, 82 Ill. 93; Nixon v. Campbell, 106 Ind. 47. The court here held that if the prescribed expenditure had been made within the township limits a forfeiture of

The principles as stated in this section apply equally to donations of money or subscriptions to the capital stock of the corporation and the issue of negotiable bonds. Some of the cases

the aid granted could not be declared although the road had failed to complete its line within the time prescribed. Barner v. Bayless, 134 Ind. 600.

To be "completed" means to be in a condition to be operated and of benefit to the people who are to pay the bonds. Pittsburgh, C., C. & St. L. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324. But see Lamb v. Anderson, 54 Iowa, 190, holding that a railroad company cannot perform the required condition as to the construction of its line by the purchase of another road to complete it to the point specified, and also as holding the same Iowa, M. & N. P. R. Co. v. Schenck, 56 Iowa, 626; Courtright v. Deeds, 37 Iowa, 503; First Nat. Bank of Cedar Rapids v. Hendrie, 49 Iowa, 403; Chicago, K. & W. R. Co. v. Makepeace, 44 Kan. 676; Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399; Guillory v. Avoyelles R. Co., 104 La. 11, 28 So. 899; State v. City of Hastings, 24 Minn. 78; McManus v. Duluth, C. & N. R. Co., 51 Minn. 30. A delay of two weeks in the completion of a line was not held a substantial compliance and the aid granted was forfeited.

Town of Birch Cooley v. First Nat. Bank of Minneapolis, 86 Minn. 385. Although there was a substantial compliance with the required conditions for the granting of aid, the court, quite contrary to the commonly accepted rule, held the railroad company not entitled to the aid bonds issued.

Pacific R. Co. v. Seely, 45 Mo. 212; Workman v. Campbell, 46 Mo. 306; Missouri Pac. R. Co. v. Tygard, 84 Mo. 263. "The road was fully completed for all purposes of transportation of passengers and freight and put into full operation and this was the evident object which the parties had in view. The terms of the contract are to 'complete and put in operation,' and this was done, though the company did not own one mile of the track which it then used. This defense, we conclude, is without merit."

Townsend v. Lamb, 14 Neb. 324; Virginia & T. R. Co. v. Lyon County Com'rs, 6 Nev. 68. A substantial compliance with the terms of the statute granting aid with reference to the point of construction of the road does not entitle the company to the aid granted even though a complete compliance would be impracticable. The court say: "But counsel for plaintiff claim that the condition has been substantially complied with and to that end offer evidence to prove that to have built the road on a line passing the point named would have rendered it an impracticable road for working purposes, in other words, as is claimed not a first-class road; and that the point touched is the nearest practicable point. * * * But it is not a substantial compliance with a contract to perform another and different matter and the fact that to have built a road as directed would have been to ruin it simply proves that the plaintiff agreed to do something which it either could not do or deemed it better not to do; but it

cited refer to such acts rather than the issue of negotiable bonds. Subscriptions to the capital stock of a corporation or aid voted in the form of negotiable bonds is not usually annulled by the consolidation of the line to which the aid is granted with another already constructed or in process of construction.[396] In connection with this subject it is well to distinguish, however, between a failure to perform conditions precedent as required by the terms of the authority, and promises or oral conditions made by officers or agents of the railway at the time when the aid is solicited and having for their purpose the inducing of such aid. The performance of conditions precedent required by law is necessary to the validity of the bonds. The fact that promises or oral agreements are not fulfilled when not made a part of the authority does not, necessarily, affect their validity in the hands of bona fide holders.[397]

was bound to do that thing substantially before it could claim any performance from defendants." Jackson v. Stockbridge, 29 Tex. 394.

[396] Bates County v. Winters, 112 U. S. 325; Livingston County v. First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. 18; Chicago, K. & W. R. Co. v. Stafford County Com'rs, 36 Kan. 121, 12 Pac. 593; Southern Kansas & P. R. Co. v. Towner, 41 Kan. 72; Vicksburg, S. & P. R. Co. v. Scott, 52 La. Ann. 512; Tagart v. Northern Cent. R. Co., 29 Md. 557. A consolidation of two railroad companies extinguishes all previously existing arrangements for the conversion of bonds into stock of one of the roads at the will of the holder.

Farnham v. Benedict, 107 N. Y. 159, 13 N. E. 784. Municipal bonds issued to aid the construction of a line of railway become void when the charter of such corporation expires by limitation before the delivery of the bonds.

Town of Mt. Morris v. Thomas, 158 N. Y. 450, affirming Town of Mt. Morris v. King, 8 App. Div. 495, 40 N. Y. Supp. 709; Wright v. Milwaukee & St. P. R. Co., 25 Wis. 46; Lynch v. Eastern, L. & M. R. Co., 57 Wis. 430.

[397] Town of Brooklyn v. Aetna Life Ins. Co., 99 U. S. 362, where the authorities of a town, duly authorized, subscribed in its behalf for stock in a railroad company and issued coupon bonds in payment therefor, the town, when sued by a bona fide purchaser for value of the coupon before maturity, cannot set up as a defense that the company disregarded its promise to construct the road, or that the town officers delivered the bonds in violation of special conditions not required by statute and of which they had no knowledge or notice.

Carpenter v. Greene County, 130 Ala. 613, 29 So. 194; Town of Eagle v. Kohn, 84 Ill. 292. The provision of act April 16th, 1869, that municipal railroad aid bonds or subscriptions shall not be valid and binding until a compliance with the conditions precedent prescribed by the act does not make a performance of the conditions before the

§ 186. Conditions precedent to issue.

(a) The notice or order for an election. The legal authority granting the right to a public corporation to issue negotiable bonds for any of the purposes considered in the preceding sections, as suggested in section 184, provides, ordinarily, for its contingent exercise upon consent of the people at a general or special election held for such purpose. The reason, apparently the basis of the provisions calling for a special election, being that the expression of the taxpayers' choice will be less affected by political or other considerations than if the question were passed upon at a general election involving the determination of other issues than that of the granting of aid.[398] Irrespec-

subscription or issuance of the bonds essential to their validity, a subsequent performance thereof being sufficient.

Chicago, K. & W. R. Co. v. Ozark Tp., 46 Kan. 415, 26 Pac. 710; Kansas City & P. R. Co. v. Rich Tp., 45 Kan. 275. In State v. City of Minneapolis, 32 Minn. 501, the city voted to issue bonds in aid of a railroad provided the terminus, general offices, and headquarters should be located there. It was held that the location of the operating headquarters of the road must be there established before the city could be compelled by mandamus to issue the bonds. See, also, Wullenwaber v. Dunigan, 30 Neb. 877, 13 L. R. A. 811, where the railroad company represented as an inducement that it would locate its depot on a certain section and after the electors had voted the aid bonds the depot was located on another section, the court restrained the issue of the bonds. People v. Morgan, 55 N. Y. 587.

Where bonds have not been issued or delivered and the conditions have not been performed as agreed, their issue will be restrained. Jackson County Sup'rs v. Brush, 77 Ill. 59; Wullenwaber v. Dunigan, 30 Neb. 877, 13 L. R. A. 811; Virginia & T. R. Co. v. Lyon County Com'rs, 6 Nev. 68; Simonton, Mun. Bonds, § 274.

The enabling act usually designates the person or tribunal who shall have the power to determine when conditions precedent have been performed. This is an official trust and its performance cannot be delegated. Jackson County Sup'rs v. Brush, 77 Ill. 59; Belo v. Forsythe County Com'rs 76 N. C. 489; Simonton, Mun. Bonds, p. 375, § 271.

Where the enabling act does not designate any person or tribunal to determine whether the conditions have been performed, the body authorized to issue the bonds must necessarily determine the question. Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Knox County Com'rs v. Nichols, 14 Ohio St. 260; Simonton, Mun. Bonds, p. 376, § 272.

[398] Coler v. Wyandot County, 3 Dill. 391, Fed. Cas. No. 2,987; State v. Benton, 29 Neb. 460; Town of Duanesburgh v. Jenkins, 46 Barb. (N. Y.) 294. Where bonds have have been issued by a town without the consent of the persons required

tive, however, of this fact, the statutes require that notice shall be given in the form prescribed, of the purpose of the election, and the questions to be submitted to the voters at such election.[399] We have in connection with this subject, contrary opinions as to the effect of an insufficient notice upon the validity of bonds voted to be issued at the election held pursuant thereto, the supreme court of the United States holding that the law will presume the giving of proper notices in such cases under the rule that where the performance of a prior act is necessary to the legality of a subsequent act proof of the latter carries with it a presumption of the due performance of the former.[400] The determination of the question may, apparently, turn upon the fact of the actual delivery of the bonds to bona fide purchasers, the cases holding uniformly that where the aid has been voted and pursuant to such authority the proper officials have executed and

by statute, they are void, at least in the hands of those to whom they are issued if not in the hands of every subsequent holder.

Starin v. Town of Genoa, 23 N. Y. 439. A special statute authorized a town to borrow money, but provided that the officers should have no power to borrow until they had first filed the written assent of two-thirds of the resident taxpayers named in the last tax list, with an affidavit that the persons whose assents are attached are two-thirds, etc. Held that these prerequisites not being strictly complied with, the bonds issued for money so borrowed were void.

[399] Thompson Houston Elec. Co. v. City of Newton, 42 Fed. 723; Brown v. Ingalls Tp., 81 Fed. 485; People v. Baker, 83 Cal. 149; People v. Counts, 89 Cal. 15; Derby v. City of Modesto, 104 Cal. 515; Cullen v. Glendora Water Co. 113 Cal. 503; Murphy v. City of San Luis Obispo, 119 Cal. 626; Bowen v. Town of Greenesboro, 79 Ga. 709; Ponder v. City of Forsyth, 96 Ga. 572. Code of Georgia 1895 requiring notice of a municipal election for the issue of bonds to specify "what amount of bonds are to be issued, for what purpose, * * * how much principal and interest to be paid annually and when to be fully paid off" does not require that the notice shall state the precise sum to be annually paid as interest, when the facts stated furnish a basis by which a calculation can be readily made of the exact amount of interest to be so paid.

City of Perry v. Norwood, 99 Ga. 300; Callaghan v. Town of Alexandria, 52 La. Ann. 1013; Hubbard v. Woodsum, 87 Me. 88; Truelsen v. City of Duluth, 61 Minn. 48; State v. Babcock, 21 Neb. 599; North v. Platte County, 29 Neb. 447; Cook v. City of Beatrice, 32 Neb. 80; Schultze v. Manchester Tp., 61 N. J. Law, 513; Baker v. City of Seattle, 2 Wash. St. 576; Packwood v. Kittitas County, 15 Wash. 88, 33 L. R. A. 673; McVichie v. Town of Knight, 82 Wis. 137.

[400] Knox County v. Ninth Nat. Bank, 147 U. S. 91.

delivered the bonds to bona fide purchasers, independent of the doctrines of estoppel or recitals the insufficiency or invalidity of the notice will not affect their legality.[401] If, however, they still remain undelivered in the hands of the public officials, their delivery may be restrained by proper proceedings.[402] The legality of all subsequent proceedings, including, of course, the validity of bonds issued, has been sustained in an indirect attack upon the sufficiency of the notice either as to its form or the manner of its service or publication, upon the ground that the regularity or sufficiency of the notice could not be raised in a collateral way, the suit in question being upon the bonds issued at the election called by such notice.[403]

(b) Its form. Statutes generally prescribe the form of the notice or order calling for an election. Their provisions are con-

[401] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539, is the leading case on this question. Here bonds were issued in payment of a railroad aid subscription and in an action by a bona fide holder the defense was urged that notice of election was given by the board of commissioners instead of by the sheriff of the county as required by the enabling act. The court held them valid in the hands of bona fide holders. In New Jersey and Missouri it has been held that in absence of recitals of any kind the bonds are good in the hands of bona fide holders. Flagg v. City of Palmyra, 33 Mo. 440; Barrett v. Schuyler County Ct., 44 Mo. 197; Mutual Ben. Life Ins. Co. v. City of Elizabeth, 42 N. J. Law, 235; Cotton v. Inhabitants of New Providence, 47 N. J. Law, 401. Simonton, Mun. Bonds, §§ 194, 195, and notes.

[402] Knox County v. Ninth Nat. Bank, 147 U. S. 91; Skinner v. City of Santa Rosa, 107 Cal. 464, 40 Pac. 742, 29 L. R. A. 512. A notice of election provided for an issue of bonds "payable in gold or lawful money" and with interest payable "annually"; the bonds as issued were payable in "gold coin of the present standard of weight and fineness" and with interest "semi-annually." The court held the bonds invalid when the question was raised before their delivery to purchasers.

City of Athens v. Hemerick, 89 Ga. 674; Hauswirth v. Mueller, 25 Mont. 156, 64 Pac. 324. The notice in this case failed to state the place of holding the election and it was held insufficient when attacked before the issue of the bonds authorized at the election held thereunder.

[403] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Knox County Com'rs v. Wallace, 21 How. (U. S.) 546; Thatcher v. People, 93 Ill. 240. When an election was held purporting to authorize the issue of bonds for the purpose of building a school house, but the notice of such election omitted to state or give any information that such question was to be voted on, it was held that a levy of taxes based upon such pretended election was without authority and void.

sidered mandatory, at least so far as the essentials of the notice are concerned,[404] but not the precise wording or phraseology. The test of the sufficiency or validity of a notice is not whether the words and punctuation as prescribed by the statutes were used, unless so required, but whether the voters at the election held pursuant to such notice understood the questions submitted to them.[405] If this is clearly expressed in unmistakable language

[404] Baltimore & D. P. R. Co. v. Pumphrey, 74 Md. 86, 21 Atl. 559.

[405] In National Bank of Commerce v. Town of Grenada, 41 Fed. 87, the notice published called for an election on the proposition to issue waterworks bonds. The ordinance the basis of the notice showed that the question to be submitted was one relative to refunding the floating indebtedness of the municipality. The court held the bonds valid. Brown v. Ingalls Tp., 81 Fed. 485. Here the court said that the notice was sufficient if it contained the information necessary to enable the electors to pass upon and determine intelligently the question submitted.

People v. Counts, 89 Cal. 15, 26 Pac. 612; City of San Luis Obispo v. Haskin, 91 Cal. 549. See Brown v. Carl, 111 Iowa, 608, 82 N. W. 1033, for a proposition submitted to the electors which was held misleading. Derby v. City of Modesto, 104 Cal. 515; Bowen v. Town of Greensboro, 79 Ga. 709, 4 S. E. 159. Notice held insufficient in not stating the amount of bonds, the rate of interest, the proportion of principal and interest to be paid annually, and further because not published for thirty days prior to the election, as required by Ga. Code, § 5081. See, also, City of Athens v. Hemerick, 89 Ga. 674.

Smith v. City of Dublin, 113 Ga. 833, 39 S. E. 327. The notice here held insufficient under Georgia Code.

Burges v. Mabin, 70 Iowa, 633, 27 N. W. 464, followed by Yarish v. Cedar Rapids, I. F. & N. W. R. Co., 72 Iowa, 556, 34 N. W. 417. The court also held in this case that a notice specifying the point to which the railway company shall have its line of road "ironed and cars running thereon" complies with the Iowa statutes requiring the notice to specify to what point the road shall be "fully completed."

Stone v. Gregory, 23 Ky. L. R. 1, 61 S. W. 1002; Hamilton v. Village of Detroit, 83 Minn. 119, 85 N. W. 933; State v. School Dist. No. 1 of Cascade County, 15 Mont. 133, 38 Pac. 462. A notice of election not stating the rate of interest at the time when the proposed bonds were to become payable and redeemable held insufficient under Comp. St. § 1950 as amended by Act Feb. 14, 1893.

Chicago, B. & Q. R. Co. v. Village of Wilber, 63 Neb. 624, 88 N. W. 660. The notice was held sufficiently definite where a maximum amount of bonds was named but giving the village the option to issue less.

Weston v. City of Newburgh, 67 Hun, 127, 22 N. Y. Supp. 22; Cartwright v. Village of Sing Sing, 46 Hun (N. Y.) 548; Taylor v. Greenville County Sup'rs, 86 Va. 506; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370; McBryde v. City of Montesano, 7 Wash. 69. It is not

in the notice, it will be held sufficient, and, therefore, all subsequent proceedings had thereunder, valid. The notice or order, unless required by statute, need not contain the name of the corporation to which the proposed aid is to be given,[406] though a notice calling for alternative aid in favor of several roads has been held insufficient and the election void.[407] In Kansas, however, the authorities hold that some existing corporation must be named in the election proceedings as the recipient of the proposed aid.[408]

(c) Its service. The service or publication of the notice or order calling the election must be made in the manner and for the time required by law if such provisions are to be found. If there is a failure to publish or serve for the time required, the election held in pursuance may not be regarded as legal, though the presumption that it is legal usually exists.[409] This presumption, how-

necessary that the ordinance itself providing for the purchase of waterworks should be set out in full in the election notice where the latter contains a fair statement of the matters to be voted upon.

Seymour v. City of Tacoma, 6 Wash. 138, 32 Pac. 1077. Under the provisions of a city charter requiring all ordinances to be published for three days consecutively, a notice of an election required to be published for thirty days need not contain such ordinance but only a fair statement of its contents.

[406] Block v. Bourbon County Com'rs, 99 U. S. 686; Ninth Nat. Bank v. Knox County, 37 Fed. 75. The court here held that where the proposed route was described with reasonable certainty it would be sufficient.

National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778; Clapp v. Otoe County (C. C. A.) 104 Fed. 473.

[407] Christian County Ct. v. Smith, 11 Ky. L. R. 834, 12 S. W. 134, 13 S. W. 276, an election at which the question of subscribing to the capital stock of two different railroad companies was submitted: held null and void.

State v. Roggen, 22 Neb. 118, 34 N. W. 108; Williams v. People, 132 Ill. 574, 24 N. E. 647. Bonds in the hands of innocent purchasers held good though authorized at an election where the question submitted to the voters was the issuing of railroad aid bonds to any railroad that may be built within two certain points within the next five years.

[408] Lewis v. Bourbon County Com'rs, 12 Kan. 186.

[409] In Humboldt Tp. v. Long, 92 U. S. 642, where notice was not given the required length of time, the court says: "It is plain that the bonds are not invalid, because all the notice of the popular election was not given which the legislative act directed. The election was a step in the process of execution of the power granted to issue bonds in payment of a municipal subscription to the stock of a railroad company. It did not itself confer the power.

ever, does not follow when there is a failure to publish or post the notice.[410] Some cases hold that the burden of proof rests upon the purchaser of bonds issued by authority of such election to prove the sufficiency of the notice both as to its form and the

Whether that step had been taken or not, and whether the election had been regularly conducted with sufficient notice and whether the requisite majority of votes had been cast in favor of a subscription and consequent bond issue, were questions which the law submitted to the board of county commissioners and which it was necessary for them to answer before they could act. In the present case, the board passed upon them and issued the bonds, asserting by the recitals that they were issued 'in pursuance of and in accordance with the act of the legislature.' Thus, the plaintiff below took them without knowledge of any irregularities in the process through which the legislative authority was exercised, and relying upon the assurance given by the board, that the bonds had been issued in accordance with the law. In his hands, therefore, they are valid instruments."

Knox County v. Ninth Nat. Bank, 147 U. S. 91; Village of Highland Park v. McAlpine, 117 Mich. 666; Warsop v. City of Hastings, 22 Minn. 438. An ordinance designated the 15th day of May as the time for holding an election, and directed the city clerk to give ten days' notice thereof by publication. It was first published May 5th when it took effect. The notice of election being published simultaneously with the publication of the ordinance was held sufficient.

Hamilton v. Village of Detroit, 83 Minn. 119, 85 N. W. 933. Notice of the election, required by statute to be either published or posted, was posted. This was held sufficient although the village council ordered the notice both printed and published; the failure to publish in accordance with the resolution not being held fatal to validity, the statutes of the state being fully complied with by the proper posting of the notice.

Kemp v. Town of Hazlehurst, 80 Miss. 443, 31 So. 908; State v. Babcock, 25 Neb. 500. A statutory requirement of submission by publication is jurisdictional and a single publication not held sufficient where the statutes require this for at least four weeks in some newspaper published in the county. Mittag v. Borough of Park Ridge, 61 N. J. Law, 151, 38 Atl. 750. Less notice than that required by statute renders void an election held pursuant to such notice.

Culver v. Village of Ft. Edward, 8 Hun (N. Y.) 340; People v. Trustees of Village of Ft. Edward, 70 N. Y. 28; Cleveland v. City Council of Spartanburg, 54 S. C. 83, 31 S. E. 871. A statutory provision that "at least three weeks notice by advertisement in one of the papers of such city of the time and of the names of managers appointed to conduct the election" is satisfied by a single publication appearing three weeks previous to the election. Baker v. City of Seattle, 2 Wash. St. 576, 27 Pac. 462.

[410] Town of Clarksdale v. Broaddus, 77 Miss. 667, 28 So. 954.

time and manner of its service or publication, but these form an exception to the general rule.[411]

§ 187. Petition.

The holding of an election at which is submitted the question of granting railroad aid bonds is frequently contingent, not upon the giving of the notice required by the statute or action by public officials, but upon the filing of a petition signed by a requisite number of qualified voters or electors of the taxing district.[412] The requirements of such petition and the right of individuals to sign is generally prescribed by statute and no general rule can be stated which will apply in all cases. Its filing, however, signed by the proper number of qualified petitioners, is held to be jurisdictional and the basis of the validity of all subsequent proceedings.[413]

[411] Post v. City of Pulaski, 47 Fed. 282; City of Santa Cruz v. Waite (C. C. A.) 98 Fed. 387; Williams v. People, 132 Ill. 574, 24 N. E. 647; Choisser v. People, 140 Ill. 21, 29 N. E. 546.

[412] Kline v. City Council of Streator, 78 Ill. App. 42. If a proposition to build a bridge and issue bonds for the same is sanctioned by a majority of the legal voters of the city, either by a petition signed by them or at an election duly called, it is sufficient.

Young v. Webster City & S. W. R. Co., 75 Iowa, 140; Berkley v. Board of Education of Lexington, 22 Ky. L. R. 638, 58 S. W. 506; Hamilton v. Village of Detroit, 85 Minn. 83. One not owning real estate in his own name in a village and residing on land owned by his wife, held not a freeholder within the meaning of Minn. Laws 1893, c. 200.

State v. School Dist. No. 9, 10 Neb. 544; Hoxie v. Scott, 45 Neb. 199; Town of Cherry Creek v. Becker, 50 Hun, 601, 2 N. Y. Supp. 514; People v. Sawyer, 52 N. Y. 296. A signer has the right to withdraw his name from such petition. Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122; State v. Town of Newberry, 47 S. C. 418; Cleveland v. City Council of Spartanburg, 54 S. C. 83.

[413] Chicago, K. & W. R. Co. v. Chase County Com'rs, 43 Kan. 760. In Craig v. Town of Andes, 93 N. Y. 405, it was held that the consent of the taxpayers must be unqualified and unconditional and their petition absolute in form, in order to confer jurisdiction upon a county judge. In this case about one-fourth of the petitioners inserted a condition in the petition that the road should be located in a certain place. The court said: "The statute confers no power upon the taxpayer to indicate or secure a railroad location to suit his convenience or benefit his property, but for the advantage of all the town."

Hoxie v. Scott, 45 Neb. 199; Cummings v. Hyatt, 54 Neb. 35. A married woman may be a freeholder and

If a petition is lacking or is deficient, either in form or signatures, it will not be held as giving the right to public officials to call an election at which the question of proposed aid is to be passed upon. The petition is the basis of official action regarding the proposed election.[414] Although official action upon such a petition for an election is considered by the courts discretionary in a large measure, yet officials required to act cannot arbitrarily refuse to call the election as petitioned.[415] A liberal

qualified under the statute to sign a petition for an election to pass upon an issue of municipal bonds.

Simonton, Mun. Bonds, § 65. "When a taxpayer has signed a petion he may revoke it if he does so before the judge or other officer to whom it is intended to be presented acquires the right to act upon it, but the withdrawal must be made before, and not after, the hearing on the petition." Noble v. City of Vincennes, 42 Ind. 125; People v. Henshaw, 61 Barb. (N. Y.) 409; Town of Springport v. Teutonia Sav. Bank, 84 N. Y. 403. Contra, Town of Andes v. Ely, 158 U. S. 312; Biddle v. Borough of Riverton, 58 N. J. Law, 289, 33 Atl. 279; Calhoun v. Millard, 121 N. Y. 69, 8 L. R. A. 248.

[414] Rich v. Mentz Tp., 134 U. S. 632. A petition not complying with the statute confers no power on the county judge to issue railroad aid bonds. Town of Andes v. Ely, 158 U. S. 312. The fact that some of the signatures attached to a petition to the county judge are conditional does not deprive him of his jurisdiction, and his determination in favor of the issue of bonds is conclusive until legally reversed.

Whiting v. Town of Potter, 18 Blatchf. 165, 2 Fed. 517; People v. Cline, 63 Ill. 394. None of the signers to the petition in this case were legal voters as required by law. The company in aid of which the bonds were issued was cognizant of this fact and it was held that the municipality could not be compelled to issue them.

Noble v. City of Vincennes, 42 Ind. 125. The court held here that a remonstrance to the granting of aid operated to withdraw the names of the remonstrants from the petition previously signed by them. Clark v. Town of Noblesville, 44 Ind. 83. Petitions not held necessary in incorporated towns.

. Taxpayers of Webster Parish v. Police Jury, 52 La. Ann. 465; Hamilton v. Village of Detroit, 85 Minn. 83; Schultze v. Manchester Tp., 61 N. J. Law, 513, 40 Atl. 589; Biddle v. Borough of Riverton, 58 N. J. Law, 289, 33 Atl. 279. The withdrawal from the petition of a sufficient number of the petitioners to reduce the amount of taxable property to less than that required by law destroys the authority of officials to proceed upon such petition. People v. Smith, 55 N. Y. 135.

[415] State v. Conrad, 147 Mo. 654, 49 S. W. 857; State v. Reno County Com'rs, 38 Kan. 317, 16 Pac. 337.

[416] Jussen v. Lake County Com'rs, 95 Ind. 567; Claybrook v. Rockingham County Com'rs, 114 N. C. 453, 19 S. E. 593; Kansas City & P. R. Co. v. Rich Tp., 45 Kan. 275, 25

rule of construction will be followed in determining the effect of such petition, and where it is not so defective or ambiguous as to mislead anyone, subsequent proceedings held thereunder will not be invalid.[416]

§ 188. The calling of an election by ordinance.

The right existing in a public corporation to issue negotiable bonds based upon a grant of legislative power is usually exercised, as already suggested in a preceding section,[417] by the people at an election held to vote upon the questions submitted, including that of the issue of bonds.[418] This election may be called by notice pursuant to an order of a quasi judicial body or upon the passage of an ordinance[419] or resolution[420] by the

Pac. 595; In De Forth v. Wisconsin & M. R., 52 Wis. 320, it was held that procuring and affixing signatures on Sunday was "business" and unlawful, and conferred no authority upon the supervisors to issue bonds.

[417] Berkley v. Board of Education of Lexington, 22 Ky. L. R. 638, 58 S. W. 506. See, also, cases cited under § 184.

[418] Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Brown v. Carl, 111 Iowa, 608, 82 N. W. 1033; Turner v. Woodson County Com'rs, 27 Kan. 314; Turpin v. Madison County Fiscal Ct., 20 Ky. L. R. 1131, 48 S. W. 1085. A second election authorizing the issue of bonds valid although the same question was submitted to the voters at a previous election, the officials failing to act under the authority then granted.

Callaghan v. Town of Alexandria, 52 La. Ann. 1013; Kemp v. Town of Hazlehurst, 80 Miss. 443, 31 So. 908; Town of Plainview v. Winona & St. P. R. Co., 36 Minn. 505; Union Bank v. Town of Oxford Com'rs, 116 N. C. 339, 21 S. E. 410; Bell v. Borough of Waynesboro, 195 Pa. 299. The incurring of indebtedness by the proper officials without authority from the electors can be subsequently ratified by them. Ecroyd v. Coggeshall, 21 R. I. 1, 41 Atl. 260; McCreight v. City of Camden, 49 S. C. 78, 26 S. E. 984; State v. Tolly, 37 S. C. 551, 16 S. E. 195; Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 879; Estey v. Starr, 56 Vt. 690. A town may rescind aid voted a railroad when no rights of third parties have intervened and nothing has been done. Davis v. Wayne County Ct., 38 W. Va. 104. See, also, cases in note, 51 Am. St. Rep. 844-848.

[419] National Bank of Commerce v. Town of Grenada, 44 Fed. 262. "It is true that section 3419 of the Colorado statute which provides for the funding of the debts of towns does not in terms say that the submission to the qualified voters of the questions of funding and the order directing the issue of the bonds shall be by ordinance. But an examination of the whole statute concerning towns and cities has satisfied my mind beyond a doubt, that it was in

proper legislative body of the corporation. Whatever the mode may be as prescribed by law for the calling of the election, whether by notice, petition or ordinance, it will not be considered valid unless the statutory requirements are followed.[421] The legality of the election establishes the validity of the bonds then voted, unless, through the operation of the doctrine of recitals, the corporation is estopped from denying this. Where the election is called by ordinance, the formalities required, so far as of record for holding the election, must be followed strictly to give legal effect to subsequent steps.[422]

the contemplation of the law makers, and is a necessary deduction from the tenor of the whole act that wherever the governing body of such municipalities is empowered to create a debt on the whole constituency, or to take action looking to the issue of municipal bonds, it should proceed in the more formal and solemn mode of an ordinance." Irwin v. Lowe, 89 Ind. 540; Bills v. City of Goshen, 117 Ind. 221, 3 L. R. A. 261; Ranney v. Baeder, 50 Mo. 600.

[420] Atchison Board of Education v. De Kay, 148 U. S. 591; City of Alma v. Guaranty Sav. Bank (C. C. A.) 60 Fed. 203. Where there is nothing in the statutes expressly requiring the passage of an ordinance as preliminary to an election, the fact that the question was submitted to the electors by resolution does not invalidate the bonds. The court say: "The law is well settled that a municipal corporation may declare its will as to matters within the scope of its corporate powers, either by a resolution or an ordinance unless its charter requires it to act by ordinance, and generally it is of little significance whether a legislative measure is couched in the language of an ordinance or of a resolution where it is enacted with the same formalities which usually attend the adoption of ordinances. If the action taken by a municipality amounts to prescribing a permanent rule of conduct, which is to be thereafter observed by the inhabitants of the municipality, or by its officers in the transaction of the corporate business, then, no doubt, the rule prescribed may be more properly expressed in the form of an ordinance; but it is eminently proper to act by resolution if the action taken is merely declaratory of the will of the corporation in a given matter and is in the nature of a ministerial act." City of Lincoln v. Sun Vapor Street-Light Co., 59 Fed. 756; Swan v. Arkansas City, 61 Fed. 478; City of Paterson v. Barnet, 46 N. J. Law, 62; Kline v. City of Streator, 78 Ill. App. 42.

[421] Force v. Town of Batavia, 61 Ill. 99; Harmon v. Auditor of Public Accounts, 22 Ill. App. 129, affirmed in 123 Ill. 122, 13 N. E. 161, and following Chicago & I. R. Co. v. Pinckney, 74 Ill. 277; Town of Middleport v. Aetna Life Ins. Co., 82 Ill. 562.

[422] National Bank of Commerce v. Town of Granada (C. C. A.) 54 Fed. 100, affirming 44 Fed. 262, 48 Fed. 278, and following Dixon County v. Field, 111 U. S. 83. The court say:

§ 189. The election.

Where negotiable bonds are authorized to be issued at an election, it may be called especially to consider the one question, viz., the incurring of indebtedness,[422] or this question may be

"We entertain no doubt but that the appropriate mode for the town to proceed under the act in question is by ordinance of its board of trustees. The proceeding involves the appointment and holding of an election and the conversion of a non-negotiable floating debt into the form of negotiable bonds drawing a high rate of interest, payable semi-annually and which must run five and many run fifteen years. A measure requiring an expression of opinion from the voters of the town at the ballot box, * * * and of so much interest to the taxpayers of the town and the holders of its securities though so many years ought not be carried into effect except by the most solemn and deliberate mode of proceeding known to the law for giving expression of the corporate will. That mode is by ordinance. This is the mode that is prescribed by the statute of Colorado. * * * The provision of the act (statute) that such ordinances shall not take effect or be in force until they are published in the mode provided by the act is mandatory. This ordinance never having been published, never went into effect. Not being in force it conferred no authority on the board of trustees or any officer of the town to do any act under it; and no one could acquire any right based on it, or on any act of the officers of the town assuming to act under it. It had no more legal effect that if it had never been passed by the board of trustees." "But the learned counsel for the plaintiff in error contends that the recitals in the bonds that they are 'issued under an ordinance' of the town relieves the plaintiff from the burdens of showing that the ordinance was published and estops the defendant from showing that it was not. It has never yet been held that a false recital in a bond can make that a law which never was a law. When an ordinance has been duly enacted, and has taken effect, authorizing the officers of a town to issue its negotiable bonds upon certain precedent requirements or conditions * * * and the officers issuing the bonds are the appointed tribunal to decide whether there has been a compliance with such precedent conditions and the bonds issued recite that they are issued in pursuance of such ordinance, it is probably true that such recital in favor of bona fide purchasers for value would import a full compliance with the requirements of the ordinance and preclude inquiry as to whether the precedent conditions were performed before the bonds were issued. But that doctrine has no application to this case."

[422] Bowen v. Town of Greensboro, 79 Ga. 709, 4 S. E. 159; Byrne v. Parish of East Carroll, 45 La. Ann. 392. See, as to the construction of the statutes of Minnesota on the subject, Truelson v. City of Duluth, 60 Minn. 132, and Janeway v. Duluth, 65 Minn. 292.

Baumann v. City of Duluth, 67 Minn. 283; Hamilton v. Village of Detroit, 83 Minn. 119, 85 N. W. 933.

submitted to the people for their determination at a general election.[424] The legality of an act providing for such special election, although questioned, has never been decided adversely, and as a question of expediency it would seem that the question of incurring indebtedness could be considered more impartially and upon its own merits at such an election than at a general one where other influences and other questions are submitted to be decided and which may influence the vote of the electors, independent of the merits. Occasionally, the question of incurring indebtedness or subscribing to the stock of a railway company has been submitted to the "male taxpayers of the county" alone, for their decision instead of all the electors who would, ordinarily, be qualified to vote at a general election or upon other questions. The limitation imposed by such an act has been held in such cases a valid one as the class named by such act or authority forms a large proportion and usually all of those interested in the question; the taxpayers of the taxing district bearing the burden of indebtedness.[425]

A proposition embodying two different questions held not objectionable since the issue of the bonds was the essential question to be determined by vote of the electors and this was clearly submitted. Robinson v. City of Goldsboro, 122 N. C. 211, 30 S. E. 324; Baker v. City of Seattle, 2 Wash. St. 576.

[424] Belknap v. City of Louisville, 99 Ky. 474, 36 S. W. 1118, 34 L. R. A. 256; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441.

[425] Baltimore & O. R. Co. v. County of Jefferson, 29 Fed. 305. The court say: "By the terms of the fifth section of the act in question, power was delegated by the legislature to the supervisors of Jefferson County to submit the question of a subscription to the capital stock of the said railroad to all the male taxpayers of the county, at a special election, above the age of twenty-one years not under any of the disabilities mentioned in the act. It is urged that the power thus conferred by the legislature is not warranted by the constitution. This is a delegation of power to local authorities for local purposes. There is nothing in the constitution which inhibits the legislature from the exercise of such a power. In the absence of such a restriction upon the legislative power, the exercise of it cannot be questioned. It has been frequently done by the legislatures of various states upon similar provisions in their constitution and in almost every instance where the power has been questioned, the courts have sustained the legislative view of its exercise. The power of taxation for local and municipal purposes has most always been delegated. The reason for it is founded in necessity and the exercise of the power cannot now be questioned."

§ 190. Questions not necessary for submission to the electors.

Although the general principle exists that before an issue of negotiable bonds will be considered valid, the question of the issue must be submitted to a vote of the people, it does not apply to all issues, and, especially, is this true of refunding bonds. The legislative authority may exist for the refunding of indebtedness; the issuing of bonds or other evidences of debt to accomplish this purpose, it has been repeatedly held, does not increase or create a debt but merely changes its form. The authorities are uniform to the effect that where legislative authority exists, the proper officials have the power to negotiate for an issue of refunding bonds without submitting the question to the electors of the district,[426] and then, although their validity may

[426] Doon Tp. v. Cummins, 142 U. S. 366; Howard v. Kiowa County, 73 Fed. 406; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 49 L. R. A. 534; Pratt County Com'rs v. Society for Savings (C. C. A.) 90 Fed. 233. "The bonds from which some of the coupons in suit were cut were issued to refund debts of the county which were evidenced by judgments and these bonds were issued without a vote of the electors of the county. It is contended that chapter fifty of the laws of 1879 did not authorize the issue of bonds to refund judgments without a vote of the electors and that these coupons and the bonds from which they were taken, are consequently void. * * * The theory of counsel for the county is that a judgment is 'current expense' of the year in which it is recovered; that by paragraphs 1630 and 1632 the board of county commissioners was forbidden to borrow money to meet current expenses without first submitting the question of such loan to a vote of the electors; and that therefore, it is prohibited from refunding a debt evidenced by a judgment under the act of 1879 without such a vote. The argument is too subtle and ingenious to be sound. * * * The refunding of a debt in the legal method * * * is not borrowing money nor is the exchange of bonds for a judgment, the making of a loan. * * * Such an exchange neither creates nor increases the debt; it simply changes the form of it." Geer v. Ouray County Com'rs (C. C. A.) 97 Fed. 435; Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692; Chicago & I. R. Co. v. Mallory, 101 Ill. 583; Common Council of Muskegon v. Gow, 94 Mich. 453. Following the city charter the court here held that the state council of Michigan has power to issue bonds without a vote of the electors when the total amount of bonds and the general tax levy for the year is less than 3 per cent of the assessed valuation.

Le Tourneau v. City of Duluth, 85 Minn. 219, 88 N. W. 529. Under Laws 1899, c. 351, § 10, a city council may issue bonds in amount less than $100,000 for the particular public purpose without the approval of the electors of the city. But see the

be questioned, the bonds thus issued will be considered valid outstanding obligations of the corporation issuing them and subject to all the rules and principles of law controlling and governing such instruments.

§ 191. The election; time and manner of holding.

The election authorized by statutory authority at which the question of an issue of negotiable bonds is submitted to the electors for their determination should be held in the manner and in accordance with laws controlling general elections,[427] unless the authority specially provides otherwise.[428] The hours during which the polls shall be kept open, the manner of balloting, the form of ballots and the questions submitted, are all regulated in the manner suggested.[429] The recitals of officers authorized by

dissenting opinion of Judge Collins. Bryan v. City of Lincoln, 50 Neb. 620, 35 L. R. A. 752.

McCreight v. City of Camden, 49 S. C. 78, 26 S. E. 984, where a submission to the electors was not considered necessary under the special authority granted the city of Camden to borrow money by issuing bonds. Murry v. Fay, 2 Wash. St. 352, 26 Pac. 533; Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163.

[427] 51 Am. St. Rep. 853-854; Town of Oregon v. Jennings, 119 U. S. 74; Town of Concord v. Robinson, 121 U. S. 165; Post v. Pulaski County, 47 Fed. 282; People v. Town of Berkeley, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; Bowen v. Town of Greenesboro, 79 Ga. 709; Edwards v. People, 88 Ill. 340; Cedar Rapids & M. R. Co. v. Boone County, 34 Iowa, 45; Union Bank of Richmond v. Town of Oxford, 116 N. C. 339, 21 S. E. 410.

[428] Humboldt Tp. v. Long, 92 U. S. 642. Bonds not void where the election was held in less than thirty days after the order calling it, the law requiring thirty days' notice, the holder being a bona fide purchaser and the bonds reciting that the election was regularly held. Knox County v. Ninth Nat. Bank, 147 U. S. 91; Harding v. Rockford, R. I. & St. L. R. Co., 65 Ill. 90; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290; Pritchard v. Magoun, 109 Iowa, 364, 46 L. R. A. 381; People v. Caruthers School Dist., 102 Cal. 184, 36 Pac. 396; Seymour v. City of Tacoma, 6 Wash. 427, 33 Pac. 1059; Phillips v. Town of Albany, 28 Wis. 340.

[429] Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692; City of Denver v. Hayes, 28 Colo. 110, 63 Pac. 311; Bras v. McConnell, 114 Iowa, 401, 87 N. W. 290; Kline v. City of Streator, 78 Ill. App. 42; People v. Seaman, 59 App. Div. 76, 69 N. Y. Supp. 55; Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444.

law in regard to the legality of the election as affected by the time, notice and manner of holding, are regarded as conclusive.[430]

§ 192. Voters and their qualifications.

The qualification of electors at such an election is fixed by legislative action,[431] and the findings or conclusions of officials authorized to pass upon all matters of fact in connection with such qualifications, the number of votes cast or the questions submitted, is generally regarded as conclusive and the public corporation estopped to deny such findings or conclusions;[432] this principle of law is especially true in regard to those matters dehors the record.[433] The presumption of law exists that electors voting

[430] See post, §§ 209 et seq.; Town of Coloma v. Eaves, 92 U. S. 484; Marcy v. Oswego Tp., 92 U. S. 637; Humboldt Tp. v. Long, 92 U. S. 642; Roberts v. Bolles, 101 U. S. 119; Anderson County Com'rs v. Beal, 113 U. S. 227; Madison County Sup'rs v. Brown, 67 Miss. 684.

[431] Harshman v. Bates County, 92 U. S. 569; Walnut Tp. v. Wade, 103 U. S. 695; McGraw v. Greene County Com'rs, 89 Ala. 407; People v. Counts, 89 Cal. 15; Stockton v. Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; Kaigler v. Roberts, 89 Ga. 476, 15 S. E. 542; Heilbron v. City of Cuthbert, 96 Ga. 312; Howell v. City of Athens, 91 Ga. 139; Murdock v. Weimer, 55 Ill. App. 527; MacKenzie v. Wooley, 39 La. Ann. 944, 3 So. 128; Everett v. Smith, 22 Minn. 53; Webb v. Lafayette County, 67 Mo. 354; Cummings v. Hyatt, 54 Neb. 35, 74 N. W. 411; Spitzer v. Village of Fulton, 33 Misc. 257, 68 N. Y. Supp. 660; McDowell v. Massachusetts & S. Const. Co., 96 N. C. 514; Smith v. City of Wilmington, 98 N. C. 343; Claybrook v. Rockingham County Com'rs, 117 N. C. 456; Hendrick v. Culberson, 23 Tex. Civ. App. 409, 56 S. W. 616; Day v. City of Austin (Tex. Civ. App.) 22 S. W. 757; 29 Am. Law. Reg. 873-920. Acts authorizing women to vote at such elections have been held constitutional. See Kimball v. Hendee, 57 N. J. Law, 307, 30 Atl. 894; Woodley v. Town Council of Clio, 44 S. C. 374, 22 S. E. 410; Wilson v. City of Florence, 39 S. C. 397, 20 L. R. A. 720; Id., 40 S. C. 290. But see Baltimore & O. R. Co. v. County of Jefferson, 29 Fed. 305.

[432] County of Moultrie v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 636; Livingstone County v. First Nat. Bank of Portsmouth, 128 U. S. 127; Reynolds & H. Const. Co. v. City of Monroe, 45 La. Ann. 1024, 13 So. 400. The official and public announcement of the result of a municipal election is essential to the validity of the taxes voted. State v. School Dist. No. 13, 13 Neb. 466; McDowell v. Massachusetts & S. Const. Co., 96 N. C. 514, 2 S. E. 351; Cleveland v. City of Spartanburg, 54 S. C. 83, 31 S. E. 871; Nelson v. Haywood County, 89 Tenn. 781, 11 S. W. 885.

[433] Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692. The court say: "We have seen that the

possess the right to exercise the franchise, that the votes received were legal and that no undue influence was exercised by those affirmatively interested in the issue of bonds.[434] Allegations in proceedings raising questions concerning the legality of the election either as to its time, place or manner of holding, the number of votes cast or the right of those voting to vote must be definite and point out with particularity the alleged illegal acts or conditions.[435]

§ 193. Canvass of election returns.

The election returns, unless otherwise provided, should be canvassed by those officials upon whom the duty usually devolves.[436]

county court at its special term in November, 1871, not only certified, upon its record, that all the conditions prescribed by its order at the January term, 1870, had been complied with by the railroad company but authorized the county judge to make a similar certificate under oath. It even certified upon its records that the subscription had been voted for by a majority of the qualified voters taking as the standard the vote cast at the preceding general election for county officers. The number of such voters who, at the time of election lived in the county was a fact dehors any official record of votes and was to be ascertained by the county court or county judge upon examination. * * * It would be rank injustice to permit the county, after the lapse of so many years to say that a majority of the voters living in the county at the time of election—a matter not determinable by any public record—did not vote for the subscription." Louisville & N. R. Co. v. Davidson County Ct., 33 Tenn. (1 Sneed) 638.

[434] Woolley v. Louisville S. R. Co., 93 Ky. 223. "It is clear that it could have been ascertained with judicial certainty how many legal votes were cast for and against this subscription and the appellants' silence upon that subject creates the presumption that the subscription obtained a majority of the legal votes and the declared result was in accordance with the vote." Hendrick v. Culberson, 23 Tex. Civ. App. 409, 56 S. W. 616. But where the tax rolls fail to show that persons who voted at such election were qualified, the election was held prima facie illegal.

[435] George v. Oxford Tp., 16 Kan. 72. Woolley v. Louisville S. R. Co., 93 Ky. 223. In this case the allegation contained the statement "that the majority of those voting in favor of the subscription were not unbribed." The court said that such a statement "is not equivalent to an allegation that a majority of those voting in favor of the subscription were bribed. The allegation is only, at most, an implied or indirect charge. It is not equivalent to direct charge of bribery made in plain and concise language, as the Civil Code requires." Luzader v. Sargeant, 4 Wash. 299, 30 Pac. 142.

[436] Brown v. Ingalls Tp., 81 Fed. 485. "Was it essential to the valid-

The purpose of laws requiring the canvass of returns within a prescribed period after the election is to secure promptness of action on the part of the returning board in order not to deprive the electors of the rights authorized to be exercised, through the casting of the necessary affirmative votes.[437] Such regulations as well as those providing for the record of the official returns are, usually, considered directory.[438] A canvass, therefore, of election returns, although made shortly after the time limited or prescribed by law has expired, does not, necessarily, invalidate the result of such election.[439]

ity of the bonds that the votes should be canvassed by the county commissioners and by them only? If under the laws of Kansas a board of county commissioners is the only body which can legally canvass and declare the result of an election held for the purpose of authorizing the issue of refunding bonds then these bonds are void; for there would be no authority in the township board to estop the township by certifying to a state of facts, the determination of which was not intrusted to it by law. Northern Bank of Toledo v. Porter Tp., 110 U. S. 608; Dixon County v. Field, 111 U. S. 83. The act itself does not make any provision by whom the votes of such an election should be canvassed or the result declared. * * * Paragraph 442 of the General Statutes of 1889 (Laws 1875) provides that before the issuing of such funding bonds (as provided for by the act of 1875) an election should be held 'to be conducted and the returns thereof ascertained in the manner provided by law for holding general elections.' The votes at general elections for township offices must be canvassed by the board of county commissioners. The act of 1875 was in force at the time of the passage of the act of 1879 under which these bonds were issued. The fact that no provision was made in the later act as to whom the returns of the election should be made * * * raises a strong presumption that the legislature deemed the provisions of the act of 1875, which related to the same subject-matter and was peculiarly applicable to the objects for which the act of 1879 was enacted, sufficient without additional legislation. Such is the construction adopted by the Kansas Court of Appeals in Faulkenstein Tp. v. Fitch, 2 Kan. App. 193." Board of Education of Topeka v. Welch, 51 Kan. 792, 33 Pac. 654; Allison v. Louisville, H. C. & W. R. Co., 72 Ky. (9 Bush) 247; City of Louisville v. Board of Park Com'rs, 112 Ky. 409, 65 S. W. 860.

[437] Stockton v. Powell, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42.

[438] Claybrook v. Rockingham County Com'rs, 117 N. C. 456, citing Wilmington, O. & E. C. R. Co. v. Onslow County Com'rs, 116 N. C. 563.

Knight v. Town of West Union, 45 W. Va. 194, 32 S. E. 163, but see Deland v. Platte County, 54 Fed. 823.

[439] Syracuse Tp. v. Rollins (C. C. A.) 104 Fed. 958; Turpin v. Madison

§ 194. Necessary votes.

The affirmative vote necessary to the authority secured at an election for an issue of negotiable bonds may be determined, either in the constitution, the general statutes of the state or the special authority providing for the issue of bonds and calling the election.[440] These provisions may require either a certain proportion of the legal electors voting at the election, of the total number registered and qualified to vote or of the vote cast at the election upon the particular question, viz., the issue of bonds without regard to the total vote upon other propositions or for candidates for public offices. The greater number of authorities hold that, unless required by law, the prescribed proportion of the legal voters necessary to carry the question need not be of the total number of registered or qualified voters, but such proportion of those who actually voted at the election and upon the question submitted, namely, the issue of negotiable bonds.[441]

County Fiscal Ct., 105 Ky. 226, 48 S. W. 1085; Claybrook v. Rockingham County Com'rs, 117 N. C. 456.

[440] Henry County v. Nicolay, 95 U. S. 619; Cass County v. Gillett, 100 U. S. 585. The constitutional provision requiring a two-thirds vote does not apply to public charters granted prior to the adoption of the constitution.

Post v. Pulaski County (C. C. A.) 49 Fed. 628; Office Specialty Mfg. Co. v. County of Elbert, 73 Fed. 324; Pacific Imp. Co. v. City of Clarksdale (C. C. A.) 74 Fed. 528; Jordan v. Cass County, 3 Dill. 185, Fed. Cas. No. 7,517; Town of Decatur v. Wilson, 96 Ga. 251.

[441] St. Joseph Tp. v. Rogers, 83 U. S. (16 Wall.) 644; Cass County v. Johnston, 95 U. S. 360. "All qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience and ought not to be adopted unless the legislative will to that effect is clearly expressed."

Carroll County v. Smith, 111 U. S. 556; Madison County v. Priestly, 42 Fed. 817, following Carroll County v. Smith, 111 U. S. 556.

Howland v. San Joaquin County Sup'rs, 109 Cal. 152; Fritz v. City & County of San Francisco, 132 Cal. 373, 64 Pac. 566; Howell v. City of Athens, 91 Ga. 139; City of South Bend v. Lewis, 138 Ind. 512, 37 N. E. 986. The court in a very elaborate opinion examines the leading cases and from them deduces "four leading principles may be considered as fully established, namely: First. Where a measure is proposed to the people and its adoption made to depend on a vote of the majority, those who do not vote are considered as acquiescing in the result declared by those who do vote even though those voting constitute a minority

Where, however, the law provides that the required proportion shall be of the total number of registered and qualified voters, such total number must then be considered in determining the question whether the required number voted affirmatively in favor of the issue of bonds.[442] This rule is also true where stat-

of those entitled to vote. Second. Where a question is required to be submitted at a certain regular election and is made to depend upon a majority of the votes cast at 'such election' a majority of all the votes cast at the election is meant and not merely a majority of the votes cast on that particular question. Third. Where at a general election a proposition is submitted to the voters, the result of the vote on the proposition will be determined by the votes cast for and against it, in the absence of a provision in the law, under which it is submitted, to the contrary. Fourth. Where a legislative body provides that a proposition shall be submitted to the voters, that those in favor of the proposition shall cast an affirmative vote and that those electors opposed to the proposition shall cast a negative vote, and that a 'majority of the votes given' shall be requisite to the adoption of the proposed measure, then the only votes to be counted and considered in determining whether the measure is adopted or not, are those which are given on the particular question involved Of the correctness of these four principles, we think there can be no dispute."

Cutler v. Madison County Sup'rs, 56 Miss. 115; May v. Bermel, 20 Misc. 515, 45 N. Y. Supp. 913; Louisville & N. R. Co. v. County Ct. of Davidson, 33 Tenn. (1 Sneed) 638. "How can we know how many legal voters there are in a county at any given time? We cannot judicially know it. If it were proved that the vote was much larger in the last preceding political election, or by the last census by the official returns, or the examination of the witnesses, it would only be a circumstance, certainly not conclusive that such was the case at the time of this election. * * * When a question or an election is put to the people, and is made to depend on the vote of a majority, there can be no other test of the number entitled to vote but the ballot box. If in fact, there be some or many who do not attend and exercise the privilege of voting, it must be presumed that they concur with the majority who do attend, if indeed they can be known at all to have an existence."

Faulkner v. City of Seattle, 19 Wash. 320, 53 Pac. 365; Miller v. School Dist. No. 3, 5 Wyo. 217, 39 Pac. 879.

[442] Floyd County v. State, 112 Ga. 794; Smith v. City of Dublin, 113 Ga. 833, 39 S. E. 327; Onstott v. People, 123 Ill. 489, 15 N. E. 34. "By the terms of the fourth section of the act under which the election was held the county authorities were not empowered to issue the bonds unless a majority of the qualified voters of the county voted in favor of issuing bonds, taking as a standard the number of votes cast at the last general election held in the county next before this vote was had. This was not done. * * *

utory provisions require the affirmative vote of a prescribed number of all the legal electors voting at the election; then the whole number of votes cast at the election must be taken into consideration in ascertaining whether or not the necessary affirmative vote has been cast without considering the vote on the question of a bond issue.[443]

We are of opinion as the proposition to issue the bonds did not receive the vote required by statute, the county court had no right to issue the bonds, and the bonds being illegal, taxes could not properly be levied and collected to pay interest thereon."

Kentucky Union R. Co. v. Bourbon County, 85 Ky. 98; Hawkins v. Carroll County Sup'rs, 50 Miss. 735; Kemp v. Town of Hazlehurst, 80 Miss. 443, 31 So. 908; State v. Harris, 96 Mo. 29, 8 S. W. 794. It was here held that under Mo. Const. 1865, art. 11, § 14, requiring an assenting vote of two-thirds of all the qualified voters of the corporation, "two-thirds of the qualified voters voting at an election was not sufficient; mere inaction of voters in failing to vote did not express assent."

State v. Winkelmeier, 35 Mo. 103; State v. Renick, 37 Mo. 270; State v. Curators of State University, 57 Mo. 178; State v. Brassfield, 67 Mo. 331; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; McDowell v. Massachusetts & S. Const. Co., 96 N. C. 514; Duke v. Brown, 96 N. C. 127; Lynchburg & D. R. Co. v. Person County Com'rs, 109 N. C. 159; Wilson v. City Council of Florence, 39 S. C. 397, 17 S. E. 835, 20 L. R. A. 720, but see Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692.

The Federal courts usually follow the decisions of the state courts construing such provisions. See Cass County v. Johnston, 95 U. S. 360; Cass County v. Jordan, 95 U. S. 373.

[443] St. Joseph Tp. v. Rogers, 83 U. S. (16 Wall.) 644; Cass County v. Johnston, 95 U. S. 360, overruling Harshman v. Bates County, 92 U. S. 569. So far as it declares the law to be unconstitutional, the court here said that a condition requiring the consent of a prescribed proportion of the legal voters was satisfied by a majority of those voting, upon the principle that all qualified voters who absented themselves from an election held on public notice duly given are presumed to assent to the expressed will of the majority of those voting unless the law providing for the election otherwise expressly declares.

Carroll County v. Smith, 111 U. S. 556, disapproving Hawkins v. Carroll County Sup'rs, 50 Miss. 735; Cronly v. City of Tucson (Ariz.) 56 Pac. 876; People v. Town of Berkeley, 102 Cal. 298, 23 L. R. A. 838; People v. Garner, 47 Ill. 246; People v. Winant, 48 Ill. 263; City of South Bend v. Lewis, 138 Ind. 512; Brown v. Tinsley, 14 Ky. L. R. 745, 21 S. W. 535; Slack v. Maysville & L. R. Co., 52 Ky. (13 B. Mon.) 1; Stebbins v. Judge of Superior Ct., 108 Mich. 693; Taylor v. Taylor, 10 Minn. 107 (Gil. 81); Everett v. Smith, 22 Minn. 53; State v. Linn County Ct., 44 Mo. 504; Ranney v. Baeder, 50 Mo. 600; State v. Benton, 29 Neb.

§ 195. Negotiable securities; delivery.

Delivery to purchasers by the proper officials, and when duly authorized, of negotiable bonds issued by public corporations, is essential to their validity.[444] So long as the bonds remain un-

460, 45 N. W. 794; Bryan v. City of Lincoln, 50 Neb. 620, 35 L. R. A. 752; State v. Ruhe, 24 Nev. 251, 52 Pac. 274; City of Ashland v. Culbertson, 19 Ky. L. R. 1812, 44 S. W. 441; Day v. City of Austin (Tex. Civ. App.) 22 S. W. 757.

[444] Lewis v. Barbour County Com'rs, 105 U. S. 739. The certificate of delivery to the proper official is conclusive as to such fact.

Young v. Clarendon Tp., 132 U. S. 340. Where bonds are never indorsed or delivered by the treasurer they never become operative.

Bergen County Freeholders v. Merchants' Exch. Nat. Bank, 21 Blatchf. 13, 12 Fed. 743; State v. Suwannee County Com'rs, 21 Fla. 1; Lake County Com'rs v. Linn, 29 Colo. 446, 68 Pac. 839. The exchange of invalid warrants for bonds duly authorized does not invalidate such bonds in the hands of bona fide purchasers.

Thomas v. Morgan County, 39 Ill. 496; Town of Prairie v. Lloyd, 97 Ill. 180. Where a town has ample authority for issuing its bonds to a certain railroad company as a donation or subscription, and the bonds are executed in proper form and made payable to the proper company, but are delivered to the secretary of a new company and there is nothing pertaining to them, or which could have been ascertained from the record, indicating their delivery to one not entitled to receive them, the bonds cannot be held invalid by reason of such alleged improper delivery after they have passed into the hands of innocent holders.

Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; Portsmouth Sav. Bank v. Village of Ashley, 91 Mich. 670. A resolution of the village council authorizing the president and clerk to sign waterworks bonds confers no authority upon those officers to issue and dispose of the bonds and if issued and disposed of without such authority they are not binding on the village.

Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Washington County v. David, 2 Neb. Unoff. 649, 89 N. W. 737. "We have no doubt that if there was an entire want of power to issue these bonds the subsequent conduct of the officers of the county towards the bonds so issued could not create an estoppel which would supply their want of original authority. We are inclined to the view that a more liberal rule is indulged in resolving doubts as to the existence of power to issue bonds when the consideration for the bonds has been received by the municipality and the bonds, even though non-negotiable, have passed into the hands of purchasers for value and their validity is not seasonably questioned than would be indulged in if the question of the want of power is challenged before or even immediately after the issue of the bonds."

In Ledwich v. McKim, 53 N. Y. 314, the court in speaking of the implied authority of an agent to

delivered, it has been held repeatedly, equities between parties who may be entitled to receive them and the public corporation can be investigated and determined by the courts which could not be so considered after delivery.[445] In some cases the word "issue" or "issuance" is held to include delivery, and the issue is not regarded complete until delivery is made.[446] Though other

deliver or put in circulation a negotiable instrument, said: "But this authority is not implied from the fact alone, that the paper is in hands other than those of him who is to be bound, but from that fact joined with this other fact, that it has been by him intrusted to those hands for the purpose and with the intent that it shall go into use and circulation."

Prairie School Tp. v. Haseleu, 3 N. D. 328, 55 N. W. 938; City of Jefferson v. Marshall Nat. Bank, 18 Tex. Civ. App. 539; Jones v City of Seattle, 19 Wash. 669; Germania Sav. Bank v. Village of Suspension Bridge, 73 Hun (N. Y.) 590. A municipality is not liable on bonds stolen and put on the market before they were delivered by the municipal corporation, even in the hands of a bona fide holder. See, however, Cooke v. United States, 12 Blatchf. 49, Fed. Cas. No. 3,178, where the treasurer of a city who had negotiable bonds lawfully in his hands, embezzled the bonds and coupons and absconded with the proceeds, the city was held liable to the bona fide holder. Copper v. Jersey City, 44 N. J. Law, 634.

[445] Alessandro Irr. Dist. v. Savings & Trust Co., 88 Fed. 928. Where corporate bonds recite their issue under a valid statute in pursuance of its provisions and nothing upon their face indicates their invalidity a defendant to a bill, seeking their sale in part satisfaction of certain liens, may by cross bill show that they are in reality void and thus prevent the court from decreeing a sale, whereby they may pass for value to innocent purchasers.

D'Esterre v. City of New York, 104 Fed. 605. "If the power exists in the municipality to issue negotiable bonds the bona fide holder is protected against irregularities on the part of its agents in negotiating them with the public. The complainant, as well as the original purchasers, was bound to know that the supervisor had no authority to sell the bonds on credit; but he was not bound to know that the supervisor had made such a sale and when he found that they had been negotiated with the public and delivered he was entitled to assume in the absence of notice to the contrary that the supervisor had negotiated them regularly and legitimately." Citing Mercer County v. Hacket, 68 U. S. (1 Wall.) 83; Town of Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355; and Stewart v. Lansing, 104 U. S. 505; McCurdy v. School Dist. No. 1, 127 Mich. 210, 86 N. W. 803; Schmid v. Village of Frankfort, 131 Mich. 197, 91 N. W. 131; People v. Walter, 68 N. Y. 403; Satterlee v. Strider, 31 W. Va. 781.

[446] Corning v. Meade County Com'rs, 102 Fed. 57. "The word 'issued' ordinarily means 'emitted' or 'sent forth' and in the absence of other definition, that must be taken to be the sense in which it was used

authorities hold to the contrary and still others hold that the term "issue" applies only to delivery.[447] It is not necessary that the formal issue, namely, the mechanical making of the bonds or their delivery, should be done at the precise time authorized by law; a substantial variance from this date will not invalidate them.[448] If certain conditions are required to be fulfilled or performed by those who are entitled to the bonds, the delivery can be delayed until such conditions or obligations are performed and this delay, unless otherwise provided by law, does not render void such bonds upon the performance of the conditions; then deliv-

in the legislation of Kansas." And the court further say: "Any other construction would have rendered the act impracticable and useless, because it was only in reliance upon a favorable vote already cast, and upon a subscription actually made that railroad companies could be induced to build their roads into many of the counties of Western Kansas. No reason occurs to us why the word 'issued' in the former limitation should be given a meaning so different, so unique and so broad as to make it cover the presentation of the petition and call for the election, while in the latter it retains its ordinary significance, moreover, if the meaning of this word was ambiguous, the practical construction given to it and to the proviso in which it occurs by the officers of the state and county and the purchasers of the bonds while they were acting and contracting under it is entitled to great consideration and ought not to be modified or avoided to the destruction of rights resting upon it, unless that construction was clearly and palpably erroneous."

[447] Perkins County v. Graff, 114 Fed. 441. The verb "issue" means to emit or send forth and it does not embrace the preliminary acts of signing and dating but is confined to the delivery of bonds.

Moller v. City of Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116. City bonds legally executed, certified by the attorney general and registered by the comptroller, though not yet sold are issued.

[448] In Chickaming v. Carpenter, 106 U. S. 663, the court said: "We see nothing in the statutes which takes away from the township authorities the right to execute and deliver the bonds if for any reason it is not done within the time named. The word 'shall' as used in the statute undoubtedly gives the township officers the whole of sixty days to get the bonds out, but it certainly does not imply that if they fail to do it voluntarily within the time they cannot be compelled to do so afterwards. And if they can be compelled to do so, it necessarily follows that they should do it voluntarily." School Dist. No. 40 v. Cushing, 8 Kan. App. 728, 54 Pac. 924; State v. Lake City, 25 Minn. 404; Woodbridge v. City of Duluth, 57 Minn. 256; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Moller v. City of Galveston, 23 Tex. Civ. App. 693, 57 S. W. 1116. Municipal bonds issued more than

ery should be made and can be demanded from the corporate officials.[449]

§ 196. Necessity for registration.

As one of the required formalities that negotiable bonds when issued may become valid and enforceable obligations outstanding against the public corporations issuing them, there may be provisions, either in the general statutes or in the special act granting authority, requiring their registration in some designated office and by some designated officer.[450] If bonds contain re-

two years after passage of ordinance providing for their payment held valid.

[449] County of Henry v. Nicolay, 95 U. S. 619. "But under the decisions of this court the purchasers of the bonds were not bound to know whether or not the proceedings of the company were regular. The charter of the Tebo and Neosho Company contained the power to construct the branch and gave the county court power to subscribe stock for it; and the Act of 1868 authorized such branch and stock to be an independent interest and the bonds on their face simply showed that they were made to the parent company, 'to the use and in the name of the Clinton and Memphis Branch,' to 'aid in building said branch.' The purchaser therefore was appraised by the law that power existed in the county court to issue such bonds, without any election of the people and there was nothing on their face to show that they were not regularly issued. It was not incumbent on him to inquire whether the railroad company had pursued all the regular steps necessary to entitle it to receive the bonds. Its agents, that is, the agents of the branch road, had them for sale and he had a right to presume that they were lawfully entitled to them."

Perkins County v. Graff, 114 Fed. 441; Thomas v. County of Morgan, 59 Ill. 479; Town of Eagle v. Kohn, 84 Ill. 292. It is not essential to the validity of the subscription or bonds issued thereunder that the conditions annexed shall have first been performed. If performed afterwards the bonds will be valid.

Gardner v. Haney, 86 Ind. 17. Bonds issued to build a schoolhouse are not necessarily void because the schoolhouse was not constructed within the corporation limits.

[450] Rock Creek Tp. v. Strong, 96 U. S. 271; Anthony v. Jasper County, 101 U. S. 693; Coler v. City of Cleburne, 131 U. S. 162; Douglass v. Lincoln County, 2 McCrary, 449, 5 Fed. 775. Municipal bonds are not duly "issued" under the laws of Missouri unless the same have been duly registered in the office of the state auditor.

Prickett v. City of Marceline, 65 Fed. 469; D'Esterre v. City of Brooklyn, 90 Fed. 586; Wood v. City of Louisiana, 5 Dill. 122, Fed. Cas. No. 17,948; First Nat. Bank of North Bennington v. Town of Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,306.

citals to the effect that they have been duly registered, if they contain such statement or if a certificate of registration is en-

Validity of bonds not affected by the omission to register them in the town clerk's office. The provision being held directory merely as it did not provide that the bonds should not be binding until registered.

St. Louis County Com'rs v. Nettleton, 22 Minn. 356. The failure to register railroad aid bonds with the auditor of the city as required by law does not prevent county officials from providing for the payment of interest.

State v. Babcock, 19 Neb. 223. In this case the court said: "There is a plain provision of the constitution applicable to bonds issued as donations for railroads and other works of internal improvement and neither the city nor the defendants can disregard it with impunity. Who is to blame for the failure to have such bonds properly certified does not appear, but until so certified it was the duty of the defendants to refuse to certify refunding bonds to take their place." The constitutions of Nebraska, North Dakota and Wyoming contain provisions to the effect that bonds shall be invalid unless certified by a designated officer.

State v. Roggen, 22 Neb. 118; Benwell v. City of Newark, 55 N. J. Eq. 260; Whann v. Coler, 159 N. Y. 535; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499; Ter. v. Hopkins, 9 Okl. 133. The officer required by law to register bonds has no power to pass upon or determine their validity.

Walker v. State, 12 S. C. 200; Lackawana Iron & Coal Co. v. Town of Little Wolf, 38 Wis. 152. The court said: "The act fails to provide who shall obtain such certificate, when it shall be made or what shall be its effect. It does not provide that the certificate shall be annexed to the bonds before they are issued or that without it the bonds shall be invalid. It contains no language which raises a presumption that the legislature intended that the annexing of such certificate to the bonds should precede the delivery thereof or be essential to their validity. The certificate affords the town no protection whatever and it seems to be of no consequence to the town whether it is annexed to the bonds or not. Under these circumstances it seems very clear to our minds that the provision for annexing the certificate of the county clerk was enacted for the purpose of facilitating the negotiation of the bonds by stamping upon them additional evidence that they were executed by the proper town officers; and that the legislature did not intend that the certificates should be essential to a valid execution and issue of the bonds."

[451] Converse v. City of Ft. Scott, 92 U. S. 503; Rock Creek Tp. v. Strong, 96 U. S. 271. A municipal bond on the back of which is indorsed the certificate of the auditor of the state that it has been duly registered in his office according to law is not invalid because he failed to make in his office an entry of his action.

In German Sav. Bank v. Franklin County, 128 U. S. 526-540, Mr. Justice Blatchford said: "The registration of the bonds by the state auditor has nothing to do with any of the terms or conditions on which

dorsed upon them, this will be held conclusive of the facts recited in such statement or endorsement irrespective of the true facts.[451] Some authorities hold that a registration does not deprive bonds of their negotiable character or quality.[452]

the stock was voted and subscribed, neither the registration nor the certificate of registry covers or certifies any fact as to compliance with the conditions prescribed in the vote on which alone the bonds were to be issued."

Comanche County v. Lewis, 133 U. S. 198. The certificate of the auditor of the state thereon that the bonds were regularly issued, that the signatures were genuine and that the bond had been duly registered, is conclusive upon the municipality when the officer so certifying is charged with that duty.

City of Cairo v. Zane, 149 U. S. 122; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363. The decision of the officer evidenced by registering and certifying the bonds that conditions had been complied with was final, as against the district, in favor of a bona fide purchaser without notice.

Priestly v. Watkins, 62 Miss. 798. "Where an act of the legislature requires that the holders of all outstanding bonds of a specified county shall present the same for registration by the clerk of the board of supervisors within a prescribed time and shall simultaneously file an affidavit—'stating the number of each bond, the date of its issuance, the amount thereof and the names of the different persons through whom the holder derives his title' and provides that, 'unless such affidavit is filed the said clerk shall not register the same, and payment of all interest or principal thereof shall be stopped,' such act is, as to valid bonds of the county, payable to bearer and not due, unconstitutional and void because it violates in two particulars, that provision in the state and Federal constitutions, respectively which protects from impairment the obligations of contracts, viz., First, in creating a statute of limitations against bonds not due and upon which no cause of action has arisen, and second, in requiring an affidavit showing the holder's chain of title to bonds payable to bearer, thus engrafting conditions and imposing burdens upon the contract not contained in it nor contemplated by the parties to it." In the case of Hardeman County v. Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536, the exact phraseology of the registration entry immaterial since statute does not prescribe what the registration shall contain.

[452] D'Esterre v. City of Brooklyn, 90 Fed. 586; Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58. Municipal coupon bonds with the corporate seal affixed, registered in the city clerk's office, as required by statute and delivered to the purchaser with the space for the name of the payee left blank, are negotiable. The court said: "The provision for registration appears to be designed to exhibit the regularity and the authority of the issue and not to prescribe the form of the obligation." But see the following cases and authorities to the contrary.

In Cronin v. Patrick County, 4

§ 197. Official signatures and seals.

The validity of negotiable bonds depends, originally, upon the authority to issue and the manner of its execution as granted to public corporations by legislative or constitutional authority. Assuming their legality in this respect, it is still necessary to their validity that they be signed by such officers or persons as are legally capable of binding the corporation. These may be either those especially designated by the special authority for the issue of bonds or general officials, the scope of whose authority and power would include the performance of such an act.[452] The

Hughes, 524-530, 89 Fed. 79, where the court say: "There are two classes of public bonds known to the stock markets essentially distinct in character and intended to be so. They are negotiable bonds and registered bonds. Those of the first class, the negotiable bonds, are made payable to some payee or his order; in which case they are transferable by indorsement and delivery; or, they are made payable to a payee or bearer, or simply to bearer in which case they are transferable by mere delivery. The other class, the registered bonds, are made payable to an obligee or his assigns and they are only transferable by regular assignment on books of the obligor."

In Savannah & M. R. Co. v. Lancaster, 62 Ala. 555-563, the court said: "The provision that the bonds might be 'registered and made payable by transfer only on the books of the company,' did not itself make them non-negotiable by mere manual transfer; it was only a promise which entitled those who should become holders of them at any time to have them changed from that character and converted into registered bonds." Simonton, Mun. Bonds, § 115.

[452] Town of Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355; Lynde v. County of Winnebago, 83 U. S. (16 Wall.) 6. In the absence of the county judge, the county clerk acting in such capacity may do certain ministerial acts such as executing and issuing bonds, etc.

Town of Aroma v. Auditor of State, 15 Fed. 843. Bonds signed by supervisors but not by county clerk sufficiently executed. Swan v. Arkansas City, 61 Fed. 478; Thayer v. Montgomery County, 3 Dill. 389, Fed. Cas. No. 13,870; Phelps v. Town of Lewiston, 15 Blatchf. 132, Fed. Cas. No. 11,076. Commissioners having power to issue coupons, a statement in the bonds that they have caused one of their number to sign the coupons is equivalent to a signing of the coupons by all.

First Nat. Bank of North Bennington v. Town of Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,806. Where a statute requires that bonds shall be signed by the selectmen, if signed by two they are valid.

Currie v. Town of Lewiston, 21 Blatchf. 236, 15 Fed. 377. The term "officers of a town" includes the supervisors, and bonds having been executed by four of the officers so named, though the supervisor was not one of them, are valid.

Dent v. Cook, 45 Ga. 323; Nian-

courts require, usually, only a substantial compliance with provisions of the law relating to ministerial or mechanical acts in connection with the issue of bonds. From this statement it must not be inferred, however, that gross irregularities in their formal execution can be overlooked.[454] The rule of law controlling this

tic Sav. Bank v. Town of Douglas, 5 Ill. App. 579; Houston v. People, 55 Ill. 398. An official required by law to countersign bonds cannot refuse to do so because of matters affecting, in his opinion, the legality of the steps required by law to be taken before the bonds could be properly issued.

Melvin v. Lisenby, 72 Ill. 63. The omission of the treasurer to countersign bonds held a mere defect in their execution.

Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291. Bonds recognized as valid by the town and the legislature were signed by the mayor and attested by the clerk as required by the enabling act, but the coupons though signed by the mayor were not attested by the clerk. The court held that this fact did not render them invalid.

Bank of Statesville v. Town of Statesville, 84 N. C. 169. A statute provided that bonds should be signed by the town magistrate, treasurer and commissioner. It was held that the requirement was directory and the omission of the commissioner to sign did not invalidate them.

Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619. Where legislative act provides that "the powers of a county as a body politic and corporate shall be exercised by a board of county commissioners" the fact that bonds were signed by the county commissioners and the probate judge of the county was not sufficient notice of irregularity in their issue to put a purchaser on inquiry, as the act of the commissioners was the act of the county in its corporate capacity, and the signature of the probate judge was a mere surplusage.

Yesler v. City of Seattle, 1 Wash. St. 308. An act requiring bonds to be signed by the mayor is sufficiently complied with if signed by the person occupying the office at date of negotiation and delivery though he was elected after the day of their date.

When the legislative act is silent in regard to officials who shall execute bonds, it should be done by the usual municipal officers. Walnut Tp. v. Wade, 103 U. S. 683; Kankakee County v. Aetna Life Ins. Co., 106 U. S. 668; Middleton v. Mullica Tp., 112 U. S. 433; Town of Windsor v. Hallett, 97 Ill. 204; Lane v. Inhabitants of Embden, 72 Me. 354.

[454] Bissell v. Spring Valley Tp., 110 U. S. 162. Bonds requiring the signature of the county clerk are incomplete and insufficiently executed without it.

Coler v. City of Cleburne, 131 U. S. 162. Even bona fide holders of municipal bonds must take the risk of the official character of those who execute them. A statute provided that bonds should be signed by the mayor. Mr. Justice Blatchford said: "This clearly means that they shall be signed by the person who is mayor of the city when they are signed, and not by any other person. The

subject, however, is not the strict and technical one, but that which requires a substantial compliance with ordinary rules affecting the making of negotiable instruments by corporate officials,[455] and the acts of de facto officers as to third persons are binding upon the public corporation.[456] It must also be remem-

legislature having declared who shall sign them, it was not open to the city council to provide that they should be signed by some other person."

Lehman v. City of San Diego, 83 Fed. 669; State v. Babcock, 19 Neb. 223. The provision of the Nebraska Constitution requiring the certificate of the state auditor and secretary on municipal internal improvement bonds is regarded as imperative and cannot be disregarded. Peck v. City of Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653.

In the signing of coupons it is not signed in the most informal or mechanical way. Lithographed signatities required in the execution of bonds should be followed. The names of the proper officials may be necessary that even the same formaltures will be good. See Phelps v. Town of Lewiston, 15 Blatchf. 131, Fed. Cas. No. 11,076; Blair v. Cuming County, 111 U. S. 363; Pennington v. Baehr, 48 Cal. 565; Town of Lexington v. Union Nat. Bank, 75 Miss. 1; Davis v. Shields, 26 Wend. (N. Y.) 341.

[455] Curtis v. County of Butler, 24 How. (U. S.) 435. The county commissioners consisted of a board of three; two of whom were authorized to transact business; bonds signed by two out of three held binding upon the county.

German Ins. Co. v. City of Manning, 78 Fed. 900. A municipality is estopped to deny the authority of city officials who have in fact signed municipal bonds.

First Nat. Bank of North Bennington v. Town of Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,806; Clarke v. Hancock County Sup'rs, 27 Ill. 305; Lane v. Inhabitants of Embden, 72 Me. 354. In construing town records evidentiary of the action of the town, the words used are to receive their ordinary and popular signification, rather than their technical meaning.

Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; People v. White, 54 Barb. (N. Y.) 622. Officers may be compelled by mandamus to execute bonds duly authorized. People v. Mead, 24 N. Y. 114; Alexander v. McDowell County Com'rs, 70 N. C. 208; Bank of Statesville v. Town of Statesville, 84 N. C. 169; Edward C. Jones Co. v. Town of Guttenberg, 66 N. J. Law, 659, 51 Atl. 274; Carriger v. Town of Morristown, 69 Tenn. (1 Lea) 243; State v. Common Council of Madison, 7 Wis. 688. Where the common council had passed a valid ordinance for the issuing of city bonds, filing and dating them are ministerial acts and a mistake in the date does not render them invalid.

[456] Anthony v. Jasper County, 101 U. S. 693; Ralls County v. Douglass, 105 U. S. 728. County bonds issued by de facto county officials cannot be impeached by showing that the officers signing were not such de jure.

bered that the authority of an official of a public corporation is special and limited, differing in this respect in its legal character from a like official of a private corporation.[457]

The failure to fix the official seal of the public corporation to the bonds does not necessarily invalidate them,[457a] neither does the

Waite v. City of Santa Cruz, 89 Fed. 619. Bonds signed by de facto municipal officers are as binding as though they had been officers de jure. See, also, Waite v. City of Santa Cruz, 184 U. S. 302, reversing 98 Fed. 387.

The same principle applies to de facto councils or other legislative bodies of municipal corporations. National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649. But there can be no officer de facto where no legal office exists.

Norton v. Shelby County, 118 U. S. 426; Gage v. McCord (Ariz.) 51 Pac. 977. Bonds properly executed by an official during his term of office may be sold by his successor. Town of Decorah v. Bullis, 25 Iowa, 12.

[457] The Floyd Acceptances, 74 U. S. (7 Wall.) 666; Marsh v. Fulton County, 77 U. S. (10 Wall.) 676; Peirce v. United States, 1 Ct. Cl. 270. The secretary of war has no general or unlimited power to bind the government by indorsing or accepting commercial paper. In Anthony v. Jasper County, 101 U. S. 693, Chief Justice Waite said: "The public can act only through its authorized agents and it is not bound until all who are to participate in what is to be done have performed their respective duties. The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted. * * * Purchasers of municipal securities must always take the risk of the genuineness of the official signatures of those who execute the paper they buy."

City of Louisville v. Bank of Louisville, 174 U. S. 439, 19 Sup. Ct. 753. In Hull v. Marshall County, 12 Iowa, 142-149, the court said: "A county judge is an officer of limited powers. His authority is defined by statute, which every one is bound to know and comprehend. No one need be deceived or injured by such a rule; if the act is legal and within the power of the county judge, it is easy to allege and show it."

Smith v. Town of Epping, 69 N. H. 558, 45 Atl. 415; McDonald v. City of New York, 68 N. Y. 23-27. "It is fundamental that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority."

[457a] San Antonio v. Mehaffy, 96 U. S. 312; Draper v. Springport, 104 U. S. 501. Mr. Justice Bradley said: "The technical form of the obligation was a matter of form rather than that of substance. The issue of the bonds under seal, as contradistinguished from bonds or obligations without seal, was merely a directory requirement." See, also, Wiley v. Board of Education, 11 Minn. 371 (Gil. 268); Gould v. Town of Venice, 29 Barb. 442; People v. Mead, 24 N. Y. 114.

failure of officials whose signatures are necessary to affix their own seals where required by law, after their signature.[458] The date of the signing and sealing, as determined by inspection of the face of a bond is conclusive,[459] and evidence showing or tending to show that signatures and seals were affixed on a date subsequent to that required by law or that which is shown by the face of the bonds is inadmissible to establish their invalidity. The use of engraved or lithographic signatures does not invalidate bonds where the use of such signatures has been formally adopted by the officials signing.[460] An official signature written by one duly authorized, though not such an official, will be held sufficient.[461]

Sealing. It is not necessary, unless the statute expressly requires it, to affix the corporate seal, and this is particularly true where a corporation has no official seal.[462] The authorities are

Bernards v. Stebbins, 109 U. S. 341. So held of a seal adopted temporarily. Solon v. Ulmsberg Savings Bank, 35 Hun (N. Y.) 1; Morton v. Carlin, 51 Neb. 202; City of San Antonio v. Gould, 24 Tex. 42. Seal necessary to validity. Thornburgh v. City of Tyler (Tex.) 43 S. W. 1054. But see Avery v. Springport, 14 Blatchf. 272, holding that coupon bonds not sealed, but showing by their wording that sealing was intended, are void.

[458] Armfield v. Town of Solon, 64 Hun, 633, 19 N. Y. Supp. 44. Affixing of wafers by a stranger opposite names of officers signing the bonds held not to invalidate them. Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122.

[459] Town of Weyauwega v. Ayling, 99 U. S. 112; Anthony v. Jasper County, 101 U. S. 693; Village of Kent v. Dana (C. C. A.) 100 Fed. 56; Inhabitants of Stoughton v. Paul, 173 Mass. 148, 53 N. E. 272; School Dist. No. 42 v. First Nat. Bank of Xenia, 19 Neb. 89; State v. Moore, 46 Neb. 590. The antedating of bonds eight days held not to affect their validity. Brown v. Bon Homme County, 1 S. D. 216.

[460] McKee v. Vernon County, 3 Dill. 210, Fed. Cas. No. 8,851; Pennington v. Baehr, 48 Cal. 565; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291.

[461] Montgomery v. St. Mary's Tp., 43 Fed. 362; Chadbourne v. St. Mary's Tp., 43 Fed. 362; Ring v. Johnson County, 6 Iowa, 265.

[462] City of San Antonio v. Mehaffy, 96 U. S. 312. Draper v. Town of Springport, 104 U. S. 501, where Mr. Justice Bradley said: "The technical form of the obligations was a matter of form rather than of substance. The issue of bonds under seal, as contradistinguished from bonds or obligations without seal, was merely a directory requirement." Bernards Tp. v. Stebbins, 109 U. S. 341. So held of a seal adopted temporarily. Jefferson County v. Lewis, 20 Fla. 980; Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42; Wiley v. Board of Education of Minneapolis, 11 Minn. 371 (Gil. 268); Gould

divided upon the question of the validity of bonds issued and in the hands of bona fide purchasers without a corporate seal affixed where the statute requires this to be done.[463]

§ 198. Form.

The necessary authority for an issue of negotiable bonds by a public corporation may contain provisions prescribing their formal wording. As stated in the preceding section, their validity does not, except in a slight degree, depend upon the mere mechanical process involved in their making, but upon the authority derived from the legislature and exercised by the bond issuing district. Bonds after their issue pass, as a rule, immediately into the hands of bona fide purchasers. If in form they comply with the requirements of general rules of law fixing the form of valid instruments of such a character, it will be considered sufficient.[464] Where statutory authority does not require or prescribe a certain form, general rules of law will apply and bonds that may be defective in form when compared with others issued by the same corporation of a prescribed form will not be

v. Town of Venice, 29 Barb. (N. Y.) 442; People v. Mead, 24 N. Y. 114; Town of Solon v. Williamsburgh Sav. Bank, 35 Hun (N. Y.) 1; Morton v. Carlin, 51 Neb. 202. But see Avery v. Town of Springport, 14 Blatchf. 272, Fed. Cas. No. 676, as holding that coupon bonds not sealed, but by their wording showing that sealing was intended, were void.

[463] Phelps v. Town of Yates, 16 Blatchf. 192, Fed. Cas. No. 11,082; Humboldt Tp. v. Long, 92 U. S. 642; Draper v. Town of Springport, 104 U. S. 501; Bernards Tp. v. Stebbins, 109 U. S. 341; Rondot v. Rogers Tp., 99 Fed. 202; Augusta Bank v. City of Augusta, 49 Me. 507; Lane v. Inhabitants of Embden, 72 Me. 354; Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122; Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439; City of San Antonio v. Gould, 34 Tex. 49.

[464] Anthony v. Jasper County, 101 U. S. 693; Atchison Board of Education v. De Kay, 148 U. S. 591; D'Esterre v. City of New York (C. C. A.) 104 Fed. 605. General statutory provisions fixing the form of bonds are superseded by a special act prescribing this.

Merced County v. California University, 66 Cal. 25. But one entitled to receive bonds cannot be compelled to take them when not in the form prescribed by statute, even though valid. Wilson v. City of Shreveport, 29 La. Ann. 673. A negotiable form does not impart validity in the absence of power to issue.

Barrett v. County Ct. of Schuyler, 44 Mo. 197. Bonds not containing the words "value received, negotia-

held invalid because of such deficiencies.[465] To protect bona fide holders, the courts are inclined to extend this principle further and to hold that bonds, where the form is prescribed by the legislative authority for their issuance, although not complying technically with the form as thus required but yet which in their substantial features follow the law, will not be considered invalid on account of such variation.[466]

ble and payable without defalcation," as required by the statutes, considered commercial and negotiable paper. Catron v. Lafayette County, 106 Mo. 659.

[465] Wood v. Allegheny County, 3 Wall. Jr. 267, Fed. Cas. No. 17,937.

[466] City of New Orleans v. Clark, 95 U. S. 644. The ordinance of a city authorizing the issue of bonds provided the company should "guarantee the said bonds and assume the payment of the principal thereof at maturity," the indorsement on the bonds by the president of the company, guaranteeing "the payment of the principal and interest" was held a sufficient compliance.

Calhoun County Sup'rs v. Galbraith, 99 U. S. 214. Bonds issued payable to the railroad company or bearer was not held a sufficient variance to invalidate them where the act provided that they should be made payable to the president or the directors of the company, their successors or assigns. In Board of Education of Atchison v. De Kay, 148 U. S. 591, the validity of bonds issued under general statute, Kansas 1868, held not to be affected where in reciting the title of that act the word "organize" is substituted for the word "incorporate." D'Esterre v. City of Brooklyn, 90 Fed. 586; Roberts & Co. v. City of Paducah, 95 Fed. 62; Village of Kent v. Dana (C. C. A.) 100 Fed. 56; D'Esterre v. City of New York, 104 Fed. 605. An erroneous citation of statutory authority is immaterial; statutory provisions serving no purpose in safeguarding a municipality held directory only and a departure therefrom is not a defect of substance which renders bonds invalid.

Murphy v. City of San Luis Obispo (Cal.) 48 Pac. 974. The statutory authority gave power to issue bonds payable "in gold coin or lawful money of the United States." The bonds were issued payable in "gold coin of the United States." Held a sufficient variance to invalidate them. This case was reversed, however, in Murphy v. City of San Luis Obispo, 119 Cal. 624, 51 Pac. 1085, where it was held that under such conditions the trustees of the city could, at their option, make the bonds payable in either gold coin of the United States or lawful money of the United States.

Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Woodward v. Reynolds, 58 Conn. 486; Middleton v. City of St. Augustine, 42 Fla. 287, 29 So. 421. Bonds and coupons providing for their payment at a place different from the one specified in legislative authority is a material variance and departure from such authority.

School Dist. No. 40 v. Cushing, 8 Kan. App. 728, 54 Pac. 924; State v. School Dist. No. 3, 34 Kan. 237; Oswego Tp. v. Anderson, 44 Kan.

Times of issue and maturity. The rule of law that a substantial compliance with the provisions of legal authority also applies to the dating of the bond and the term of its maturity so long as the life of the bond comes substantially within the law merely because it may have been executed at a different time from that contemplated by legal authority, does not make it invalid.[467]

214; Wiley v. Board of Education of Minneapolis, 11 Minn. 371 (Gil. 268); Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291. Refunding bonds issued in different denominations from the old indebtedness not invalid.

Bogart v. Lamotte Tp., 79 Mich. 294; State v. Roggen, 22 Neb. 118, 34 N. W. 108. The absence of a required certificate by certain officials invalidates bonds. Starin v. Town of Genoa, 23 N. Y. 439; Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. Misrecital of authority held immaterial.

Barker v. Town of Oswegatchie, 10 N. Y. Supp. 834; Oswego City Sav. Bank v. Board of Education of Union Free School, 70 App. Div. 538, 75 N. Y. Supp. 417. Where printed bonds are issued to replace original typewritten ones surrendered at the time of such substitution, the corporation is liable on the substituted bonds. State v. Village of Perrysburg, 14 Ohio St. 472. Bonds issued in the name of "The town of Perrysburg" instead of "the incorporated village of Perrysburg" held valid.

State v. Anderson County, 67 Tenn. (8 Baxt.) 249; Shelby County v. Jarnagin (Tenn.) 16 S. W. 1040; Brownson v. Smith, 93 Tex. 614. School district bonds not required to be certified by the Atty. General under Rev. St. art. 918d. City of Memphis v. Memphis Sav. Bank, 99 Tenn. 104.

[467] Gilchrist v. City of Little Rock, 1 Dill. 261, Fed. Cas. No. 5,421. Bonds made payable at an earlier date than directed by the city ordinance relating to the mode of executing them are not void in the hands of bona fide purchasers. City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.) 88 Fed. 449; Syracuse Tp. v. Rollins, 104 Fed. 958; Prettyman v. Tazewell County Sup'rs, 19 Ill. 406; Woodruff v. Town of Okolona, 57 Miss. 806. A bond payable at a longer period from the date of issuance than authorized by law is void although containing a recital that it is issued in pursuance of law.

McMullen v. Ingham Circuit Judge, 102 Mich. 608, 61 N. W. 260. When statute provides that payment of loans obtained by boards of county supervisors "shall in all cases be made within fifteen years from date of such loan," an issue of county bonds is limited to fifteen years. Syracuse Sav. Bank v. Town of Seneca Falls, 21 Hun (N. Y.) 304; Brownell v. Town of Greenwich, 114 N. Y. 518, 4 L. R. A. 685. Holder not bound to examine entire issue to see that no more bonds come due in a single year than the statute permits.

Hoag v. Town of Greenwich, 133 N. Y. 152. Where municipal bonds

Rate of interest. The rate of interest, however, as authorized, it is held, is not a directory provision, but mandatory, and a bond issued bearing interest at a different rate from that authorized, may be held invalid even in the hands of a bona fide holder or at least to the extent of such excess of interest rate.[468]

§ 189. Recitals of authority.

The recitals in a bond as to statutory authority need not repeat the precise phraseology employed in such authority; the

are void because payable at a different time than that authorized by law, but the bonds were issued and purchased in good faith and the municipality had a legal right to issue such bonds, except as to time of payment, the law will imply a promise by the municipality to repay to the purchaser the amount paid for such bonds at the time and according to the terms which should have been inserted in the bonds.

Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899; First Nat. Bank of St. Johnsbury v. Town of Concord, 50 Vt. 257. The selectmen and treasurer whose duty it was to issue the bonds were the ones to decide when to perform that duty, and defendant knowing that they were being issued but taking no steps to prevent it could not thereafter raise the objection that the bonds were prematurely issued, against a bona fide holder.

Yesler v. City of Seattle, 1 Wash. St. 308; State v. Common Council of Madison, 7 Wis. 688. Where the common council has passed a valid ordinance for the issuing of city bonds, filling up and dating them is a ministerial act and a mistake in the date does not render them invalid.

[468] Lewis v. Clarendon, 5 Dill. 329, Fed. Cas. No. 8,320. A city was authorized to issue bonds "bearing interest at the rate of 6% per annum"; they were issued bearing interest at the rate of 10%—held valid to the extent of 6% and principal. E. M. Derby & Co. v. City of Modesto, 104 Cal. 515. Where statutory limit as to rate of interest is not exceeded, the bonds are not invalid because they provide for semi-annual payment of interest.

City of Quincy v. Warfield, 25 Ill. 317. Bonds authorized to bear interest at the rate of 8% when issued at the rate of 12% will be valid to the extent of 8% only. Sherlock v. Village of Winnetka, 68 Ill. 530. Bonds sold disregarding statutory authority as to rate of interest, held valid but the authorities considered personally liable. Beattie v. Andrew County, 56 Mo. 42. Where no rate is specified in the authority, any rate not prohibited by law may be fixed. Parkinson v. City of Parker, 85 Pa. 313. A bond calling for interest in excess of the legal rate, void only as to such excess.

Nelson v. Haywood County, 87 Tenn. 781, 11 S. W. 885, 4 L. R. A. 648. The fact that the act authorized the bonds to be issued bearing interest at the legal rate where they were payable in another state where

substance is the desired end; the intent or meaning of the statute is to be followed—not its technicalities unless mandatory in their character.[469] Bonds containing provisions or requirements void under the laws of the state do not become invalidated by reason of such provisions if otherwise legal.[470]

§ 200. The ratification of void securities.

In a preceding section,[471] the question of ratification of a void issue of negotiable bonds has been considered to a certain extent. In this section additional authorities and principles are given bearing upon the subject. The general rule of law applying to the ratification of an issue of bonds void for the want of authority, seems to be that to the extent the legislature could, constitutionally, authorize the bonds of public corporations, bonds issued without sufficient statutory authority may be cured or ratified by subsequent legislation and this ratification by the legislature, it has been held, is, in all respects, equal to original authority and cures all defects in power to issue and all irregularities in the execution of the bonds.[472] A ratification also,

the legal rate is greater than in the state where they were issued does not render them invalid.

[469] Johnson County Com'rs v. January, 94 U. S. 202. The fact that the act under which the bonds were issued was erroneously referred to in their recitals does not render them void. Atchison Board of Education v. De Kay, 148 U. S. 591. The use of the word "organize" does not affect the validity of the bonds where the authority required the word "incorporate." D'Esterre v. City of New York, 104 Fed. 605.

[470] Town of Enfield v. Jordan, 119 U. S. 680.

[471] See § 171.

[472] Bissell v. City of Jeffersonville, 24 How. (U. S.) 287. "Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence and the state legislatures have often had occasion to pass laws to obviate such difficulties. Such laws when they do not impair any contract or injuriously affect the rights of third persons are generally regarded as unobjectionable and certainly are within the competency of the legislative authority."

Campbell v. City of Kenosha, 72 U. S. (5 Wall.) 194; Beloit v. Morgan, 74 U. S. (7 Wall.) 619; St. Joseph Tp. v. Rogers, 83 U. S. (16 Wall.) 664; Jasper County v. Ballou, 103 U. S. 745; Town of Thompson v. Perrine, 103 U. S. 806; Read v. City of Plattsmouth, 107 U. S. 568; Otoe County v. Baldwin, 111 U. S. 1; Bolles v. Town of Brimfield, 120 U. S. 759; Cooper v. Town of Thompson, 13 Blatchf. 434, Fed. Cas. No. 3,202; Dows v. Town of Elmwood, 34 Fed. 114; Deyo v. Otoe County, 37 Fed. 246; City of Columbus v. Dennison (C. C. A.) 69

it has been held, relates back to the time of issuance of the bonds. It may apply, as already suggested, to informalities or defects in the execution or delivery,[473] or to defects and deficiencies in

Fed. 58; Lehman v. City of San Diego (C. C. A.) 83 Fed. 669, affirming 73 Fed. 105; but to render bonds valid, they must be issued according to the manner provided by the original authority as ratified.

Yavapai County v. McCord (Ariz.) 59 Pac. 99. The act of 1896 having validated railroad aid bonds theretofore issued, no original invalidity in such bonds or the enactment under which they were issued, is available to prevent their being refunded. Town of Duanesburgh v. Jenkins, 57 N. Y. 177.

In Coleman v. Broad River Tp., 50 S. C. 321, the court said: "That act could only legalize and validate the contracts or obligations that were legal; and no contract could be legal that was not constitutional, no act of the old company could be legal or valid which in its incipiency and at its completion was clearly unconstitutional and void; therefore, this act to declare, if that had been its purpose, that such bonds issued in pursuance of it was legal and valid, would be beyond the scope of the legislature itself."

Shell v. Carter County (Tenn. Ch. App.) 42 S. W. 78. An order of a county court authorizing the payment of coupons was not considered here a ratification of the bonds from which the coupons were detached. Cumberland County Sup'rs v. Randolph, 89 Va. 614; Knapp v. Grant, 27 Wis. 147. The fact that a city council was proceeding to levy and assess a tax to pay bonds, and resisted plaintiff's application for an injunction to restrain such tax, was held sufficient evidence of a ratification by the city of the issue of the bonds.

Stated negatively, the rule is that the legislature cannot, "by retrospective act exercise greater power than they could prospectively." See the following cases: Elmwood Tp. v. Marcy, 92 U. S. 289; Katzenberger v. City of Aberdeen, 121 U. S. 172; Quaker City Nat. Bank v. Nolan County, 59 Fed. 660; Marshall v. Silliman, 61 Ill. 218; Cairo & St. L. R. Co. v. City of Sparta, 77 Ill. 505; Barnes v. Town of Lacon, 84 Ill. 461; Gaddis v. Richland County, 92 Ill. 119; Choisser v. People, 140 Ill. 21.

Shawnee County Com'rs v. Carter, 2 Kan. 115. "The act differs from those retrospective laws which are frequently passed supplying defects and curing informalities in the proceedings of officers and tribunals acting within the scope of their authority. The County commissioners were not acting within the scope of their authority in issuing these bonds. They did not conform to the law only in an irregular way but they broke down the barriers which the law had raised in a very regular way, and their acts in the premises were void not for want of any formality or regularity or mistake as to time or otherwise but for want of power under the law." Sykes v. Town of Columbus, 55 Miss. 115; Hasbrouck v. City of Milwaukee, 13 Wis. 37.

[473] Town of Duanesburgh v. Jenkins, 57 N. Y. 177, 191. The court say: "How the consent of a town shall be given is clearly in the dis-

the legal authority to issue,[474] whether such defect of power arises from the fact that there was no legally incorporated organization capable of issuing bonds,[475] or granting the existence of

cretion of the legislature. It has often given it to the majority in number and amount of taxpayers; it may give it to the supervisor, or any other officer, since the whole power is of its creation, and since the consent of all the taxpayers or inhabitants but one is powerless to bind the single dissentient, except upon the theory of the complete and plenary power of the legislature in the premises. In this case a commissioner has been regularly appointed under the statute, by whom bonds were to be issued and stock subscribed for, provided certain consents were obtained and proofs filed according to the requirements of the several acts upon the subject. Consents were obtained and proofs were made and filed which are now, on the one side, claimed to be, and on the other are denied to be, in conformity to the law. The commissioner, meanwhile, executed the bonds, subscribed for stock and delivered the bonds to the company in payment of the subscription; complying with the requirements of the statute in all respects, if the requisite consents had been given and proofs made. The only officer of the town who had any duty in the premises, acted by giving the bonds, and the legislature, seeing the whole matter, released the conditions which it had imposed, and declared his assent binding upon the town, if the bonds had been issued and the road had been built, and the bonds in that case obligatory. As it might have authorized action in this way and on these conditions, by the town, originally, I seen no objections to giving effect to its ratification of the action of the town and holding its consent, thus expressed, effectual."

[474] Steele County v. Erskine (C. C. A.) 98 Fed. 215, affirming judgment in Erskine v. Steele County, 87 Fed. 630; Campbell v. City of Indianapolis, 155 Ind. 186; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Knapp v. Grant, 27 Wis. 147.

[475] Beloit v. Morgan, 74 U. S. (7 Wall.) 619; Comanche County v. Lewis, 133 U. S. 198; Harper County Com'rs v. Rose, 140 U. S. 71; Ashley v. Presque Isle County Sup'rs, 60 Fed. 55; Cornell University v. Village of Maumee, 68 Fed. 418. Bonds duly and lawfully issued by a municipal corporation cannot be rendered invalid in the hands of a bona fide holder by the fact that such corporation, though properly a city, has issued such bonds under the name of a village, having previously been recognized as a village in an act of the legislature changing its name, and having levied and collected taxes, passed ordinances and otherwise acted as such.

New York Life Ins. Co. v. Cuyahoga County Com'rs (C. C. A.) 106 Fed. 123; School Dist. No. 25 v. State, 29 Kan. 57. A corporation de facto authorized to issue bonds. Riley v. Garfield Tp., 54 Kan. 463. Although the original organization of Garfield County was without authority from the constitution containing an area of less than 432 square miles by actual survey, yet as the statute creating the county

a legal corporation that such corporation did not possess the legal power to issue the bonds or to issue them for the precise purpose.[476] Again the defect of power may arise because of a total lack of such authority or because of an issue of bonds in excess of an amount authorized. Curative acts which ratify or attempt to ratify void bonds are not usually held constitutional because in violation of provisions to the effect that special laws shall not be passed where a general law can be made applicable, nor are such acts held in violation of constitutional provisions prohibiting the legislature from passing special laws conferring corporate powers.[477]

Neither do such acts violate a prohibition in the constitution against retroactive laws.[478] Where irregularities in the manner of the exercise of a power exist, a municipal corporation may, upon a full knowledge of all the circumstances in the case, ratify

did not show that its area was less, and was not void upon its face, the county had a de facto organization. The records of such organization appeared regular and valid, state officials proclaimed the organization, and its validity was subsequently recognized by them and the legislature. All of the bonds issued by Garfield County under the provisions of the statute and in regular form while its organization as a county was in existence are valid obligations in the hands of bona fide purchasers.

[476] Utter v. Franklin, 172 U. S. 416; Schneck v. City of Jeffersonville, 152 Ind. 204, 52 N. E. 212.

[477] In Read v. City of Plattsmouth, 107 U. S. 568, coupon bonds were issued without authority of law and the legislature passed an act legalizing them. This was held not to be a violation of that provision in the constitution which provides that "the legislature shall pass no special act conferring corporate powers" as the act merely recognized the existence of an obligation and provided a medium for enforcing payment according to the original intention of the parties. No new corporate powers were thereby conferred. Springfield Safe Deposit & Trust Co. v. City of Attica (C. C. A.) 85 Fed. 387.

[478] In the case of City of New Orleans v. Clark, 95 U. S. 644, Mr. Justice Field said: "A law requiring a municipal corporation to pay a demand which is without legal obligation but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation is not a retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or of any of its subordinate agencies with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals and thus protect vested rights from invasion."

an illegal issue of bonds by the payment of interest,[479] their delivery or other act[480] that will be regarded by the courts as tantamount to a ratification. The doctrine of ratification will only apply, however, in cases where the party ratifying possesses the original power to perform the act ratified. If the bonds are void because of want of authority, the doctrine cannot apply.[481]

§ 201. Negotiable bonds; their validity.

The presumption of law at all times exists in favor of the validity of negotiable bonds, both as to the sufficiency of power and the existence of all conditions and requirements necessary to and attendant upon their formal execution and delivery. This presumption throws upon the party attacking their validity, the burden of proof as to all questions raised.[482] This presumption

[479] Cass County v. Gillett, 100 U. S. 585; Inhabitants of Pompton v. Cooper Union, 101 U. S. 196; Irwin v. Town of Ontario, 3 Fed. 49; Portsmouth Sav. Bank v. City of Springfield, 4 Fed. 276; First Nat. Bank of Oswego v. Town of Walcott, 7 Fed. 892; Denison v. City of Columbus, 62 Fed. 775, affirming 69 Fed. 58; Treadway v. Schnauber, 1 Dak. 236; Johnson v. County of Stark, 24 Ill. 75; Keithsburgh v. Frick, 34 Ill. 405; Jones v. Cullen, 142 Ind. 335; Leavenworth, L. & G. R. Co. v. Douglas County Com'rs, 18 Kan. 170; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; State v. Van Horne, 7 Ohio St. 327; Kellogg v. Ely, 15 Ohio St. 64.

[480] City of Hannibal v. Fauntleroy, 105 U. S. 408.

[481] See authorities cited under note 472 of this section. Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655. "We do not attach any importance to the fact that the town authorities paid one installment of interest on these bonds. Such a payment works no estoppel. If the legislature was without power to authorize the issue of these bonds and its statute attempting to confer such authority is void, the mere payment of interest which was equally unauthorized cannot create of itself a power to levy taxes resting on no other foundation than the fact that they have once been illegally levied for that purpose." Commercial Nat. Bank v. Iola City, 22 L. Ed. 463; City of Parkersburg v. Brown, 106 U. S. 487; Daviess County v. Dickinson, 117 U. S. 657; Doon Tp. v. Cummins, 142 U. S. 366; Thomas v. Town of Lansing, 14 Fed. 618; Cowdrey v. City of Caneadea, 16 Fed. 532; Stebbins v. Perry County, 167 Ill. 567; Falkenstein Tp. v. Fetch, 2 Kan. App. 193; Weismer v. Village of Douglas, 4 Hun (N. Y.) 201; Union Bank v. Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487.

[482] Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384; Murray v. Lardner, 69 U. S. (2 Wall.) 110. Coupon bonds, of the ordinary kind, payable to bearer, pass by delivery and a purchaser of them, in good faith, is unaffected by want of title

of validity applies equally to the extent of necessary legal authority, the performance of all necessary acts by public officials

in the vendor. The burden of proof, on a question of such faith, lies on the party who assails the possession.

Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 772; City of Lexington v. Butler, 81 U. S. (14 Wall.) 282. "Issued by authority of law, as the bonds purport to have been, and being, by the regular indorsement thereof, made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the number in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed, and the interest secured by the coupons being unpaid he instituted the present suit to recover the amount. Evidently, the prima facie presumption in such a case is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid." County of Henry v. Nicolay, 95 U. S. 619; City of San Antonio v. Mehaffy, 96 U. S. 312; Cummins v. District Tp. of Doon, 42 Fed. 644; Keene Five-Cent Sav. Bank v. Lyons County, 90 Fed. 523; Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505; Washington County v. Williams (C. C. A.) 111 Fed. 801; Fidelity Trust & Guaranty Co. v. Fowler Water Co., 113 Fed. 560; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Lake County Com'rs v. Standley, 24 Colo. 1, 49 Pac. 23; Lake County Com'rs v. Linn, 29 Colo. 446, 68 Pac. 839; Brand v. Town of Lawrenceville, 104 Ga. 486, 30 S. E. 954.

In Choisser v. People, 140 Ill. 21, and in Sampson v. People, 140 Ill. 466, the burden of proof, it is held, is upon the party asserting the validity of bonds; see, however, Hutchinson v. Self, 153 Ill. 542, decided subsequently holding the rule given in the text.

People v. Town of Harp, 67 Ill. 62; City of Aberdeen v. Sykes, 59 Miss. 236; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619.

Neely v. Yorkville, 10 S. C. 141. If a corporation has previously exhausted its power by issuing other bonds to the full extent of its power, the onus of showing the fact is upon the corporation.

Walker v. State, 12 S. C. 200; City of Memphis v. Bethel (Tenn. Ch. App.) 17 S. W. 191. In an action upon coupons representing the interest on certain city bonds, the fact that relator is the holder thereof, and that they were payable to bearer is sufficient evidence of ownership and casts the burden of disproving ownership upon the city.

Galbraith v. City of Knoxville, 105 Tenn. 453, 58 S. W. 643; Simonton, Mun. Bonds, § 163. "But the defendant may give evidence to show that the bonds were fraudulently issued or that the conditions precedent were not performed or that they had been lost or stolen before plaintiff received them and if defendant proves such defense, the burden is then shifted on the plaintiff to prove that he is a bona fide holder." Marion County Com'rs v. Clark, 94 U. S. 278; Cromwell v. County of Sac, 96 U. S. 51; Stew-

and the existence of all the conditions necessary to warrant the issue of valid bonds.[483]

§ 202. As affected by adverse decisions of a state court.

The Federal authorities have adopted without dissent the rule that where a public corporation under authority of law has issued its bonds, negotiable in their character and payable to bearer at a future date, and which under the judicial decisions of the state are valid at the time of issue, that their validity before maturity, in the hands of bona fide purchasers, cannot be affected by subsequent decisions of the state courts holding the law, under authority of which the bonds were issued, unconstitutional or void.[484] Such decisions may affect the validity of bonds

art v. Town of Lansing, 104 U. S. 505; City of San Antonio v. Lane, 32 Tex. 405.

[483] City of Gladstone v. Throop (C. C. A.) 71 Fed. 341; City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.) 88 Fed. 449; Union Bank of Richmond v. Oxford Com'rs, 90 Fed. 7; Burlington Sav. Bank v. City of Clinton, 106 Fed. 269. Improvement bonds not invalid because the method provided by statute for assessing the cost of improvements against the abutting property is illegal.

Lake County Com'rs v. Keene Five-Cent Sav. Bank (C. C. A.) 108 Fed. 505; Floyd County Com'rs v. Shorter, 50 Ga. 489; Akin v. Ordinary of Bartow County, 54 Ga. 59; State v. Hordey (Kan.) 18 Pac. 942.

[484] Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175. The decision of the supreme court of Iowa in the case of State v. County of Wapello, 13 Iowa, 390, overruled by a unanimous opinion, former decisions of that court sustaining the validity of certain bonds and holding the law under which they were authorized unconstitutional and the bonds void. The opinion of the U. S. supreme court was delivered by Justice Swayne who said in part: "The late case in Iowa and two other cases of a kindred character in another state also overruling earlier adjudications stand out as far as we are advised in unenviable solitude and notoriety. However we may regard the late case in Iowa affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts, altering the construction of the law.' The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged, we adhere. It is the law of this court. * * *

not issued, but all persons into whose hands bonds already issued may come have the right to consider the constitutionality of such authority conclusively established.[485] The validity of coupon bonds in the hands of innocent holders, it has even been held, will not be affected by the pendency of suits brought to test the question of their legality where the bonds were purchased during the pendency of such suit.[486] If, however, the holders of such bonds are made parties to such litigation or as a few cases

To hold otherwise would be as unjust as to hold that rights acquired under a statute may be lost by its repeal."

Lee County v. Rogers, 74 U. S. (7 Wall.) 181; City of New York v. Lamson, 76 U. S. (9 Wall.) 477; Callaway County v. Foster, 93 U. S. 567; Douglass v. Pike County, 101 U. S. 677; Union Bank v. Oxford Com'rs, 90 Fed. 7, reversed in (C. C. A.) 96 Fed. 293; Durant v. Iowa County, 1 Woolw. 69, Fed. Cas. No. 4,189; Smith v. Tallapoosa County, 2 Woods, 574, Fed. Cas. No. 13,113; Columbia County Com'rs v. King, 13 Fla. 451; Steines v. Franklin County, 48 Mo. 167; State v. Saline County Ct., 48 Mo. 390; Bailey v. Town of Lansing, 13 Blatchf. 424, Fed. Cas. No. 738; Stallcup v. City of Tacoma, 13 Wash. 141.

[485] Warren County v. Marcy, 97 U. S. 96; United States v. Lee County Sup'rs, 2 Biss. 77, Fed. Cas. No. 15,589. Where county bonds had been sold upon the faith of decisions of the supreme court of the state declaring their validity, the fact that the court afterwards reversed its decision does not invalidate those previously purchased in good faith before maturity.

Smith v. Tallapoosa County, 2 Woods, 574, Fed. Cas. No. 13,113; Waples v. City of Dubuque, 116 Iowa, 167, 89 N. W. 194.

[486] Warren County v. Marcy, 97 U. S. 96. The rule that all persons are bound to take notice of a suit pending with regard to the title to property and that they at their peril buy the same from any of the litigating parties does not apply to negotiable securities purchased before maturity.

Town of Orleans v. Platt, 99 U. S. 676; Cass County v. Gillett, 100 U. S. 585. A bona fide purchaser of negotiable securities before their maturity is not affected with constructive notice of a suit pending.

Carroll County v. Smith, 111 U. S. 556. The issuing of a temporary injunction which was afterwards made permanent by a state court restraining municipal officers from issuing municipal bonds does not estop a bona fide holder who was not a party to the suit from maintaining title to such bonds issued after the temporary injunction.

Miller v. Perris Irr. Dist., 99 Fed. 143. A de facto corporation may legally do and perform every act which it could do were it a de jure corporation. Its acts are valid as to third persons except where challenged by the state in direct proceedings; bonds issued, therefore, by a de facto corporation, are valid even where the state subsequently

hold have actual knowledge of its pendency, this rule would not apply.[487] The doctrine stated in this section applies to the validity of negotiable bonds, not only under the conditions already named but also to acts ratifying or attempting to ratify a void issue of bonds although the judicial policy of the state may be against the constitutionality of the ratification act, yet before such decision, if bonds ratified by a legislature have passed into the hands of bona fide purchasers, such subsequent decision by the courts of the state cannot affect their validity.

§ 203. Validity of issue in excess of legal authority.

A public corporation may possess the legal authority to issue negotiable bonds to and including a certain amount. There may be constitutional provisions prohibiting the incurring of indebtedness in excess of this amount, or the special authority may be limited to such amount. The corporation does, however, issue its negotiable bonds in excess of the sum thus legally authorized and the question of the validity of such excess bonds then arises. There are found two lines of decisions, the one holding that the bonds issued in excess of the amount authorized are totally void, even in the hands of bona fide purchasers,[488] the other holding

in a direct proceeding attacking the validity of the organization of such corporation secures a judgment declaring it void; citing, Shapleigh v. City of San Angelo, 167 U. S. 646; Havemeyer v. Iowa County, 70 U. S. (3 Wall.) 294; Ashley v. Presque Isle County Sup'rs (C. C. A.) 60 Fed. 55; Phelps v. Town of Lewiston, 15 Blatchf. 131, Fed. Cas. No. 11,076.

[487] Stewart v. Town of Lansing, 104 U. S. 505; Durant v. Iowa County, 1 Woolw. 69, Fed. Cas. No. 4,189. The pendency of a suit to restrain the transfer of bonds and a decree in such suit that they be delivered up to be canceled, are inoperative as respects a bona fide holder for value. But if he have actual knowledge of proceedings when he becomes the owner and holder, he is concluded by them.

Diamond v. Lawrence County, 37 Pa. 353. The purchaser of bonds pendente lite and all subsequent purchasers are affected by a decree of the court in a suit pending at the time of the purchase; such bonds, however, not having the quality of commercial paper in Pennsylvania.

[488] Francis v. Howard County, 50 Fed. 44. The bonds issued by a county in excess of the amount allowed by law are void and their collection cannot be enforced even by a bona fide purchaser for value; and when a number of bonds partially invalid on this account, are issued

that where a public corporation has issued bonds to an amount in excess of its constitutional or legislative authority, all of which were issued at the same time, each bond is valid to the extent of its proportionate share of the indebtedness authorized.[489] In the first line of authorities, there are some which hold that if the bonds in excess of the constitutional or statutory limitation can be separated from those within such limit, the former will be held void and the latter valid.[490]

§ 204. Legality as affected by subsequent legislation.

If there exists a reason for the doctrine as stated in a preceding section in regard to subsequent adverse decisions of the courts as affecting the validity of bonds, good at the time of issue, there is an irrefutable reason for the principle followed by all courts, state as well as Federal, that the validity of bonds, corporate indebtedness or obligations is determined by laws in force at the time when such bonds were issued or obligations incurred. They cannot be affected by changes subsequently made and this rule would apply in the case of bonds authorized but

and delivered at the same time, or at different times as part of one transaction, the invalid portion should be equally distributed among all and none should have priority.

Aetna Life Ins. Co. v. Lyon County, 95 Fed. 325; Everett v. Independent School Dist. of Rock Rapids, 109 Fed. 697; Sutro v. Pettit, 74 Cal. 332; Sutro v. Rhodes, 92 Cal. 117; Catron v. La Fayette County, 106 Mo. 659. Borough of Millerstown v. Frederick, 114 Pa. 435, holds the whole issue void where a portion is in excess of the constitutional limitation. Mitchell County v. City Nat. Bank, 15 Tex. Civ. App. 172, 39 S. W. 628.

[489] City of Columbus v. Woonsocket Inst. of Savings (C. C. A.) 114 Fed. 162. Where a city has issued bonds to an amount in excess of its constitutional authority, all of which were created by the same ordinance and sold at the same time, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.

Gillim v. Daviess County, 12 Ky. L. R. 596, 14 S. W. 838; Nolan County v. State, 83 Tex. 182, 17 S. W. 823. If bonds issued by a county in excess of the amount of the bonded debt which it could legally create were issued at the same time, the amount of the valid debt should be distributed between them pro rata.

[490] Daviess County v. Dickinson, 117 U. S. 657; City of Litchfield v. Ballou, 114 U. S. 190; Merchants' Exch. Nat. Bank v. Bergen County, 115 U. S. 384; McPherson v. Foster Bros., 43 Iowa, 48; Catron v. La Fayette County, 106 Mo. 659; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042.

not yet formally executed and delivered.[491] This rule also applies to legislation which impairs or destroys the power of a public corporation to levy taxes for the payment of either principal or interest of bonds legally issued when at the time of such issue the power to levy taxes for this specific purpose existed. The power to levy taxes, it is held, is a part of the contract between the corporation and the holder of negotiable bonds which cannot be impaired by subsequent action in violation of that provision of the Federal constitution forbidding the passage of laws impairing the obligation of a contract.[492] The principle also prevents the passage of legislation or other action diverting funds or property which at the time of the issue of the bonds

[491] Callaway County v. Foster, 93 U. S. 567; German Sav. Bank v. Franklin County, 128 U. S. 526. Where the court in the syllabi say: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

Board of Education of Dist. No. 3 v. Bolton, 104 Ill. 220. But see Wade v. Town of La Moille, 112 Ill. 79, and Williams v. People, 132 Ill. 574; Slocomb v. City of Fayetteville, 125 N. C. 362; People v. Otis, 90 N. Y. 48; Knapp v. Town of Newtown, 1 Hun (N. Y.) 268; Dodge v. Platte County, 16 Hun (N. Y.) 285; Marsh v. Town of Little Valley, 4 T. & C. (N. Y.) 116; Gibson v. Knapp, 21 Misc. 499, 47 N. Y. Supp. 446; City of Mitchell v. Smith, 12 S. D. 241, 80 N. W. 1077; Stallcup v. City of Tacoma, 13 Wash. 141. A purchaser has the right to rely on the existing construction, a law authorizing the issue of bonds.

[492] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; City of Galena v. Amy, 72 U. S. (5 Wall.) 705; Riggs v. Johnson County, 73 U. S. (6 Wall.) 166; Rees v. City of Watertown, 86 U. S. (19 Wall.) 107; Louisiana v. City of New Orleans, 102 U. S. 203; Wolff v. City of New Orleans, 103 U. S. 358; Louisiana v. Pilsbury, 105 U. S. 278; Ralls County Ct. v. United States, 105 U. S. 733; Louisiana v. City of New Orleans, 109 U. S. 285; Port of Mobile v. Watson, 116 U. S. 289; Seibert v. Lewis, 122 U. S. 284; United States v. Howard County Ct., 2 Fed. 1; Devereaux v. City of Brownsville, 29 Fed. 742; Hicks v. Cleveland (C. C. A.) 106 Fed. 459; Padgett v. Post (C. C. A.) 106 Fed. 600; Maenhaut v. City of New Orleans, 2 Woods, 108, Fed. Cas. No. 8,939; United States v. Jefferson County, 5 Dill. 310, Fed. Cas. No. 15,472; United States v. Johnson County, 5 Dill. 207, note, Fed. Cas. No. 15,489; United States v. Treasurer of Muscatine County, 2 Abb. 53, Fed. Cas. No. 16,538; Columbia County Com'rs v. King, 13 Fla. 451; Peoria, D. & E. R. Co. v. People, 116 Ill. 401; Moore v. City of New Orleans, 32 La. Ann. 726; State v. St. Louis, K. & N. W. R. Co., 130 Mo. 243; Munday v. City of Rahway, 43 N. J. Law, 338; McCless v. Meekins, 117 N. C. 34; Morton v. Comp-

was either devoted or to be devoted to the payment of either their principal or interest.[493] The general tendency of all courts, both federal and state, is to protect the contract obligation existing in favor of the bona fide purchaser of negotiable securities issued by public corporations. The clause of the Federal constitution prohibiting a state from passing any law impairing the obligation of a contract affords a real and substantial protection to the investor.

§ 205. Securities of public corporations; their legal character.

Bonds issued by public corporations, either with or without coupons attached, were, at first, considered by the courts as non-negotiable instruments; later, however, they came to be recognized as negotiable paper and bona fide holders for value were protected to the same extent as holders of negotiable notes and bills under the law merchant. They are now fully and universally recognized as negotiable instruments.[494] They are also con-

troller General, 4 S. C. (4 Rich.) 430; City of Memphis v. Bethel (Tenn.) 17 S. W. 191.

[493] Edwards v. Kearzey, 96 U. S. 595; Louisiana v. Police Jury of St. Martin's Parish, 111 U. S. 716; St. Tammany Water Works v. New Orleans Water Works, 120 U. S. 64; Lehigh Water Co. v. Borough of Easton, 121 U. S. 388; McGahey v. State of Virginia, 135 U. S. 662; Sun Mut. Ins. Co. v. Board of Liquidation of New Orleans, 24 Fed. 4; Fazende v. City of Houston, 34 Fed. 95; Saginaw Gas Light Co. v. City of Saginaw, 28 Fed. 529; Willis v. Miller, 29 Fed. 238; Coast Line R. Co. v. City of Savannah, 30 Fed. 646; Maenhaut v. City of New Orleans, 2 Woods, 108, Fed. Cas. No. 8,939; Edwards v. Williamson, 70 Ala. 145; Brodie v. McCabe, 33 Ark. 690; English v. Sacramento City & County Sup'rs, 19 Cal. 172 (Sinking fund tax); Board of Liquidators of City Debts v. Municipality No. 1, 6 La. Ann. 21; State v. Board of Liquidation of City Debt, 40 La. Ann. 398; State v. Walsh, 31 Neb. 469; Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; People v. Common Council of Buffalo, 140 N. Y. 300; Lilly v. Taylor, 88 N. C. 489; Goodale v. Fennell, 27 Ohio St. 426; Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893; Terry v. Wisconsin M. & F. Ins. Co. Bank, 18 Wis. 87; Smith v. City of Appleton, 19 Wis. 468.

[494] Mercer County v. Hacket, 68 U. S. (1 Wall.) 83. Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175. "Bonds and coupons like these by universal commercial usage and consent have all the qualities of commercial paper." Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384.

Police Jury of Tensas v. Britton, 82 U. S. (15 Wall.) 566. "The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand.

sidered chattels in so far as that character tends to relieve them from defenses and burdens incident to choses in action and to give them a merchantable character for investment and commercial purposes.[495] The legal effect of such a character is to place them on an equality before the law with ordinary negotiable paper pertaining to the commercial business of the country and to make them marketable and vendible and before maturity, free of equities between the original parties.[496]

Such instruments transferred before maturity to a bona fide purchaser leave behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. This characteristic of commercial paper, which no court has more faithfully enforced than this, raises the doubt whether the power to issue it can be implied from the ordinary powers of local administration and police which are conferred upon the boards and trustees of political districts."

City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Humboldt Tp. v. Long, 92 U. S. 642; Marion County Com'rs v. Clark, 94 U. S. 278; Carter County v. Sinton, 120 U. S. 517, 7 Sup. Ct. 650; County of Wilson v. Third Nat. Bank, 103 U. S. 770. The words to "bearer" or "order" are not essential to negotiability. City of Ottawa v. First Nat. Bank, 105 U. S. 342. See note to White v. Vermont & M. R. Co., 16 L. Ed. 221; Griffith v. Burden, 35 Iowa, 138; Craig v. City of Vicksburg, 31 Miss. 216.

But a bond not complying with the requirements of negotiable paper lacking, for instance, a definite and certain sum to be paid, will not be considered negotiable. See Parsons v. Jackson, 99 U. S. 434; Hopper v. Town of Covington, 8 Fed. 777; Id., 118 U. S. 148; 1 Daniel, Neg. Inst. § 53; City of Memphis v. Brown, 11 Am. Law Reg. (N. S.) 629.

[495] City of Memphis v. Brown, 11 Am. Law Reg. (N. S.) 629; Griffith v. Burden, 35 Iowa, 138; State v. Cunningham, 51 Mo. 479; Force v. City of Elizabeth, 27 N. J. Eq. 408.

[496] Murray v. Lardner, 69 U. S. (2 Wall.) 110; Aurora City v. West, 74 U. S. (7 Wall.) 82; Marion County Com'rs v. Clark, 94 U. S. 278; Durant v. Iowa County, 1 Woolw. 69, Fed. Cas. No. 4,189; Griffith v. Burden, 35 Iowa, 138; Consolidated Ass'n of Planters v. Avegno, 28 La. Ann. 552; First Nat. Bank of St. Paul v. Scott County Com'rs, 14 Minn. 77 (Gil. 59). Where negotiable bonds bearing interest annually have attached coupons for the payment of interest and are transferred with overdue coupons still attached, the purchaser takes them subject to any infirmity of title in the seller. The fact that the coupons are by their terms payable on presentation to a particular person does not affect this rule.

Belo v. Forsythe County Com'rs, 76 N. C. 489; Boyd v. Kennedy, 38

The authorities also hold that this character makes them exempt from the defense of usury founded on the fact that they may have been issued and sold below par value,[497] and also subject to the rule of damages in an action for conversion which applies to chattels rather than that which applies to private evidence of debt.[498] As between parties by delivery, unless registered, the bearer has full title and the maker cannot set up against one who has taken them in good faith, equities which might be available against the original payee provided they were not utterly void in their inception. Their legal character, as thus stated, is sustained at the present time by an overwhelming and universal weight of authority.[499]

The statutory authority to issue bonds bearing interest, running for a long time and payable to bearer or with provisions for registration, usually authorizes, by implication, the issuance of bonds fully negotiable in their character according to the usual rules of the law merchant.[500]

N. J. Law, 146. See Diamond v. Lawrence County, 37 Pa. 353, as an early case holding that a county bond is subject, even in the hands of innocent holders, to equities existing against them in favor of the maker. Such bonds not having, however, the quality of commercial paper in Pennsylvania. "We will not treat bonds like these as negotiable securities: on this ground we stand alone. All the courts, American and English, are against us." This holding has since been reversed. See Mason v. Frick, 105 Pa. 162.

[497] Richardson v. Lawrence County, 154 U. S. 536; Woods v. Lawrence County, 1 Black (U. S.) 386, 410.

[498] Meixell v. Kirkpatrick, 33 Kan. 282; Murray v. Stanton, 99 Mass. 345.

[499] Durant v. Iowa County, 1 Woolw. 69, Fed. Cas. No. 4,189; Hancock v. Chicot County, 32 Ark. 575; Lindsey v. Rottaken, 32 Ark. 619; Jefferson County v. Burlington & M. R. R. Co., 66 Iowa, 385; Maddox v. Graham, 59 Ky. (2 Metc.) 56; Cecil v. Board of Liquidation, 30 La. Ann. 34, 51 Am. St. Rep. 822-861, 98 Am. Dec. 664-691; Simonton, Mun. Bonds, §§ 111-124a.

[500] City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.) 58 Fed. 935. "This act clearly authorizes the issuance of 'bonds' bearing a legal rate of interest for any loans lawfully made. It also empowers the council to issue 'new bonds,' to extend the time of payment of 'bonds falling due.' That this contemplates, and by necessary implication authorizes, the issue of negotiable bonds we have no doubt. The general power to issue 'bonds' must be taken to authorize 'bonds' in the usual form of such well known commercial obligations. That usual form embodies a contract and obligation negotiable in its terms." Distinguishing Brenham v. German American Bank, 144 U. S. 173.

Ashley v. Presque Isle County

§ 206. Validity of negotiable securities. The doctrine of estoppel.

Bonds possessing all of the elements and characteristics of negotiable paper, as stated in the preceding section, are not subject, before maturity, when in the hands of bona fide and innocent purchasers for value, to equities that may exist in favor of the maker of such bonds. The doctrine of estoppel has been held to apply to the maker through acquiescence in the existence of certain conditions or circumstances which might, if taken advantage of speedily, relieve it from its obligation, through the principle of estoppel by recitals, course of dealing and the payment of interest to be considered in succeeding sections.

The nonperformance of conditions required to be fulfilled by the party entitled to bonds, if acquiesced in, is not sufficient to render such bonds invalid.[501] A public corporation that has as such voted for and issued bonds, it has been held, is estopped from setting up as a defense against an innocent holder that it never was incorporated.[502] So also is a public corporation hav-

Sup'rs (C. C. A.) 60 Fed. 55; West Plains Tp. v. Sage (C. C. A.) 69 Fed. 943; Howard v. Kiowa County, 73 Fed. 406; German Ins. Co. v. City of Manning, 78 Fed. 900; D'Esterre v. City of Brooklyn, 90 Fed. 586; City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668, 960; Winston v. City of Ft. Worth (Tex. Civ. App.) 47 S. W. 740.

[501] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Randolph County v. Post, 93 U. S. 502, and cases cited; Augusta Bank v. City of Augusta, 49 Me. 507; Deming v. Inhabitants of Houlton, 64 Me. 254; Shurtleff v. Inhabitants of Wiscasset, 74 Me. 130. In Morril v. Smith County (Tex. Civ. App.) 33 S. W. 899, it is held, however, that where the fact of the non-performance of conditions can be ascertained by an inspection of the records on the part of the purchaser, the corporation will not be estopped to set such up as a defense.

[502] Aller v. Cameron, 3 Dill. 198, Fed. Cas. No. 243. See, also, National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778, where the illegality of an incorporation was set up as a defense to bonds issued by a board of education organized as a corporate body. The court in its opinion say: "It was recognized and its action was acquiesced in, by the state and by the citizens, for at least 18 months; and, as against bona fide purchasers of its bonds, its acts, as a de facto board of education, if within the powers granted to a board legally organized under this law, are binding upon the defendant corporation. It is the province of the state to question, by proper judicial proceedings, its incorporation; not that of a defendant in a private suit, when it has as-

ing the authority to issue bonds for one purpose estopped from setting up as a defense against a bona fide and innocent purchaser of such bonds, the fact that the moneys derived from their sale were used for a different purpose, perhaps an illegal one, from that for which they purported or were authorized to be issued or that such moneys were never expended for the benefit of the corporation.[502] Some authorities also hold that where

serted its corporate existence, and incurred liabilities to innocent parties on the faith of it. 'When a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence.'" See cases cited.

[502] Hackett v. City of Ottawa, 99 U. S. 86. "It would be the grossest injustice and in conflict with all the past utterances of this court to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal as to the purposes with which these bonds were issued. Whether such representations were made inadvertently or with the intention by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared in Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381, as to private corporations, may be reiterated as peculiarly applicable to this case; 'A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind and cannot by their representations or silence involve others in onerous engagements and then defeat the calculations and claims their own conduct had superinduced.'" Portland Sav. Bank v. City of Evansville, 25 Fed. 389; Pickens Tp. v. Post (C. C. A.) 99 Fed. 659; Francis v. Howard County, 50 Fed. 44; National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778. The city of Huron issued bonds, the proceeds of which were used by it for the purpose of conducting a campaign in the state legislature for the location of the state capital of South Dakota at that city. This unlawful use was urged as an objection to the validity of the bonds and on this point the court say: "It is no defense to these bonds, against innocent purchasers for value, before maturity, that the defendant loaned $59,500 of the proceeds of the sale of them to the city of Huron for city warrants that were never paid, and that cannot be legally enforced, so that it has actually realized but $500 from the sale of its bonds. That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers, who had no knowledge

the statutory authority exists and bonds are issued, the maker will be estopped from denying their execution when it has received and retained the benefit of the moneys evidenced by the

of, nor part in, the gift or waste. They are in no way responsible for the wise and economical use by the corporation of the funds it borrows. Anderson County Com'rs v. Beal, 113 U. S. 227; City of Cairo v. Zane, 149 U. S. 122; Maxcy v. Williamson County Ct., 72 Ill. 207.

"Nor is it any defense to such bonds, as against bona fide purchasers, that the citizens and officers of a municipal corporation, with the intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of the bonds that they were issued for such lawful purpose, and then appropriated the proceeds to the unlawful purpose. Corporations are as strongly bound to an adherence to truth in their dealings with mankind as are individuals, and they cannot, by their representations or silence, induce others to part with their money or property, and then repudiate the obligations for which the money was expended, and which their statements represented to be valid. The defendant, in its resolutions and records, in all the resolutions and records of the city council of Huron in the call for and vote at the election which authorized the issue of the bonds, and in the bonds themselves, declared that they were issued for a lawful purpose, viz., 'to raise funds for the purchase of a school site, and for the erection of a school building thereon.' The present holders purchased them and paid for them with no notice or knowledge that they were issued for any other purpose, and in the full belief that these declarations were true. It is no defense for this corporation, as against these bona fide purchasers, that during all this time it intended to use, and has since used, the money it raised from these bonds for the unlawful purpose of conducting a campaign for the state capital. It is no defense that it knew at the time it was taking these proceedings and making these declarations that they were false, and that during all this time it intended—First, to deprive itself of the school site and building; and second, to deprive the purchasers of the bonds of the moneys they paid for them on the faith of its representations, and that it has accomplished the former purpose, and now seeks, with the aid of the courts, to accomplish the latter. Such a plea cannot be entertained in a court of justice. The corporation is estopped to deny that these bonds were issued to raise money for a school site and school building." West Plains Tp. v. Sage (C. C. A.) 69 Fed. 943; Lyon County v. Keene Five-Cent Sav. Bank (C. C. A.) 100 Fed. 337, affirming 97 Fed. 159; D'Esterre v. City of New York, 104 Fed. 605; Wood v. City of Louisiana, 5 Dill. 122, Fed. Cas. No. 17,948; Borough of Freeport v. Marks, 59 Pa. 253; Bond Debt Cases, 12 S. C. 200; Jones v. City of Camden, 44 S. C. 319; Nolan County v. State, 83 Tex. 182, 17 S. W. 823; Town of Clifton Forge v. Alleghany Bank, 92 Va. 283, 23 S. E. 284. See, also, cases cited § 210.

bonds.[504] These principles of estoppel apply, however, only to innocent purchasers, or those not having knowledge of irregularities or defects in issue, execution and delivery,—a rule so well established that the citation of many authorities is unnecessary.[505]

§ 207. The same subject.

For the protection of the bona fide holder of negotiable bonds we have then the well-established principle applying to negotiable paper, that a bona fide holder for value before maturity and without notice takes an absolute title and is not affected by equities which are good as between the original parties, the courts holding that bonds issued by public corporations containing negotiable words partake of the character and are negotiable paper according to the strict meaning of the word as used in the law merchant.[506] The principle or doctrine of equitable estoppel also

[504] Mobile v. Sands, 127 Ala. 493, 29 So. 26; Brown v. Milliken, 42 Kan. 769; Oswego Tp. v. Anderson, 44 Kan. 214, 24 Pac. 486. See, however, Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174, as holding to the contrary. Nolan v. State, 83 Tex. 132, 17 S. W. 823.

[505] Cromwell v. Sac County, 96 U. S. 59; Scotland County v. Hill, 132 U. S. 107; Brooklyn Trust Co. v. Town of Hebron, 51 Conn. 22; Town of Essex v. Day, 52 Conn. 483; Madison County Sup'rs v. Brown, 67 Miss. 684; Hopple v. Hipple, 33 Ohio St. 116.

[506] In speaking of the commercial character of municipal bonds, Mr. Justice Grier said in Mercer County v. Hackett, 68 U. S. (1 Wall.) 83: "This species of bonds is a modern invention intended to pass by manual delivery and to have the qualities of negotiable paper and their values depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessities of commerce require that they should be so. A mere technical dogma of the courts or the common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usage of trade and commerce are acknowledged by the courts as part of the common law although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer and gives a bond with negotiable qualities and by this reason obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond for some technical reason cannot be made payable to bearer. That

is applied for the protection of the bona fide holder of such bonds, namely, that where public corporations with full knowledge of defects in the manner of issue after having received and retained the benefits of the proceeds of their bonds[507] recognize directly or indirectly the validity of such bonds by the levying of a tax for their payment or the payment of interest,[508] the voting or retention of stock purchased with the proceeds,[509] their recogni-

these securities are treated as negotiable by the commercial usages of the whole civilized world and have received the sanction of judicial recognition, not only in this court but of nearly every state in the Union, is well known and admitted. * * * Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds, we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators,' are pleas which might have just weight in an application to restrain the issue or negotiation of these bonds, but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of bona fide holders." See, also, authorities cited under § 205.

[507] Kiowa County Com'rs v. Howard (C. C. A.) 83 Fed. 296; Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202, citing Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 772; State v. Van Horne, 7 Ohio St. 327; State v. Trustees of Union Tp., 8 Ohio St. 394; State v. Trustees of Goshen Tp., 14 Ohio St. 569; New York Life Ins. Co. v. Cuyahoga County Com'rs (C. C. A.) 106 Fed. 123. But see Travelers' Ins. Co. v. Johnson City (C. C. A.) 99 Fed. 663, 49 L. R. A. 123, where it is held in the absence of authority to issue bonds and where the benefits claimed to have been received and retained are of a doubtful character that such bonds are void even in the hands of bona fide holders.

[508] Nugent v. Putnam County Sup'rs, 86 U. S. (19 Wall.) 241; County of Clay v. Society for Savings, 104 U. S. 579; City of Parkersburg v. Brown, 106 U. S. 487; Anderson County Com'rs v. Beal, 113 U. S. 227; Hill v. City of Memphis, 134 U. S. 198; Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692; New Haven, M. & W. R. Co. v. Chatham, 42 Conn. 465; Town of Keithsburg v. Frick, 34 Ill. 405; People v. Cline, 63 Ill. 394; Lippincott v. Town of Pana, 92 Ill. 24; Leavenworth, L. & G. R. Co. v. Douglas County Com'rs, 18 Kan. 169; Morris County Com'rs v. Hinchman, 31 Kan. 729; David v. Parish of East Baton Rouge, 27 La. Ann. 230; Town of Mentz v. Cook, 108 N. Y. 504; Germania Sav. Bank v. Town of Darlington, 50 S. C. 337; Nelson v. Haywood County, 87 Tenn. 781. See, also, § 200, note 479, supra, and § 208, post. But see to the contrary, Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 665; Daviess County Ct. v. Howard, 76 Ky. (13 Bush) 101; and First Nat. Bank of Decorah v. District Tp. of Doon, 86 Iowa, 330, 53 N. W. 301.

[509] Pendleton County v. Amy, 80

tion by public officials or the corporation as valid,[510] the retention of the consideration,[511] or the issue or renewal of refunding bonds to replace them,[512] will not be heard to raise the question of such irregularities as a defense in an action against them.

U. S. (13 Wall.) 297; Nugent v. Putnam County Sup'rs, 86 U. S. (19 Wall.) 241; Luling v. City of Racine, 1 Biss. 314, Fed. Cas. No. 8,603. But see Marsh v. Fulton County, 77 U. S. (10 Wall.) 676.

[510] Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 781; Jasper County v. Ballou, 103 U. S. 745; Atchison Board of Education v. De Kay, 148 U. S. 591; Ranger v. City of New Orleans, 2 Woods, 128, Fed. Cas. No. 11,564; Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384; Portsmouth Sav. Bank v. City of Springfield, 4 Fed. 276; City of Columbus v. Dennison (C. C. A.) 69 Fed. 58; Cronin v. Patrick County, 89 Fed. 79; Washington County v. Williams, 111 Fed. 801; Society for Savings v. City of New London, 29 Conn. 175; Town of Essex v. Day, 52 Conn. 483; Leavenworth, L. & G. R. Co. v. Douglas County Com'rs, 18 Kan. 170; State v. Scott County Com'rs, 58 Kan. 491, 49 Pac. 663; Morris County Com'rs v. Hinchman, 31 Kan. 729; Town of Eminence v. Grasser's Ex'r, 81 Ky. 52; Carver v. Board of Liquidation, 35 La. Ann. 261; Washington County v. David, 2 Neb. Unoff. 649, 89 N. W. 737; State v. Van Horne, 7 Ohio St. 330; State v. Trustees of Goshen Tp., 14 Ohio St. 569; State v. Mitchell, 31 Ohio St. 592; Presidio County v. City Nat. Bank (Tex. Civ. App.) 44 S. W. 1069; Town of Bennington v. Park, 50 Vt. 178. But see to the contrary, Weismer v. Village of Douglas, 64 N. Y. 91; and Oswego County Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786.

[511] Pendleton County v. Amy, 80 U. S. (13 Wall.) 297; Anderson County Com'rs v. Beal, 113 U. S. 227; Whiting v. Town of Potter, 2 Fed. 517; Third Nat. Bank of Syracuse v. Town of Seneca Falls, 15 Fed. 783. Such bonds have been held void in some cases but the corporation receiving their proceeds will be required to do equity to the other party. See Brown v. City of Atchison, 39 Kan. 37, and Clark v. Saline County Com'rs, 9 Neb. 516. The same doctrine also applies to private corporations or individuals. See, Bradley v. Ballard, 55 Ill. 414; State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407; Morville v. American Tract Soc., 123 Mass. 129; Parish v. Wheeler, 22 N. Y. 494, and Northwestern Union Packet Co. v. Shaw, 37 Wis. 655. But the supreme court of the United States has held in a recent case that the rule will not apply where there is an absolute want of power and a violation of the constitution in issuing the bonds. See Hedges v. Dixon County, 150 U. S. 182; Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381; Bissell v. City of Jeffersonville, 24 How. (U. S.) 287; Town of Coloma v. Eaves, 92 U. S. 484; Hackett v. City of Ottawa, 99 U. S. 86; Chaffee County v. Potter, 142 U. S. 355.

[512] Graves v. Saline County, 161 U. S. 359; Ballou v. Jasper County, 3 Fed. 620; City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.)

§ 208. Estoppel through the payment of interest.

As a particular form of the application of the doctrine of equitable estoppel against a public corporation to deny the validity of its bonds in the hands of bona fide holders, we have many authorities holding that where the corporation pays the interest upon its bonds for a series of years, or the principal of some of them, it will thereafter be estopped to deny their validity,[513] although decisions of the courts are not uniform in this respect.[514]

58 Fed. 935; Ashley v. Presque Isle County Sup'rs, 60 Fed. 55; Shaw v. Independent School Dist. of Riverside, 62 Fed. 911; Brown v. Ingalls Tp., 81 Fed. 485; Barber County Com'rs v. Society for Savings (C. C. A.) 101 Fed. 767; Union Bank of Richmond v. Oxford Com'rs, 90 Fed. 7; Johnson v. Stark County, 24 Ill. 75; City of Coolidge v. General Hospital Soc., 9 Kan. App. 891, 58 Pac. 562; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; State v. Wilkinson, 20 Neb. 610, 31 N. W. 376; State v. Dakota County, 22 Neb. 448, 35 N. W. 225; Hills v. Peekskill Sav. Bank, 101 N. Y. 490. The same rule also applies to the reissue of bonds which, it has been held by the courts, is a waiver of defects in the old bonds. See County of Moultrie v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631; Marcy v. Oswego Tp., 92 U. S. 637; Douglas County Com'rs v. Bolles, 94 U. S. 104; Warren County v. Marcy, 97 U. S. 96; Jasper County v. Ballou, 103 U. S. 745; Town of Aroma v. Auditor of State, 15 Fed. 843; Cowdrey v. Town of Caneadea, 16 Fed. 532; Rich v. Town of Mentz, 18 Fed. 52; Chandler v. Town of Attica, 18 Fed. 299; Second Ward Sav. Bank v. City of Huron, 80 Fed. 660, affirmed in 86 Fed. 272, 49 L. R. A. 534, and Town of Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122.

[513] Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 772; Kirkbride v. Lafayette County, 108 U. S. 208; Atchison Board of Education v. De Kay, 148 U. S. 591; Luling v. City of Racine, 1 Biss. 314, Fed. Cas. No. 8,603; Second Ward Sav. Bank v. City of Huron, 80 Fed. 660; Dudley v. Lake County Com'rs (C. C. A.) 80 Fed. 672; Heed v. Cowley County Com'rs, 82 Fed. 716; Washington County v. Williams, 111 Fed. 801; Town of Keithsburg v. Frick, 34 Ill. 405; People v. Cline, 63 Ill. 394; Leavenworth, L. & G. R. Co. v. Douglas County Com'rs, 18 Kan. 170; Brown v. Milliken, 42 Kan. 769; Town of Eminence v. Grasser's Ex'r, 81 Ky. 52; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Calhoun v. Millard, 121 N. Y. 69, 8 L. R. A. 248; Town of Cherry Creek v. Becker, 123 N. Y. 161; State v. Van Horne, 7 Ohio St. 331; Trustees of Goshen Tp. v. Springfield, Mt. V. & P. R. Co., 12 Ohio St. 624; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173; Nelson v. Haywood County, 87 Tenn. 781, 4 L. R. A. 648; Nolan County v. State, 83 Tex. 182.

[514] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.)

§ 209. The doctrine of recitals.

The principle of estoppel also applies to recitals in bonds, which are statements of the constitutional or legislative authority for their issue and the performance or compliance with all of the conditions required by such authority necessary to be done or performed as precedent to a valid issue.[515] The doctrine as applied to recitals is substantially this, that where legislative authority has been given a public corporation or its officials the power to issue bonds upon the performance of some precedent condition,[516] such as a particular manner of holding an election

665; Ashuelot Nat. Bank v. School Dist. No. 7, 41 Fed. 514; Brown v. Ingalls Tp., 81 Fed. 485; Oxford Com'rs v. Union Bank of Richmond (C. C. A.) 96 Fed. 293; Clarke v. Town of Northampton, 105 Fed. 312, 58 L. R. A. 900; Sherrard v. Lafayette County, 3 Dill. 236, Fed. Cas. No. 12,771; Stebbins v. Perry County, 167 Ill. 567; Bogart v. Lamotte Tp., 79 Mich. 294; Buncombe County Com'rs v. Payne, 123 N. C. 432; Glenn v. Wray, 126 N. C. 730, citing Williams v. Clouse, 91 N. C. 327; Tyler v. Capehart, 125 N. C. 64; Claybrook v. Rockingham County Com'rs, 117 N. C. 456; Union Bank of Richmond v. Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487, and Piedmont Wagon Co. v. Byrd, 119 N. C. 460.

Noel Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638.

[515] Hainer, Mun. Secur. § 372, par. 3; and cases cited.

[516] County of Moultrie v. Rockingham Ten-Cent Sav. Bank, 92 U. S. 631; County of Henry v. Nicolay, 95 U. S. 619; Pompton Tp. v. Cooper Union, 101 U. S. 196; Clay County v. Society for Savings, 104 U. S. 579; Anderson County Com'rs v. Beal, 113 U. S. 227; Marshall v. Town of Elgin, 3 McCrary, 35, 8 Fed. 783. See, however, the case of Mercer County v. Provident Life & Trust Co. (C. C. A.) 72 Fed. 623; Moulton v. City of Evansville, 25 Fed. 382; Kimball v. Town of Lakeland, 41 Fed. 289, 10 L. R. A. 500; Kingman County Com'rs v. Cornell University (C. C. A.) 57 Fed. 149; National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778. The court in its opinion by Judge Sanborn say:

"Corporations are as strongly bound to an adherence to truth in their dealings with mankind as are individuals and they cannot by their representations or silence induce others to part with their money or property and then repudiate the obligations for which the money was expended and which their statements represented to be valid. * * * It is a general and salutary principle of the law that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny their existence, is conclusively es-

or the existence of some fact,[517] and where it may be gathered from the legislative enactment that certain officials of the corporation are invested with the power to decide whether the conditions precedent have been complied with or such facts existed,[518] their recital or statement in the bonds issued by them

topped to interpose such denial. No reason occurs to us why a municipal body that has induced others to act to their prejudice by its certificate that it has performed an act that the laws intrusted to it to perform should be excepted from this rule, and permitted to deny its certificate, to the prejudice of those it has deceived, simply because the performance of the act was required by the constitution. This view is not novel."

[517] Wilson v. Salamanca Tp., 99 U. S. 499; Town of Scipio v. Wright, 101 U. S. 665; Bernards Tp. v. Morrison, 133 U. S. 523; City of South St. Paul v. Lamprecht Bros. Co. (C. C. A.) 88 Fed. 449; Speer v. Kearney County Com'rs, 88 Fed. 749; Miller v. Perris Irr. Dist., 99 Fed. 143; Stanley County Com'rs v. Coler (C. C. A.) 113 Fed. 705, reversing on rehearing the judgment in (C. C. A.) 96 Fed. 284, and affirming 89 Fed. 257; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619.

[518] Humboldt Tp. v. Long, 92 U. S. 642; Warren County v. Marcy, 97 U. S. 96. "We have substantially held that if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it." Citing Lynde v. Winnebago County, 83 U. S. (16 Wall.) 6; Town of Coloma v. Eaves, 92 U. S. 484; Douglas County Com'rs v. Bolles, 94 U. S. 104, and Johnson County Com'rs v. January, 94 U. S. 202.

Livingston County v. First Nat. Bank, 128 U. S. 102; National Bank of Commerce v. Town of Granada (C. C. A.) 54 Fed. 100. Recitals in a bond by officers in regard to matters concerning which they have no official duty do not estop the municipality from disputing the truth of such recitals. Mercer County v. Provident Life & Trust Co. (C. C. A.) 72 Fed. 623; Heed v. Cowley County Com'rs, 82 Fed. 716; Chilton v. Town of Gratton, 82 Fed. 873, affirmed (C. C. A.) 97 Fed. 145; Seward County Com'rs v. Aetna Life Ins. Co., 90 Fed. 222; Geer v. School Dist. No. 11 (C. C. A.) 97 Fed. 732; Brattleboro Sav. Bank v. Trustees of Hardy Tp., 98 Fed. 524; Rondot v. Rogers Tp. (C. C. A.) 99 Fed. 202, citing among other cases, Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 772; State v. Van Horne, 7 Ohio St. 327; State v. Trustees of Union Tp., 8 Ohio St. 394; and State v. Trustees of Goshen Tp., 14 Ohio St. 569.

Hughes County v. Livingston, 104 Fed. 306; Clapp v. Otoe County, 104 Fed. 473; Trustees of Hardy Tp. v. Brattleboro Sav. Bank (C. C. A.) 106

that they have been so complied with or that certain conditions exist, is conclusive of the fact and binding upon the corporation;[519] for, as said by the supreme court of the United States,

Fed. 986, affirming 98 Fed. 524; Wilkes County Com'rs v. Coler (C. C. A.) 113 Fed. 725.

Fulton v. Town of Riverton, 42 Minn. 395. "The second assignment raises the question as to whether these bonds and coupons are valid in the hands of innocent and bona fide purchasers for value, as against the defendant. * * * The claim is that in respect to the petition, the statute was not complied with; that the one actually presented, and upon which the town authorities proceeded, did not bear the requisite number of signatures; and that this irregularity or defect vitiates the bonds and coupons, wherever they may be found. It is obvious that by the legislative act referred to the township supervisors were created a tribunal to examine and determine whether or not the requisite two-thirds in number of the legal voters had affixed their signatures to the petition. It was their duty to ascertain and decide as to this condition precedent to a proper exercise of their authority to issue the bonds. * * * The board of supervisors did decide this question and thereupon issued the bonds. In each was a statement that it was issued in pursuance of the special act before cited, coupled with a recital and certificate that 'all acts, conditions and things required to be done precedent to and in the issuing of said bonds have been properly done, happened and performed in regular and due form as required by law.' This recital and certificate was a declaration of the decision made by a body or tribunal invested with power to pass upon the existence of the facts therein stated, and was conclusive in a suit brought against the township by a bona fide holder of the bonds."

Deming v. Inhabitants of Houlton, 64 Me. 254; State v. Board of Education of Perrysburg, 27 Ohio St. 96. In National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778, the court very tersely and clearly states the rule obtaining in the Federal courts on the doctrine of recitals. They say: "Where the municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity, to defeat them." See cases cited.

[519] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Lynde v. Winnebago County, 83 U. S. (16 Wall.) 6; Town of Venice v. Murdock, 92 U. S. 494; Marcy v. Oswego Tp., 92 U. S. 637; City of Menasha v. Hazard, 102 U. S. 81; Harter Tp. v. Kernochan, 103 U. S. 562. The court after speaking of the bond recitals and the conditions precedent say: "In view of these facts, it is difficult to perceive upon what just

ground the township can escape liability. In the first place, the bonds were issued in pursuance of a popular vote in favor of a donation to be met by a special tax, and also of a vote, at a subsequent special election in favor of an issue of bonds in payment of that donation. In the next place and as conclusive against the township, the recitals in the bonds import a compliance with all of the provisions of the acts of assembly under which they were issued. It is true that the bonds do not, in express words, refer to the special election of May 20, 1870; but since the amendatory act authorized the township, upon a vote at a regular or special town meeting or election, to issue bonds in payment of the donation previously voted, the recital in them fairly imports that such an election was, in fact, held before they were issued." American Life Ins. Co. v. Town of Bruce, 105 U. S. 328; Town of Pana v. Bowler, 107 U. S. 529; Inhabitants of New Providence v. Halsey, 117 U. S. 336; Chaffee County Com'rs v. Potter, 142 U. S. 355. As against a bona fide holder, the maker of bonds which in themselves afford no data by which the total of the amount could be determined and which contain recitals that all the requirements of the act authorizing their issue have been fully complied with and that the whole amount of the issue did not exceed the limit of the indebtedness as prescribed by the constitution, is estopped by the recitals from questioning their validity on the ground that the percentage of indebtedness fixed by the constitution was exceeded, distinguishing Dixon County v. Field, 111 U. S. 83. The court in part say: "We held in that case (Lake County v. Graham, 130 U. S. 674), that the county was not estopped from pleading the constitutional limitation, because there was no recital in the bonds in regard to it and because, also, the bonds showing upon their face that they were issued to the amount of $500,000. The purchaser having that data before him was bound to ascertain from the records the total assessed valuation of the taxable property of the county, and determine for himself, by a simple arithmetical calculation, whether the issue was in harmony with the constitution; and that the bonds, having been issued in violation of that provision of the constitution, were not valid obligations of the county. Our decision was based largely upon the ruling of this court in Dixon County v. Field, 111 U. S. 83. To the views expressed in that case we still adhere; and the only question for us now to consider, therefore, is: Do the additional recitals in these bonds, above set out, and the absence from their face of anything showing the total number issued of each series, and the total amount in all, estop the county from pleading the constitutional limitation? In our opinion these two features are of vital importance in distinguishing this case from Lake County v. Graham and Dixon County v. Field, and are sufficient to operate as an estoppel against the county. Of course, the purchaser of bonds in open market was bound to take notice of the constitutional limitation on the county with respect to indebtedness which it might incur. But when, upon the face of the bonds there was an express recital that that limitation had not been passed, and the bonds themselves did not show that it had, he was bound to look no

further. An examination of any particular bond would not disclose, as it would in the Lake County Case, and in Dixon County v. Field, that, as a matter of fact, the constitutional limitation had been exceeded, in the issue of the series of bonds. The purchaser might even know, indeed it may be admitted that he would be required to know the assessed valuation of the taxable property of the county, and yet he could not ascertain by reference to one of the bonds and the assessment roll, whether the county had exceeded its power, under the constitution, in the premises. True, if a purchaser had seen the whole issue of each series of bonds and then compared it with the assessment roll, he might have been able to discover whether the issue exceeded the amount of indebtedness limited by the constitution. But that is not the test to apply to a transaction of this nature. It is not supposed that any one person would purchase all of the bonds at one time, as that is not the usual course of business of this kind. The test is—What does each individual bond disclose? If the face of one of the bonds had disclosed that, as a matter of fact, the recital in it, with respect to the constitutional limitation, was false, of course the county would not be bound by that recital, and would not be estopped from pleading the invalidity of the bonds in this particular. Such was the case in Lake County v. Graham and Dixon County v. Field. But that is not this case. Here, by virtue of the statute under which the bonds were issued the County Commissioners were to determine the amount to be issued which was not to exceed the total amount of the indebtedness as the date of the first publication of the notice requesting the holders of county warrants to exchange their warrants for bonds, at par. The statute, in terms, gave to the commissioners the determination of a fact, that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued, and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying that it is untrue."

Town of Andes v. Ely, 158 U. S. 312; City of Evansville v. Dennett, 161 U. S. 434; Gunnison County Com'rs v. Rollins, 173 U. S. 255, affirming 80 Fed. 692. Where the bonds do not on their face show the amount of the issue, the recital that the total issue does not exceed the constitutional limitation of indebtedness estops the county from disputing its truth as against an innocent purchaser.

Huidekoper v. Buchanan County, 3 Dill. 175, Fed. Cas. No. 6,847; Westerman v. Cape Girardeau County, 5 Dill. 112, Fed. Cas. No. 17,432; Washington Tp. v. Coler (C. C. A.) 51 Fed. 362 (as to the insufficiency of a recital); Deland v. Platte County, 54 Fed. 823; City of Columbus v. Dennison (C. C. A.) 69 Fed. 58; Dudley v. Lake County Com'rs (C. C. A.) 80 Fed. 672; Chilton v. Town of Gratton, 82 Fed. 873, affirmed 97 Fed. 145. Bonds in excess of an authorized issue will be held valid

"The recital is itself a decision of the fact by the appointed tribunal."[520] Such a recital or "decision," as it is termed, is conclusive upon the corporation as to bonds in the hands of a bona fide holder who, it is held, as to such matters, is not bound to look for further evidence of a compliance with the conditions of is-

in the hands of bona fide holders where the limit of the issue can only be ascertained from records or data which are peculiarly within the control and knowledge of the public officials issuing them or where they have better access, to the necessary information, than strangers.

Brown v. Ingalls Tp., 86 Fed. 261; Township of 96 v. Folsom, 87 Fed. 304; Lake County Com'rs v. Sutliff (C. C. A.) 97 Fed. 270, 49 L. R. A. 127; Wesson v. Town of Mt. Vernon (C. C. A.) 98 Fed. 804, citing, among other cases, Town of New Orleans v. Platt, 99 U. S. 676; Town of Oregon v. Jennings, 119 U. S. 74; Sherman County v. Simons, 109 U. S. 735, following Zabriskie v. Cleveland, C. & C. R. Co., 23 How. (U. S.) 381; and Risley v. Village of Howell (C. C. A.) 64 Fed. 453.

Pickens Tp. v. Post (C. C. A.) 99 Fed. 659; Cowley County Com'rs v. Heed (C. C. A.) 101 Fed. 768; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 55 L. R. A. 364. The proviso is made in this case that the recitals will not operate as an estoppel if the act under which the bonds are issued prescribes some public record as the test of the existence of some of the acts or conditions contained in the bonds.

State v. City of Montgomery, 74 Ala. 226; Chicago, K. & W. R. Co. v. Chase County Com'rs, 49 Kan. 399, 30 Pac. 456, following Hutchinson & S. R. Co. v. Kingman County Com'rs, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401; State v. Wichita County Com'rs, 62 Kan. 494, 64 Pac. 45; City of South Hutchinson v. Barnum, 63 Kan. 872, 66 Pac. 1035; Gibbs v. School Dist. No. 10, 88 Mich. 334, 50 N. W. 294; Spitzer v. Village of Blanchard, 82 Mich. 234; St. Paul Gaslight Co. v. Village of Sandstone, 73 Minn. 225; Lane v. Schomp, 20 N. J. Eq. (5 C. E. Green) 82; Belo v. Forsythe County Com'rs, 76 N. C. 489; Coler v. Dwight School Tp., 3 N. D. 249, 55 N. W. 587, 28 L. R. A. 649; State v. Board of Education of Perrysburg, 27 Ohio St. 96; Kerr v. City of Corry, 105 Pa. 282; Coler v. Rhoda School Tp., 6 S. D. 640, 63 N. W. 158; Wilson v. Board of Education of Huron, 12 S. D. 535, 81 N. W. 952; City of San Antonio v. Lane, 32 Tex. 405; Cumberland County Sup'rs v. Randolph, 89 Va. 614, 16 S. E. 722.

[520] Town of Coloma v. Eaves, 92 U. S. 484. One of the leading cases on this point.

The court say in part: "Apart from and beyond the reasonable presumption that the officers of the law, the township officers, discharged their duty, the matter has passed into judgment. The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided and certified their decision. They have declared the contingency to have happened on the occurrence of which the authority to issue the bonds was complete. Their recitals are such a decision; and beyond

sue.[521] The recitals or statements work no estoppel, however, except when made by those officials or that tribunal either especially designated or having the general power to perform such acts. If not made by those having authority to decide and assert the facts which constitute the conditions precedent to a legal

those a bona fide purchaser is not bound to look for evidence of the existence of things in pais. He is bound to know the law conferring upon the municipality power to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is by the law confided to others—to those most competent to decide it—and which the purchaser is, in general, in no condition to decide for himself."

[521] Pendleton County v. Amy, 80 U. S. (13 Wall.) 297; Marcy v. Oswego Tp., 92 U. S. 637; Leavenworth County v. Barnes, 94 U. S. 70; Douglas County Com'rs v. Bolles, 94 U. S. 104; Johnson County Com'rs v. January, 94 U. S. 202. "The bonds recite that they were issued in conformity to law and in pursuance of the election held on the 6th of April, 1869. It is true they refer to the wrong statute but falsa demonstratio non nocet. The bad here does not hurt the good. The act of the commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the county and a bona fide holder no question involving the infirmity of the securities can be raised. The principle of estoppel applies and it precludes the obligor from interposing such a defense."

Henry County v. Nicolay, 95 U. S. 619; Moultrie County v. Fairfield, 105 U. S. 370; Sherman County v. Simons, 109 U. S. 735; Wood v. Allegheny County, 3 Wall. Jr. 267, Fed. Cas. No. 17,939; Miller v. Town of Berlin, 13 Blatchf. 245, Fed. Cas. No. 9,562; Nicolay v. St. Clair County, 3 Dill. 163, Fed. Cas. No. 10,257; Pollard v. City of Pleasant Hill, 3 Dill. 195, Fed. Cas. No. 11,253; Mygatt v. City of Green Bay, 1 Biss. 292, Fed. Cas. No. 9,998; Davis v. City of Kendallville, 5 Biss. 280, Fed. Cas. No. 3,638; Lewis v. Comanche County, 35 Fed. 343; Mathis v. Runnels County (C. C. A.) 60 Fed. 494; Rathbone v. Kiowa County Com'rs (C. C. A.) 83 Fed. 125; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 49 L. R. A. 534; Waite v. City of Santa Cruz, 89 Fed. 619; Haskell County Com'rs v. National Life Ins. Co. (C. C. A.) 90 Fed. 228; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 55 L. R. A. 364; City of Kearney v. Woodruff (C. C. A.) 115 Fed. 90; E. M. Derby & Co. v. City of Modesto, 104 Cal. 515; Danielly v. Cabaniss, 52 Ga. 211; State v. Saline County Ct., 48 Mo. 390; Claybrook v. Rockingham County Com'rs, 117 N. C. 456; Flagg v. School Dist. No. 70, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; State v. Fayette County Com'rs, 37 Ohio St. 526; Reis v. State, 133 Cal. 593, 65 Pac. 1102, reversing 59 Pac. 298; Nelson v. Haywood County, 87 Tenn. 781, 4 L. R. A. 648; Mitchell County v. City Nat. Bank, 15 Tex. Civ. App. 172, 39 S. W. 628.

issue of bonds, the recitals will not be accepted as a substitute for proof.[522]

The decisions of state courts upon questions of commercial law not controlling. In a recent case[523] in the circuit court of appeals for the eighth circuit, Judge Sanborn for the court said upon this question:

"But the question that has been under consideration here is not one of the construction of the constitution or of the statutes of the state of Iowa. It simply involves the construction and effect of recitals in negotiable instruments. It is a question of commercial, and not of constitutional law, upon which the decisions of the state courts are not controlling in the Federal tribunals. It is not only the privilege, but the duty, of the Federal courts, imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Juris-

[522] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Bissell v. City of Jeffersonville, 24 How. (U. S.) 287; Chisholm v. City of Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686. "Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent. The officers and agents of private corporations, entrusted by them with the management of their own business and property, may estop their principals, and subject them to the consequences of their unauthorized acts. But the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition, that no municipal or political body can be estopped by the acts or declarations of its offiers from denying their authority to bind it." Town of Coloma v. Eaves, 92 U. S. 484; Warren County v. Marcy, 97 U. S. 96; Bourbon County Com'rs v. Block, 99 U. S. 686; Dixon County v. Field, 111 U. S. 84; Merchants' Bank v. Bergen County, 115 U. S. 384; Town of Oregon v. Jennings, 119 U. S. 74; Bernards Tp. v. Morrison, 133 U. S. 523; Rich v. Mentz Tp., 134 U. S. 632; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173; Williams v. Town of Roberts, 88 Ill. 11; City of Vicksburg v. Lombard, 51 Miss. 111; Hudson v. Inhabitants of Winslow, 35 N. J. Law, 437; Com. v. Common Councils of Pittsburgh, 88 Pa. 66; DeVoss v. City of Richmond, 18 Grat. (Va.) 338; Simonton, Mun. Bonds, §§ 209 et seq.; Hainer, Mun. Secur. §§ 435 et seq.

[523] Independent School Dist. of Sioux City v. Rew (C. C. A.) 111 Fed. 1, 55 L. R. A. 364.

diction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents."[524]

§ 210. Estoppel not applying to recitals of law.

The principle of estoppel does not apply, however, to recitals of authority, for in this respect, it is held, every purchaser of bonds acquires and holds them charged with full notice of the possession of power in the first instance on the part of the public corporation to issue them: the question of legislative authority in a public corporation to issue negotiable bonds cannot be concluded by mere recitals, even when the bonds have come into the hands of bona fide holders for value.[525]

[524] Swift v. Tyson, 16 Pet. (U. S.) 1; Carpenter v. Providence & W. Ins. Co., 16 Pet. (U. S.) 495; New York Cent. R. Co. v. Lockwood, 84 U. S. (17 Wall.) 357; Brooklyn City & N. R. Co. v. National Bank of Republic, 102 U. S. 14; Burgess v. Seligman, 107 U. S. 20; Myrick v. Michigan Cent. R. Co., 107 U. S. 102; Smith v. Alabama, 124 U. S. 465; Bucher v. Cheshire R. Co., 125 U. S. 555; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397; Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co. (C. C. A.) 70 Fed. 201, 30 L. R. A. 193; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749.

[525] Town of South Ottawa v. Perkins, 94 U. S. 260; McClure v. Oxford Tp., 94 U. S. 429. Every purshaser of municipal bonds which refer to the statute under which they were issued is bound to take notice of all its requirements. The court say: "To be a bona fide holder one must be himself a purchaser for value without notice or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all its requirements." After commenting on the statutory requirements and the recitals in the bonds themselves the court continues: "These bonds, therefore, carried upon their face unmistakable evidence that the forms of the law under which they purported to have been issued had not been complied with because thirty days had not elapsed between the time the law took effect and the date of the election. If a purchaser may be, as he

§ 211. Distinction between power to issue and irregularity in its exercise.

The doctrine of recitals, as stated in section 208, although applied frequently, has never been carried to the extreme of holding

sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true."

Independent School Dist. of Steamboat Rock v. Stone, 106 U. S. 183; Dixon County v. Field, 111 U. S. 83; Merchants' Bank v. Bergen County, 115 U. S. 384; Katzenberger v. City of Aberdeen, 121 U. S. 172; Sutliff v. Lake County Com'rs, 147 U. S. 230, following Dixon County v. Field, 111 U. S. 83; Lake County v. Graham, 130 U. S. 674, and distinguishing Chaffee County v. Potter, 142 U. S. 355, reversing Lake County Com'rs v. Sutliff (C. C. A.) 97 Fed. 270.

Citizens' Sav. & Loan Ass'n v. Perry County, 156 U. S. 692; Kelly v. Town of Milan, 21 Fed. 842; Bates v. Independent School Dist. of Riverside, 25 Fed. 192; Sutliff v. Lake County, 47 Fed. 106; National Bank of Commerce v. Town of Granada, 48 Fed. 278; National Bank of Commerce v. Town of Granada (C. C. A.) 54 Fed. 100; Francis v. Howard County (C. C. A.) 54 Fed. 487, affirming 50 Fed. 44; Coffin v. Kearney County Com'rs (C. C. A.) 57 Fed. 137.

City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.) 58 Fed. 935. A recital that the bonds are "refunding bonds" issued to take up "old bonds falling due" estops the city as against a bona fide holder from showing that the old bonds were invalid.

Barber County Com'rs v. Society for Savings (C. C. A.) 101 Fed. 767. Recitals in refunding bonds estop the maker from setting up as a defense fraudulent indebtedness. Shaw v. Independent School Dist. of Riverside, 62 Fed. 911. An estoppel arises from recitals in refunding bonds that prevents a showing of the illegality of the original issue. Prickett v. City of Marceline, 65 Fed. 469; Quaker City Nat. Bank v. Nolan County (C. C. A.) 66 Fed. 883, affirming 59 Fed. 660; Rathbone v. Kiowa County Com'rs, 73 Fed. 395; Manhattan County v. City of Ironwood (C. C. A.) 74 Fed. 535, following McClure v. Oxford Tp., 94 U. S. 429; Springfield Safe-Deposit & Trust Co. v. City of Attica (C. C. A.) 85 Fed. 387; D'Esterre v. City of Brooklyn, 90 Fed. 586; Burlington Sav. Bank v. City of Clinton, 111 Fed. 439; Bissell v. City of Kankakee, 64 Ill. 249; McPherson v. Foster Bros., 43 Iowa, 48; Com. of Virginia v. State, 32 Md. 501; Heard v. Calhoun School Dist., 45 Mo. App. 660; Wilkes County Com'rs v. Call, 123 N. C. 308, 44 L. R. A. 252; Union Bank of Richmond v. Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487; Stanly County Com'rs v. Snuggs, 121 N. C. 394, 39 L. R. A. 439; People's Bank of St. Paul v. School Dist. No. 52, 3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642; Miller v. Hixson, 64 Ohio St. 39, 59 N. E. 749; Town of Klamath Falls v. Sachs, 35 Or. 325, 57 Pac. 329; Livingston v. School Dist. No. 7, 9 S. D. 345, 69 N. W. 15; Nolan County v. State, 83 Tex. 182,

that public officials can, by their recitals or decisions, create a power on the part of the public corporation to issue bonds where none existed.[526] In a case decided by the supreme court of the United States,[527] Mr. Justice Hunt said: "These bonds are securities which pass from hand to hand with the immunity given by the common law to bills of exchange and promissory notes. The persons who execute and deliver them—the officers of the county

17 S. W. 823; Ball v. Presidio County (Tex. Civ. App.) 27 S. W. 702. Where bonds purchased were numbered from ninety to ninety-six inclusive, this fact alone does not charge a purchaser with notice of lack of power to issue; eighty-six bonds of $1,000 each only being authorized, there being no requirement in the statutes or order that bonds should be numbered from one to eighty-six inclusive. Mitchell County v. City Nat. Bank, 91 Tex. 361, 43 S. W. 880; Slifer v. Howell's Adm'r, 9 W. Va. 391.

[526] Town of South Ottawa v. Perkins, 94 U. S. 260. "Not only the courts but individuals are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score and can take no advantage from the allegation that he is a bona fide purchaser without notice. He would, it is true, be precluded from doing so on another ground, namely, the want of any legislative authority in fact in the town to issue the bonds in question. Want of such authority is a fatal objection to their validity no matter under what circumstances the holder may have obtained them."

Northern Bank of Toledo v. Porter Tp. Trustees, 110 U. S. 608; Hedges v. Dixon County, 150 U. S. 182; Daviess County v. Dickinson, 117 U. S. 657; Smith v. Town of Ontario, 15 Blatchf. 267, Fed. Cas. No. 13,085; Lewis v. Comanche County Com'rs, 35 Fed. 343; Travelers' Ins. Co. v. Oswego Tp., 55 Fed. 361; Swan v. Arkansas City, 61 Fed. 478; National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778. The court here held, that if the want of power did not appear from the bonds, or the public records to which the statutes under which they were issued referred, recitals might constitute an estoppel in favor of a bona fide purchaser.

Rathbone v. Kiowa County Com'rs, 73 Fed. 395; Fairfield v. Rural Independent School Dist., 111 Fed. 453; Washington County v. David, 2 Neb. Unoff. 649, 89 N. W. 737; Buncombe County Com'rs v. Payne, 123 N. C. 432; National Life Ins. Co. v. Mead, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, rehearing denied, 13 S. D. 342, 83 N. W. 335; Oswego County Sav. Bank v. Town of Genoa, 28 Misc. 71, 59 N. Y. Supp. 829; Cass County v. Wilbarger County, 25 Tex. Civ. App. 52, 60 S. W. 988. If the law under which bonds are issued is unconstitutional, a recital that they were "issued under and in compliance with the constitution and laws of the state," affords no protection to a bona fide holder. Peck v. City of Hempstead, 27 Tex. Civ. App. 80, 65 S. W. 653.

[527] Daviess County v. Huidekoper, 98 U. S. 98.

court in this instance—are the agents of the municipal body authorizing their issue and not of the persons who purchase or receive them. If these agents exceed their authority as to form, manner, detail or circumstance, if they execute it in an irregular manner, it is the misfortune of the town or county and not of the purchaser; the loss must fall on those whom they represent and not on those who deal with them. There must indeed be power which, if formally and duly exercised, will bind the county or town; no bona fides can dispense with this and no recital can excuse it." The doctrine of recitals, however, has been carried to the extent that recitals of public officials that bonds were issued for a proper and public purpose and such as authorized are conclusive.[528]

[528] Marshall County Sup'rs v. Schenck, 72 U. S. (5 Wall.) 772; City of Ottawa v. First Nat. Bank of Portsmouth, 105 U. S. 342. "The bonds in suit constitute a portion of the issue of $60,000 referred to in Hackett v. City of Ottawa, 99 U. S. 86. * * * As in that case, so here, the bonds recite that they were issued in virtue of the power conferred by the charter of the city upon its council * * * to borrow money on its credit and to issue, bonds pledging its revenue for the payment thereof, and also in pursuance of two ordinances of the city council, one, passed June 15, 1869, entitled 'An ordinance to provide for a loan for municipal purposes,' * * * Waiving any direct decision of the question, much elaborated by counsel, as to what * * * is to be regarded as a municipal or corporate purpose for which the city can lawfully exercise the power of borrowing money and issuing bonds, we there adjudged the defense to be insufficient for these reasons. The city council had power, the voters consenting, to issue negotiable securities for certain municipal purposes, if the purchaser under some circumstances, would have been bound to take notice of the provisions of the ordinances whose titles were recited in the bonds, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinance provided for a loan for municipal purposes; such a representation, by the constituted authorities of the city, would naturally avert suspicion of bad faith upon their part and induce purchasers to omit an examination of the ordinances themselves and consequently the city was estopped, as against a bona fide holder for value, to say that the bonds were not issued for legitimate or proper municipal or corporate purposes." Comanche County v. Lewis, 133 U. S. 198. See, however, Barnett v. City of Denison, 145 U. S. 135; City of Cairo v. Zane, 149 U. S. 122; Guernsey v. Burlington Tp., 4 Dill. 372, Fed. Cas. No. 5,855; National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778. See quotations from Judge Sanborn's opinion, § 204, note 503, supra; Ris-

§ 212. The doctrine as applied to bonds containing no recitals of authority.

Where negotiable bonds are issued containing no recitals of authority, it is quite generally held that they are not unimpeachable in the hands of bona fide holders. In an action on the bonds under such circumstances, the plaintiff should show either that the bonds contained such recitals as would preclude the public corporation from impeaching their validity or else that they were issued in substantial compliance with the law authorizing them and for a proper purpose.[529]

§ 213. Bona fide holder.

The question of who is or may become a bona fide holder[530] of negotiable bonds issued by public corporations is an important

ley v. Village of Howell (C. C. A.) 64 Fed. 453; Wesson v. Saline County (C. C. A.) 73 Fed. 917, following City of Evansville v. Dennett, 161 U. S. 434, and overruling Post v. Pulaski County (C. C. A.) 49 Fed. 628; Ashman v. Pulaski County (C. C. A.) 73 Fed. 927; Second Ward Sav. Bank v. City of Huron, 80 Fed. 660; Waite v. City of Santa Cruz, 89 Fed. 619; Haskell County Com'rs v. National Life Ins. Co. (C. C. A.) 90 Fed. 228; Meade County Com'rs v. Aetna Life Ins. Co. (C. C. A.) 90 Fed. 237; City of Uvalde v. Spier (C. C. A.) 91 Fed. 594; Village of Kent v. Dana (C. C. A.) 100 Fed. 56; Clapp v. Otoe County (C. C. A.) 104 Fed. 473; City of Pierre v. Dunscomb, 106 Fed. 611; Independent School Dist. of Sioux City v. Rew, 111 Fed. 1, 55 L. R. A. 364; Clapp v. Village of Marice City (C. C. A.) 111 Fed. 103; Town of Brewton v. Spira, 106 Ala. 229, 17 So. 606; Brown v. Milliken, 42 Kan. 769; State v. Wichita County Com'rs, 62 Kan. 494, 64 Pac. 45; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; Jones v. City of Camden, 44 S. C. 319; City of Jefferson v. Marshall Nat. Bank, 18 Tex. Civ. App. 539, 46 S. W. 97. But see the case of Noel Young Bond & Stock Co. v. Mitchell County, 21 Tex. Civ. App. 638; Town of Clifton Forge v. Brush Elec. Co., 92 Va. 289, 23 S. E. 288; Mills v. Gleason, 11 Wis. 470.

[529] Town of Concord v. Robinson, 121 U. S. 165; Hopper v. Town of Covington, 10 Biss. 488, 8 Fed. 777; Bolles v. Perry County (C. C. A.) 92 Fed. 479; Lewis v. Bourbon County Com'rs, 12 Kan. 186; Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520.

[530] Mercer County v. Hacket, 68 U. S. (1 Wall.) 83. "Although we doubt not the facts stated as to the atrocious frauds which have been practiced in some counties, in issuing and obtaining these bonds we cannot agree to overrule our own decisions and change the law to suit hard cases. The epidemic insanity of the people, the folly of county officers, the knavery of railroad 'speculators' are pleas which might have

one, for upon the existence of such a condition depends the application of the principles of estoppel, as suggested in the preceding sections. To constitute a bona fide holder it is necessary that one should have purchased the bond before maturity,[531] have given value for it,[532] and have no legally competent knowledge of defects or irregularities in the manner of issue which as against one having such knowledge does not preclude the municipality

just weight in an application to restrain the issue or negotiation of these bonds but cannot prevail to authorize their repudiation, after they have been negotiated and have come into the possession of bona fide holders." Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. (11 Wall.) 459. "One who purchases railroad bonds in open market, supposing them to be valid and having no notice to the contrary will be deemed a bona fide holder." McClure v. Oxford Tp., 94 U. S. 429. "A bona fide holder is a purchaser for value without notice, or the successor of one who was."

Town of Venice v. Murdock, 92 U. S. 494; Town of Genoa v. Woodruff, 92 U. S. 502; Humboldt Tp. v. Long, 92 U. S. 642; Douglas County Com'rs v. Bolles, 94 U. S. 104; Town of Orleans v. Platt, 99 U. S. 676; Montclair Tp. v. Ramsdell, 107 U. S. 147; Sayles v. Garrett, 110 U. S. 288; Mobile Sav. Bank v. Oktibbeha County Sup'rs, 24 Fed. 110; Sioux City & St. P. R. Co. v. County of Osceola, 45 Iowa, 168; Id., 52 Iowa, 26; Independent Dist. of Rock Rapids v. Society for Savings, 98 Iowa, 581, 67 N. W. 370; School Dist. No. 40 v. Cushing, 8 Kan. App. 728, 54 Pac. 924; Taylor v. Daviess County, 17 Ky. L. R. 711, 32 S. W. 416; Pugh v. Moore, 44 La. Ann. 209; State v. Clinton, 28 La. Ann. 52; State v. Hart, 46 La. Ann. 40; City of Elizabeth v. Force, 29 N. J. Eq. 587; Copper v. Jersey City, 44 N. J. Law, 634. See in 29 Am. Law Reg. (N. S.) 380, a scholarly and thorough discussion of the question and the rights of bona fide holders by Clarence H. Childs of the Minneapolis bar.

Germania Sav. Bank v. Village of Suspension Bridge, 73 Hun, 590, 26 N. Y. Supp. 98. One cannot be a bona fide holder of bonds stolen from the public authorities before issue. Town of Ontario v. Union Bank of Rochester, 21 Misc. 770, 47 N. Y. Supp. 927; Cagwin v. Town of Hancock, 84 N. Y. 532; Seybel v. National Currency Bank, 54 N. Y. 288; Oswego County Sav. Bank v. Town of Genoa, 66 App. Div. 330, 72 N. Y. Supp. 786. There cannot be a bona fide holder of bonds issued without authority. See, also, 18 Am. Rep. 259-269. Hainer, Mun. Secur. §§ 397 et seq., and Simonton, Mun. Bonds, §§ 116 et seq.

[531] Texas v. White, 74 U. S. (7 Wall.) 700; Town of Grand Chute v. Winegar, 82 U. S. (15 Wall.) 355; Cromwell v. Sac County, 96 U. S. 51.

[532] Briggs v. Town of Phelps, 70 Fed. 29; D'Esterre v. City of Brooklyn, 90 Fed. 586; Town of Greenburg v. International Trust Co. (C. C. A.) 94 Fed. 755; Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044, citing Common Council of Cedar Springs v. Schlich, 81 Mich. 405, 8 L. R. A. 851; Gibbs v. School Dist. No. 10, 88 Mich. 334.

from setting them up.[533] In a leading text-book on municipal bonds[534] the following definition is given: "A bona fide holder of a negotiable bond or other negotiable paper is a second or other subsequent holder of it who takes it for value in good faith before maturity and without notice of defects and such a holder obtains a perfect title and may hold it against the world. It becomes his absolutely, with the right to demand payment of it for himself and, if necessary, to enforce its collection in his own name and his privies have the same rights." It is not necessary to constitute one a bona fide holder of negotiable bonds to show that he himself paid value therefor but he can rely upon the title of any prior bona fide holder for value. A transferee from a bona fide purchaser of negotiable bonds takes all the rights of the transferor and may invoke every presumption and estoppel from their recitals to sustain their validity that such transferor might, although he takes them as a donation after maturity and with notice of alleged defenses,[535] or without re-

[533] Scotland County v. Hill, 132 U. S. 107; Mobile Sav. Bank v. Oktibbeha County Sup'rs, 22 Fed. 580; Suffolk Sav. Bank v. City of Boston, 149 Mass. 364, 4 L. R. A. 516; Schmid v. Village of Frankfort, 131 Mich. 197, 91 N. W. 131; Starin v. Town of Genoa, 23 N. Y. 439; City of Lynchburg v. Slaughter, 75 Va. 57.

[534] Simonton, Mun. Bonds, § 116. See, also, Bronson, Mun. Bonds, pp. 29 et seq.

[535] Village of Montclair v. Ramsdell, 107 U. S. 147, citing and quoting from Douglas County Com'rs v. Bolles, 94 U. S. 104, where, in speaking of recitals in bonds, the court said: "Behind such a recital, as we have seen, a bona fide holder for value paid is bound to look for nothing except legislative authority given for the issue of municipal bonds to railroad companies. He is not required to examine whether the conditions upon which such authority may be exercised have been fulfilled. He may rely upon the decision made by the tribunal selected by the legislature. Do then, the plaintiffs below stand in the position of bona fide holders for value paid, and without notice of any defect or irregularity in the proceedings anterior to the issue of the bonds? In view of the findings of the circuit court, very plainly they do. They are the holders of the coupons in suit taken from those bonds, some of which they purchased without notice of any defense. The residue of those held by them are owned by other persons who deposited them with the plaintiffs for collection taking a receipt. There is no evidence when or for what consideration those other persons purchased and no evidence of actual notice to them or to the plaintiffs of any of the facts anterior to the issue of the bonds. The findings of the court exhibit no fraud in the inception of the contracts nor any-

gard to any knowledge which such purchaser may himself have affecting the validity of the bonds.[536] An overdue and unpaid coupon, it has been held, does not render the whole bond dishonored so as to deprive the buyer of the character of a bona fide purchaser before maturity.[537] The fact that a railroad com-

thing that casts upon the holders of the bonds or coupons the burden of showing that they are bona fide holders for value. The legal presumption, therefore, is that they are. But the plaintiffs are not forced to rest upon mere presumption to support their claims to be considered as having the rights of purchasers without notice of any defense. They can call to their aid the fact that their predecessors in ownership were such purchasers. To the rights of those predecessors they have succeeded. Certainly the railroad company paid for the bonds and coupons by giving an equal amount of their stock, which the county now holds; and nothing in the special facts found shows that the company knew of any irregularity or fault in the issue. And still more; the contractor for building the railroad received the bonds from the county in payment of his work either in whole or in part after his work had been completed. There is no pretense that he had notice of anything that should have made him doubt their validity. Why was he not a bona fide purchaser for value? The law is undoubted that every person succeeding him in the ownership of the bonds is entitled to stand upon his rights." Lake County Com'rs v. Sutliff (C. C. A.) 97 Fed. 270; Pickens Tp. v. Post (C. C. A.) 99 Fed. 659, citing Goodman v. Simonds, 20 How. (U. S.) 343; Brown v. Spofford, 95 U. S. 474.

Hughes County v. Livingston (C. C. A.) 104 Fed. 306; Johnson v. Butler, 31 La. Ann. 770; Seybel v. National Currency Bank, 54 N. Y. 288, 13 Am. Rep. 583. A purchaser of bonds payable to buyer is not bound to make inquiry of or take any special precaution concerning the title of one offering to sell such bonds.

[536] Gunnison County Com'rs v. Rollins, 173 U. S. 255, following Chaffee County v. Potter, 142 U. S. 355; Lake County v. Graham, 130 U. S. 674.

[537] Cromwell v. Sac County, 96 U. S. 51. "The interest stipulated was a mere incident of the debt. The holder of the bond had his option to insist upon its payment when due, or to allow it to run until the maturity of the bond; that is until the principal was payable. Many causes may have existed for a failure to meet the interest as it matured, entirely independent of the question of the validity of the bonds in their inception. The payment of previous installments of interest would seem to suggest that only causes of a temporary nature had prevented their continued payment. If no installment had been paid, and several were past due, there might have been greater reason for hesitation on the part of the purchaser to take the paper and suspicions might have been excited that something was wrong in issuing it. All that we now decide is, that the simple fact that an installment of interest is overdue and unpaid, disconnected from other facts is not sufficient to

pany, to whom the municipal aid bonds were given, delivered the bonds to third parties in payment for goods will not deprive such holders of the rights of purchasers in good faith and for value if the goods for which they were exchanged were of value to the company in the construction or operation of the road.[538] The burden of proof, it is usually held, to establish the fact of a bona fide holding is upon the plaintiff in an action brought to recover on municipal bonds.[539] One cannot be a bona fide holder where the conditions or circumstances are such as to charge him with notice of the want of original authority to issue bonds.[540]

affect the position of one taking the bonds and subsequent coupons before their maturity for value as a bona fide purchaser. To hold otherwise would throw discredit upon a large class of securities issued by municipal and private corporations having years to run with interest payable annually or semi-annually. Temporary financial pressure, the falling off of expected revenues or income and many other causes having no connection with the original validity of such instruments have heretofore in many instances prevented a punctual payment of every installment of interest on them as it matured; and similar causes may be expected to prevent a punctual payment of interest in many instances hereafter. To hold that a failure to meet the interest as it matures renders them, though they may have years to run, and all subsequent coupons dishonored paper, subject to all defenses good against the original holders, would greatly impair the currency and credit of such securities and correspondingly diminish their value." National Bank of North America v. Kirby, 108 Mass. 497; Burnham v. Brown, 23 Me. 400; Grafton Bank v. Doe, 19 Vt. 463; Boss v. Hewitt, 15 Wis. 260.

[538] Kennicott v. Wayne County Sup'rs, 6 Biss. 138, Fed. Cas. No. 7,710.

[539] Tracey v. Town of Phelps, 22 Fed. 634. But see Pickens Tp. v. Post (C. C. A.) 99 Fed. 659, as holding that the holder of a negotiable instrument is presumed to have taken it before maturity for value and without notice of defects.

Grant Tp. v. Reno Tp., 114 Mich. 41, 72 N. W. 18. "To entitle Haugan (the holder of the bonds) to a judgment against the township of Grant it was necessary that he should show that he or some former owner of the bonds was a purchaser in good faith before maturity, for a valuable consideration and without notice of the invalidity of the bonds, as the law imposes the burden of such showing upon the plaintiff where the defendant shows that the bond or note was illegal or void in the hands of the payee." Citing Paton v. Coit, 5 Mich. 505; Manistee Nat. Bank v. Seymour, 64 Mich. 59, 31 N. W. 140; Bottomley v. Goldsmith, 36 Mich. 27; Mace v. Kennedy, 68 Mich. 389, 36 N. W. 187; Conley v. Winsor, 41 Mich. 253; Lytle v. Town of Lansing, 147 U. S. 59, 13 Sup. Ct. 254.

Thompson v. Village of Mecosta, 127 Mich. 522, 86 N. W. 1044; Thompson v. Town of Mamakating, 37 Hun (N. Y.) 400.

[540] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156; Francis v. Howard County, 50 Fed.

§ 214. Coupons; their legal character.

The express authority granted public corporations to issue negotiable bonds bearing interest, carries with it the power to issue evidences of the latter obligation in the form of coupons payable to bearer or to order.[541] A coupon is therefore a written promise by the maker of the bond to which it may be attached to pay one of the installments of interest due upon the principal.[542] When

44. "Howard County assessment rolls of 1883 were public records, made in obedience to the constitution and laws of the state. They were open to the inspection of the public and they contained the amount of the taxable property of the county. Purchasers of the bonds were chargeable with notice of these records and had they been consulted, the discovery would have followed that a tax of one-fourth of one per cent authorized by the constitution and the third section of the act of 1881 levied annually on property valued at $863,011.38 would liquidate in ten years an indebtedness of only $14,982.77. The bonds in excess of that amount are void and collection of the excess cannot be enforced against the county, even by a bona fide purchaser for value."

Cagwin v. Town of Hancock, 84 N. Y. 532. "There can be no bona fide holder of bonds within the meaning of the law applicable to negotiable paper which have been issued without authority. A town has no general authority to issue such bonds. It can issue them only by virtue of special authority conferred by some statute. Unless issued in the way pointed out by statute they cannot bind the town. The statute specifies the powers of the agents of the town and the precise conditions upon which the bonds could be issued; and all persons taking the bonds are chargeable with knowledge of the statute and they must see to it that the statute has been complied with before they can with absolute safety take the bonds. Such is the law as laid down in this state."

[541] Atchison Board of Education v. De Kay, 148 U. S. 591. "But it is further insisted that even if the bonds were valid, the coupons were not because coupons are not named in the section of the statute authorizing the issue of the bonds. But coupons are simply instruments containing the promise to pay interest and the express authority was to issue bonds bearing interest. While it is true that the power to borrow money granted to a municipal corporation does not carry with it by implication the power to issue negotiable bonds we are of opinion that the express power to issue bonds bearing interest carries with it the power to attach to those bonds interest coupons."

[542] Moore v. Greenhow, 114 U. S. 338. And see Vashon v. Greenhow, 135 U. S. 713, construing the coupon contract of the state of Virginia as authorized by the funding acts of March 30, 1871, and March 28, 1879. Strickler v. Yager, 29 Fed. 244; Willis v. Miller, 29 Fed. 238; Antoni v. Wright, 22 Grat. (Va.) 833; Poin-

legally issued by public corporations they, equally with the bonds to which annexed, if payable to bearer or payable to order and endorsed in blank, become transferable by delivery and are subject to the same rules and principles of negotiable paper that apply to the bond itself with respect to the rights and title of a bona fide holder.[543] The bona fide holder of such coupons, therefore, has the right to invoke the same principles of law which attach to a negotiable bond and apply the same doctrines of estoppel and, though separated from the bond to which they were once attached, they retain the same nature and character as the bond.[544] A holder of a detached coupon possesses equal rights with the owner of the bond from which it was cut.[545] Suit can be maintained upon them under the same conditions as

dexter v. Greenhow, 84 Va. 441, 4 S. E. 742, following Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91.

[543] City of Lexington v. Butler, 81 U. S. (14 Wall.) 282; Town of East Lincoln v. Davenport, 94 U. S. 801. In this case Hunt, J., said, in speaking of the point mentioned in the text: "The case shows that the plaintiff below was the bona fide owner of the coupons sued upon. Questions of form merely or irregularity or fraud or misconduct on the part of the agents of the town cannot therefore, be considered. Whether the supervisor of the town signed the bonds during the midnight hours, whether he delivered them at about daylight on the morning of April 2, 1873, and whether he immediately left the town to avoid the service of an injunction are matters not chargeable to the owner of the bonds. The supervisor was not his agent but the agent of the town, and if there has been misconduct on his part, the town, rather than a stranger must bear the consequences. There must be authority in the town to issue the bonds by the statutes of the state. If this cannot be found the holder must fail, if it exists, he is entitled to recover." Thayer v. Montgomery County, 3 Dill. 389, Fed. Cas. No. 13,870; Cooper v. Town of Thompson, 13 Blatchf. 434, Fed. Cas. No. 3,202; Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 170 N. Y. 58; Grand Rapids & I. R. Co. v. Sanders, 54 How. Pr. (N. Y.) 214.

[544] Lake County Com'rs v. Platt (C. C. A.) 79 Fed. 567; Gray v. York, 15 Blatchf. 335, Fed. Cas. No. 5,731; Augusta Bank v. City of Augusta, 49 Me. 507; First Nat. Bank of St. Paul v. Scott County Com'rs, 14 Minn. 77 (Gil. 59). See as to the rights of a bona fide holder bought after maturity. Miller v. Town of Berlin, 13 Blatchf. 245, Fed. Cas. No. 9,562; Arents v. Com., 18 Grat. (Va.) 750.

[545] City of Kenosha v. Lamson, 76 U. S. (9 Wall.) 477; Evertson v. National Bank of Newport, 66 N. Y. 14, 23 Am. Rep. 9; Second Nat. Bank v. School Dist. of Connellsville, 23 Pa. Co. Ct. R. 636; Brown v. Town of Point Pleasant, 36 W. Va. 290, 15 S. E. 209.

would apply to the bond itself and the bona fide holder is as effectually shielded in such an action from the defense of prior equities between the original parties as the holder of negotiable instruments.[546] They are generally transferred by delivery being promises to pay to bearer and bear interest from the time of demand after their maturity.[547] If unpaid they are considered independent contracts for the payment of the interest they represent and an action upon them can be maintained without any proof of title to the bonds; the possession of the coupon is presumptive evidence of the right of the holder to recover.[548]

[546] City of Lexington v. Butler, 81 U. S. (14 Wall.) 282. "Coupons attached as interest warrants to bonds for the payment of money lawfully issued by municipal corporations as well as the bonds to which they are attached, when they are payable to order or are indorsed in blank or are made payable to bearer, are transferable by delivery and are subject to the same rules and regulations so far as respects the title and rights of the holder as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are endorsed in blank or are payable to bearer are as effectually shielded from the defense of prior equities between the original parties if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments." Citing Mercer County v. Hacket, 68 U. S. (1 Wall.) 83; Moran v. Miami County Com'rs, 2 Black (U. S.) 722.

Bank of California v. Dunn, 66 Cal. 38; Muhlenburg County v. Morehead, 20 Ky. L. R. 377, 46 S. W. 216; Bainbridge v. City of Louisville, 83 Ky. 285. A municipality is liable to the owner of stolen coupons if paid after maturity to one other than such true owner although in the hands of a bona fide purchaser.

[547] Town of Genoa v. Woodruff, 92 U. S. 502; United States Mortg. Co. v. Sperry, 138 U. S. 313; City of Cairo v. Zane, 149 U. S. 122; Corcoran v. Chesapeake & O. Canal Co., 1 MacArthur (D. C.) 358; Hughes County v. Livingston (C. C. A.) 104 Fed. 306; People v. Getzendaner, 137 Ill. 234; Town of Lexington v. Union Nat. Bank, 75 Miss. 1, 22 So. 291; Burroughs v. Richmond County Com'rs, 65 N. C. 234; McLendon v. Anson County Com'rs, 71 N. C. 38; Harper v. Ely, 70 Ill. 581; Humphreys v. Morton, 100 Ill. 592; Drury v. Wolfe, 134 Ill. 294.

[548] Knox County Com'rs v. Aspinwall, 21 How. (U. S.) 539; Thomson v. Lee County, 70 U. S. (3 Wall.) 327; McCoy v. Washington County, 3 Wall. Jr. 381, Fed. Cas. No. 8,731; City of Kenosha v. Lamson, 76 U. S. (9 Wall.) 477. "We agree that if this were an action upon the bonds to recover installments of interest that had accrued thereon * * * there would be great difficulty in maintaining in his name as well as without producing the bonds as the proper evidence that interest was due. The plaintiff under such circumstances, doubtless, would have a remedy for withholding the interest; but * * * we do not regard the action as founded upon the bonds

§ 215. Time and place of payment.

The fact that coupons are made payable at a certain place does not necessarily require a demand for their payment to be made at that place.[549] If, however, the authority for the issue of negotiable bonds with coupons requires that they "shall be transferable only on the books of the city," it has been held, a holder of the coupons cannot recover unless the bonds have been transferred as provided in the act.[550] If payable out of a special fund,

but upon the coupons. The bonds are recited in very general terms, it is true in the declaration; but it is by way of explaining and bringing into view the relation which the coupons originally held to the bonds and which in an important sense, they still hold, though distinct as it respects ownership, as they represent the interest that had become due upon them. The relation we refer to is that these coupons are not received or intended to have the effect of extinguishing the interest due on the bonds as this collateral security, or rather this evidence of the interest, upon well settled principles, cannot have that effect without an express agreement between the parties. Besides the coupons are given simply as a convenient mode of obtaining payment of the interest as it becomes due upon the bonds. There is no extinguishment till payment."

Kennard v. Cass County, 3 Dill. 147, Fed. Cas. No. 7,697; Dudley v. Lake County Com'rs (C. C. A.) 80 Fed. 672; Town of Cicero v. Clifford, 53 Ind. 191; Burroughs v. Richmond County Com'rs, 65 N. C. 234; Bank of U. S. v. Macalester, 9 Pa. 475; Beaver County v. Armstrong, 44 Pa. 63; National Exch. Bank v. Hartford, P. & F. R. Co., 8 R. I. 375; City of Memphis v. Bethel (Tenn.) 17 S. W. 191; Kennard v. Cass County, 1 Cent. Law J. 35. See, also, New London City Nat. Bank v. Ware River R. Co., 41 Conn. 542; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Smith v. Clark County, 54 Mo. 58; Langston v. South Carolina R. Co., 2 S. C. (2 Rich.) 248.

[549] Walnut Tp. v. Wade, 103 U. S. 683; Hughes County v. Livingston (C. C. A.) 104 Fed. 306. "The fact that the bonds and coupons were not presented for payment at the bank in New York where by their terms they were payable, was immaterial. There was no claim that the county had ever paid them, or endeavored to pay them; no claim that it had ever placed the money at the bank in New York to be applied to their payment. In this state of the case, the plaintiff was not required to go through the useless ceremony of presenting his coupons where there was nothing to pay them before he commenced his suit for the default of the county. The fact that coupons are made payable at a particular place does not make a presentation for payment at that place necessary before an action can be maintained upon them." Smith v. Tallapoosa County, 2 Woods, 574, Fed. Cas. No. 13,113; Wallace v. McConnell, 13 Pet. (U. S.) 136.

[550] Oelrich v. City of Pittsburgh, 1 Pittsb. Rep. 522, Fed. Cas. No. 10,442.

it is necessary in a suit to allege and prove the existence of the fund and in the case there are not moneys sufficient in such fund, a demand for payment is properly refused and the holder of such coupons will have no right of action to recover the account due from the general revenues of the corporation.[551] A condition imposed by a municipality upon the holder of coupons in regard to their deposit for payment not authorized by the conditions of the bond from which the coupons were detached is not binding upon the coupon holder.[552]

§ 216. Negotiable securities; sale.

The manner or time of sale of bonds issued by a public corporation may be irregular or in violation of some express statutory provision which condition is considered of so grave a character as to raise a serious question of their validity even though in all other respects such bonds are legal. Circumstances to be considered in determining their validity when considered with reference to sale may be their disposal at a price less than par when prohibited in this respect by law;[553] the consideration for the

[551] Corcoran v. Chesapeake & O. Canal Co., 1 MacArthur (D. C.) 358; Hall v. City of New Orleans, 19 Fed. 870; Lorsbach v. Lincoln County, 94 Fed. 963. Neither coupons nor the bonds to which they may have been attached nor judgments upon them are claims within the meaning of the Nevada statutes requiring all claims against counties to be presented and allowed by the proper county officials. State v. Lincoln County Com'rs, 23 Nev. 262, 45 Pac. 982; Seymour v. Frost, 25 Wash. 644, 66 Pac. 90.

[552] Bailey v. Buchanan County, 54 N. Y. Super. Ct. (22 J. & S.) 237.

[553] Mercer County v. Hacket, 68 U. S. (1 Wall.) 83; Richardson v. Lawrence County, 154 U. S. 536; National Life Ins. Co. v. Board of Education of Huron (C. C. A.) 62 Fed. 778; Williams v. Board of Revenue of Butler County, 123 Ala. 432, 26 So. 346; Jones v. Macon & B. R. Co., 39 Ga. 138, determining the right of a citizen to restrain the illegal use or sale, below a lawful price, of railroad aid bonds; Sherlock v. Village of Winnetka, 59 Ill. 389; City of Atchison v. Butcher, 3 Kan. 104; Frantz v. Jacob, 88 Ky. 525, 11 S. W. 654; Neuse River Nav. Co. v. New Bern Com'rs, 52 N. C. (7 Jones) 275; Baker v. City of Elizabeth, 37 N. J. Law, 142.

People v. Dakin, 43 Hun (N. Y.) 382. The premium from the sale of bonds belongs, so it is held in this case, to the fund to create which the bonds were issued. Delafield v. State of Illinois, 26 Wend. (N. Y.) 192; Citizens' Sav. Bank v. Town of Greenburg, 31 Misc. 428, 65 N. Y. Supp. 554, citing Cagwin v. Town of Hancock, 84 N. Y. 532; Brownell v. Town of Greenwich, 114 N. Y. 518, 4 L. R. A. 685, following Village of

sale whether cash received or the delivery of the bonds as the payment of the original obligation;[554] the mode of sale or delivery whether through a financial agent or representative of the corporation, directly by its own officers or after public notice to the best bidder;[555] and the time of sale considered with reference to

Ft. Edward v. Fish, 156 N. Y. 363, and distinguishing Town of Greenburg v. International Trust Co. (C. C. A.) 94 Fed. 755.

Armstrong County v. Brinton, 47 Pa. 367; Whelen's Appeal, 108 Pa. 162. Where the sale of bonds is prohibited at less than par, commissions are not permissible which reduce the amount received by the corporation to less than par. Those bonds however, which had been in the hands of bona fide holders were held good.

Germania Sav. Bank v. Town of Darlington, 50 S. C. 337; Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; Hunt v. Fawcett, 8 Wash. 396. Where bonds are prohibited by law from being sold under par, a contract is void by which a commission is paid in effect making a sale at less than par.

Where the statutes do not prohibit the sale of public securities at less than par, it is now generally held that they may be sold at such prices as they may bring in the market. See Griffith v. Burden, 35 Iowa, 143; Orchard v. School Dist. No. 70, 14 Neb. 378; and City of Memphis v. Bethel (Tenn.) 17 S. W. 191.

[554] Com. v. Inhabitants of Williamstown, 156 Mass. 70, 30 N. E. 472; Hoag v. Town of Greenwich, 133 N. Y. 152. The public corporation may purchase its own bonds. Evans v. Tillman, 38 S. C. 238, 17 S. E. 49. The question of accrued interest considered with reference to a provision for sale of bonds "at not less than par or face value." Duryee v. Friars, 18 Wash. 55; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370.

[555] Roberts & Co. v. Taft (C. C. A.) 109 Fed. 825; Mills v. Bellmer, 48 Cal. 124. A public official has no right to insert a condition in an advertisement calling for bonds which is not to be implied from his authorized duty simply to advertise and is not necessary to the exercise of his authority.

Smith v. Los Angeles County, 99 Cal. 628. Public officials under act of March 14, 1883, have no power to employ an agent to procure bids for bonds about to be issued.

Sidway v. South Park Com'rs, 120 Ill. 496, 11 N. E. 852; Sherlock v. Village of Winnetka, 59 Ill. 389. The sale of bonds by a public corporation to its officials will be void and this without considering those principles of equity which apply to persons acting in a fiduciary capacity or the legal doctrine that no one can contract with himself.

Reed v. Town of Orleans, 1 Ind. App. 25, 27 N. E. 109; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; Butterfield v. Inhabitants of Melrose, 88 Mass. (6 Allen) 187; Suffolk Sav. Bank v. City of Boston, 149 Mass. 364; Powell v. Heisler, 45 Minn. 549. Town officers negotiating and selling bonds issued under a void statute are not personally liable to one purchasing with

their formal and legal issue or delivery.[556] In all these essentials the law presumes a full compliance with the terms of authority and it is seldom that bonds valid in other respects will be held void because of irregularities in the time or manner of sale. A substantial compliance with formalities attendant upon their disposition is all the courts require and this rule is especially applicable where there is authority for their issue, the manner of their issue has been regular and they have passed into the hands of bona fide holders.[557] If there are irregularities in connection with the manner or time of sale, the agreement or contract for such sale may be held void without affecting the validity of the bonds.[558] Where the marketable value of municipal bonds is impaired or destroyed by questions affecting their legality in connection with the authority to issue or the manner of its exercise, a prospective buyer or bidder cannot be compelled to take such bonds or, in case of his refusal, he is not liable for damages which the corporation may sustain by reason of such action. This rule

notice of the act under which the bonds were issued or the use to be made of their proceeds.

Butler County v. Boatmen's Bank, 143 Mo. 13, 44 S. W. 1047; Coquard v. School Dist. of Joplin, 46 Mo. App. 6; City of New York v. Sands, 105 N. Y. 210, 11 N. E. 820, reversing same case in 39 Hun, 519; Armstrong v. Village of Ft. Edward, 159 N. Y. 315. The express authority to borrow money and issue bonds implies the power to employ a person to procure a purchaser for such bonds. Street v. Craven County Com'rs, 70 N. C. 644; Blanton v. McDowell County Com'rs, 101 N. C. 532.

[556] Gaddis v. Richland County, 92 Ill. 119; Attorney General v. City of Salem, 103 Mass. 138; Attorney General v. Burrell, 31 Mich. 25; People v. Booth, 32 N. Y. 397; People v. Clark, 53 Barb. (N. Y.) 171.

[557] In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Thomas v. City of Grand Junction, 13 Colo. App. 80, 56 Pac. 665; Duval County v. Knight, 42 Fla. 366, 29 So. 408; Cushman v. Carver County Com'rs, 19 Minn. 295 (Gil. 252), following The Chaska Co. v. Carver County Sup'rs, 6 Minn. 130 (Gil. 204); Ninginger v. Carver County Com'rs, 10 Minn. 133 (Gil. 106).

[558] Roberts & Co. v. Taft (C. C. A.) 109 Fed. 825; State v. West Duluth Land Co., 75 Minn. 456. Certain contract considered and held not in violation of Laws 1895, c. 289, § 4, forbidding the sale of certain bonds at less than their par value. Village of Ft. Edward v. Fish, 86 Hun, 548, 33 N. Y. Supp. 784; Village of Ft. Edward v. Fish, 156 N. Y. 363; Elyria Gas & Water Co. v. City of Elyria, 57 Ohio St. 374. So held with reference to an ordinance. Hunt v. Fawcett, 8 Wash. 396.

holds true even where there is a subsequent decision passing upon the questions raised and establishing the validity of the bonds.[559]

§ 217. Their payment.

Negotiable bonds as issued by public corporations may have provision made for their payment from a special fund or special tax levy upon specific property,[560] or they may be a general obligation of the corporation and payable from its general revenues.[561] In the former case, such bonds are not generally held an indebtedness coming within the meaning of the constitutional provisions but simply an assignment of the rights of the public corporation in and to certain sources of revenue. The holder of such bond is limited in his recovery, either of principal or interest, to such revenues or funds.[562] Though it may depend upon the

[559] City of Great Falls v. Theis, 79 Fed. 943. After discussing the business customs of brokers in bonds the court say: "In view of these well-known facts and in accordance with the usages of the country in such transactions, it is necessary in order to give effect to the intentions of the parties, to read into the contract an implied condition that the buyers should not be bound to take the bonds unless the proceedings of the city government had been conducted in substantial conformity with the laws, and proper records had been made so that competent lawyers of good reputation would be able to certify to the validity of the bonds. In every contract to sell land and give a good and sufficient deed there is an implied warranty for a marketable title and the vendor cannot enforce the contract against his vendee when there is an apparent flaw in his title for in such a case the court will not hazard an opinion as to whether or not the title can be sustained if it should become the subject of litigation. For the same reasons the courts must, in such cases as the one under consideration refuse to adjudge a party liable to pay damages for refusing to accept municipal bonds without marketable value where the value is destroyed or impaired by questions of legality arising from facts shown by or omissions in the plaintiff's own records."

[560] United States v. Macon County, 99 U. S. 582; Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115; Davis v. City of Des Moines, 71 Iowa, 500.

[561] White v. City of Decatur, 119 Ala. 476, 23 So. 999. Where priority is given to bond holders of surplus revenues, they cannot be used for the payment of a mortgage to the exclusion of bond creditors.

State v. Hannibal & St. J. R. Co. (Mo.) 11 S. W. 746; Lewis v. Taylor, 18 Ohio Cir. Ct. R. 443; Richardson v. Marshall County, 100 Tenn. 346, 45 S. W. 440. The payment and cancellation of municipal bonds held as absolutely extinguishing them. No subsequent theft and recirculation can make them valid obligations against the maker.

[562] Braun v. Benton County Com'rs, 66 Fed. 476; Goshen High-

wording of the security whether the rule holds in all cases, the indebtedness may be for a special purpose and still, by its wording, payable out of the general revenues or a general obligation.[563] The payment of all indebtedness incurred by a public corporation is usually made at its fiscal office,[564] unless by express promise in the evidence of indebtedness, payment is arranged

way Com'rs v. Jackson, 165 Ill. 17; City of Valparaiso v. Gardner, 97 Ind. 1; Strieb v. Cox, 111 Ind. 299; Quill v. City of Indianapolis, 124 Ind. 292; City of New Albany v. McCulloch, 127 Ind. 500; Davis v. City of Des Moines, 71 Iowa, 500; City of Clinton v. Walliker, 98 Iowa, 655; Kingsberry v. Pettis County, 48 Mo. 209; Walker v. Munroe County Com'rs, 11 Ind. App. 285, 38 N. E. 1095; City of Galveston v. Heard, 54 Tex. 420; Baker v. City of Seattle, 2 Wash. St. 576. But see Carroll County v. United States, 85 U. S. (18 Wall.) 71; United States v. Clark County, 95 U. S. 769; United States v. Clark County, 96 U. S. 211; Kimball v. Grant County Com'rs, 21 Fed. 145; City of Wyandotte v. Zeitz, 21 Kan. 649; State v. Fayette County Com'rs, 37 Ohio St. 526. See, also, authorities cited in the following note.

[563] United States v. City of Ft. Scott, 99 U. S.152. Justice Harlan in the opinion in this case said: "The general reference upon the margin of the bonds, to the ordinance under which the improvement was projected should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property the means with which to make payment, or to withhold payment altogether, if the special assessment should prove inadequate for payment." "Experience informs us that the city would have met with serious, if not insuperable, obstacles in its negotiations, had the bonds upon their face in unmistakable terms declared that the purchaser had no security beyond the assessments upon the particular property improved. If the corporate authorities intended such to be the contract with the holders of the bonds, the same good faith which underlies and prevades the statute of March 2, 1871, required an explicit avowal of such purpose in the bond itself, or, in some other form, by language brought home to the purchaser which could neither mislead nor be misunderstood." Woodbridge v. City of Duluth, 57 Minn. 256; Austin v. City of Seattle, 2 Wash. St. 667; Bank of British Columbia v. City of Port Townsend, 16 Wash. 450; Fowler v. City of Superior, 85 Wis. 411.

[564] Johnson v. Stark County, 24 Ill. 75; Sherlock v. Village of Winnetka, 68 Ill. 530; Evansville, I. & C. Straight Line R. Co. v. City of Evansville, 15 Ind. 395; Skinker v. But-

for elsewhere.[565] Where no such agreement is made, the corporation cannot be compelled to pay either the principal or interest of bonds at other than the regular office provided for the making of disbursements.[566] The payment of bonds when their validity is established is obligatory upon the corporation and its officers and where discretionary powers are not vested in the officials, either as to the time or manner of payment, if there are revenues which can be devoted to the purpose, such officials cannot refuse payment. Mandamus will lie against them in case of refusal to enforce the performance of duties imposed upon them by law.[567]

§ 218. Time of payment.

The time of payment is fixed under authority of law specifically determined either by an inspection of the authority itself or in-

ler County, 112 Mo. 332; Friend v. City of Pittsburgh, 131 Pa. 305, 6 L. R. A. 636.

[565] Meyer v. City of Muscatine, 68 U. S. (1 Wall.) 384; Thomson v. Lee County, 70 U. S. (3 Wall.) 327; City of Lexington v. Butler, 81 U. S. (14 Wall.) 282; Lynde v. County of Winnebago, 83 U. S. (16 Wall.) 6; Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; Town of Enfield v. Jordan, 119 U. S. 680; City of Cairo v. Zane, 149 U. S. 122; Gray v. State, 72 Ind. 567; Maddox v. Graham, 59 Ky. (2 Metc.) 78; Skinker v. Butler County, 112 Mo. 332. Where the authority for the issue of funding bonds is silent as to the place of payment, the power to designate one beyond the limits of the county is implied.

City of Vicksburg v. Lombard, 51 Miss. 111; Kunz v. School Dist. No. 28, 11 S. D. 578; Austin v. Gulf, C. & S. F. R. Co., 45 Tex. 236.

[566] City of Los Angeles v. Teed, 112 Cal. 319; People v. Tazewell County, 22 Ill. 147; City of Pekin v. Reynolds, 31 Ill. 529.

[567] Gray v. State, 72 Ind. 567. "It is claimed * * * that as the language of the statute is merely permissive, conferring the power and authority upon the officers mentioned without in terms making it their duty to take up and redeem the bonds, etc., they have a discretion to do so or not and that, therefore, mandamus will not lie against them to compel them to do so. But we are clear in the opinion that there was no such discretion to be exercised by the officers named. It was the intention of the legislature that the bonds should be paid and not that they should be paid or left unpaid at the option of the officers named. This is clearly gathered from the tenor of the entire act. The appropriation of money, and the authority conferred upon the officers named to borrow money for the purpose of the act, tend to repel the idea that the legislature intended to leave it to the option or discretion of the officers named, whether to pay the bonds or not." Little River Tp. v. Reno County Com'rs, 65 Kan. 9, 68 Pac. 1105.

directly by action of public officials where discretionary powers are given to them in this respect; in either case, the obligation to pay exists at the time of the maturity of the principal of such bonds or the interest, as already stated, at the various times when installments come due in accordance with the tenor of such bonds and coupons.[568] Where the authority expressly designates the maturity of the bond, such a provision must be complied with and the weight of authority is to the effect that bonds issued for a longer or shorter period than thus required by statute are invalid.[569] The time of maturity may, however, be discretionary with the officials issuing bonds,[570] or the entire issue or any portion may be redeemable at the pleasure of the maker.[571] If bonds are not payable before the date of maturity, a holder cannot be compelled to accept payment and surrender them.[572]

§ 219. Medium of payment.

From the face of the bond is to be determined the medium of its payment and where the authority or the bond is silent as to

[568] McMullen v. Person, 102 Mich. 608; Town of Pontotoc v. Fulton, 79 Miss. 511, 31 So. 102; Kemp v. Town of Hazlehurst, 80 Miss. 443, 31 So. 908; Ter. v. Hopkins, 9 Okl. 133; City of Memphis v. Memphis Sav. Bank, 99 Tenn. 104, 42 S. W. 16.

[569] Norton v. Town of Dyersburg, 127 U. S. 160; Barnum v. Town of Okolona, 148 U. S. 393; City of Alma v. Guaranty Sav. Bank, 60 Fed. 203; Union Pac. R. Co. v. Lincoln County, 3 Dill. 300, Fed. Cas. No. 14,380; Davis v. Yuba County, 75 Cal. 452; McMullen v. Person, 102 Mich. 608; Alpena County Sup'rs v. Simmons, 104 Mich. 305; McCormick v. Village of West Duluth, 47 Minn. 272; Woodruff v. Town of Okolona, 57 Miss. 806; Potter v. Town of Greenwich, 92 N. W. 662; Hoag v. Town of Greenwich, 133 N. Y. 152; People's Bank of St. Paul v. School Dist. No. 52, 3 N. D. 496, 28 L. R. A. 642. But compare Rock Creek Tp. v. Strong, 96 U. S. 271.

[570] Chicago, B. & Q. R. Co. v. City of Aurora, 99 Ill. 205; People's Nat. Bank of Brattleboro v. Ayer, 24 Ind. App. 212; Flagg v. City of Palmyra, 33 Mo. 440; Catron v. La Fayette County, 106 Mo. 659; Singer Mfg. Co. v. City of Elizabeth, 42 N. J. Law, 249.

[571] Brenham v. German American Bank, 144 U. S. 173; National Bank of Republic v. City of St. Joseph, 31 Fed. 216; Stewart v. Henry County, 66 Fed. 127; Roberts & Co. v. City of Paducah, 95 Fed. 62; Town of Essex v. Day, 52 Conn. 483; Turpin v. Madison County Fiscal Ct., 105 Ky. 226, 48 S. W. 1085; Ter. v. Hopkins, 9 Okl. 133; Nolan County v. State, 83 Tex. 182.

[572] Allentown School Dist. v. Derr, 115 Pa. 439.

this, a promise to pay in legal tender or "gold coin of the United States" does not render bonds invalid.[573]

§ 220. To whom payable.

Negotiable bonds in common with other instruments of a like character are usually made payable to bearer or order with provisions for endorsement in blank and registration. When payable to bearer or endorsed in blank by the one to whom originally payable, such bonds are payable to bearer and the holder is entitled to payment.[574] Where provision is made for registration when registered in the required manner and by the proper officials, they then become payable only to the party in whose name they stand upon the registration books of the trustee or

[573] Woodruff v. State of Mississippi, 162 U. S. 291; Moore v. City of Walla Walla, 60 Fed. 961; Pollard v. City of Pleasant Hill, 3 Dill. 197, Fed. Cas. No. 11,253; Judson v. City of Bessemer, 87 Ala. 240, 4 L. R. A. 742; Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 121; Murphy v. City of San Luis Obispo, 119 Cal. 624, 39 L. R. A. 444; Atkinson v. Lanier, 69 Ga. 460; Heilbron v. City of Cuthbert, 96 Ga. 312; Churchman v. Martin, 54 Ind. 380; Farson v. Sinking Fund Com'rs of Louisville, 97 Ky. 119; Opinion of the Court, 49 Mo. 216; Bond of Greenwald, 51 Tenn. (4 Heisk.) 453; Winston v. City of Ft. Worth (Tex. Civ. App.) 47 S. W. 740; Kenyon v. City of Spokane, 17 Wash. 57. But see Skinner v. City of Santa Rosa, 107 Cal. 464, 29 L. R. A. 512.

[574] Amey v. Allegheny City, 24 How. (U. S.) 364; Strong v. District of Columbia, 4 Mackey (D. C.) 242; Calhoun County Sup'rs v. Galbraith, 99 U. S. 214; City of Ottawa v. First Nat. Bank of Portsmouth, 105 U. S. 342; Carter County v. Sinton, 120 U. S. 517; City of Cadillac v. Woonsocket Inst. for Savings (C. C. A.) 58 Fed. 935; Ashley v. Presque Isle County Sup'rs (C. C. A.) 60 Fed. 65; West Plains Tp. v. Sage, 60 Fed. 943; Pacific Imp. Co. v. City of Clarksdale (C. C. A.) 74 Fed. 528. A bond negotiable in form, when not so authorized, is not void but simply nonnegotiable.

D'Esterre v. City of Brooklyn, 90 Fed. 586; Edwards v. Bates County (C. C. A.) 99 Fed. 905; Evans v. Cleveland & P. R. Co., 21 Leg. Int. 29, Fed. Cas. No. 4,557; Carpenter v. Greene County, 130 Ala. 613, 29 So. 194; Blackman v. Lehman, 63 Ala. 547. Under Ala. Code, § 2098, the legal title to municipal bonds payable to bearer passes only by indorsement.

Clapp v. Cedar County, 5 Iowa, 15; Sioux City v. Weare, 59 Iowa, 95; School Dist. No. 40 v. Cushing, 8 Kan. App. 728; Town of Lexington v. Union Nat. Bank, 75 Miss. 1; Manhattan Sav. Inst. v. Town of East Chester, 44 Hun (N. Y.) 537; Com. v. Allegheny County Com'rs, 37 Pa. 237; City of Austin v. Nalle, 85 Tex. 520.

municipality.[575] But a provision for registration does not prevent the holder of unregistered bonds from recovering interest.[576] The fact that a railroad corporation to whom aid bonds are originally voted may become consolidated with another corporation does not usually release the public corporation issuing such bonds from its obligations and this is especially true where there is a statutory authority permitting the consolidation of railroad corporations at the time of the issue of such bonds. It has been held that such statutory authority must be considered as a "silent factor" in determining the legal rights of the parties to such a transaction. The bonds then become payable to the consolidated company instead of that company to whom the aid was originally granted.[577]

[575] Chapman v. City Council of Charleston, 30 S. C. 549, 3 L. R. A. 311. See, also, Id., 28 S. C. 373, 13 Am. St. Rep. 681.

[576] St. Louis County Com'rs v. Nettleton, 22 Minn. 356. In this case the statute allowed the payment of interest but the point was made that interest could not be paid even under this statute on unregistered bonds because it provided that "All bonds heretofore issued and still unpaid shall be registered by the holder thereof." The court said: "Although the language is in form imperative when we consider that construing it strictly would render the act of doubtful validity we think it was not intended to require a registration of the bonds as a condition of the holder's right to demand the interest but was intended only for the convenience of those bondholders who may choose to avail themselves of it and consequently that it was not intended to take from the county commissioners the authority to provide for paying the interest on bonds not registered. The commissioners still provide for raising, by tax, the amount required to pay all the interest on the county debt, the county treasurer pays to the state treasurer the amount which has been certified by the state auditor to the county auditor, and the balance remains in the county treasury to pay the interest according to the terms of the bonds or contracts under which the debts exist. The levy of the $12,000 for railroad bond interest was valid and the court below will sustain the same."

[577] Pope v. Lake County Com'rs, 51 Fed. 769. "Any person or corporation subscribing for stock in a railroad company in aid of its construction does so with the knowledge that such company may become merged into a new consolidated railroad corporation. It must be held to have been in the contemplation of such subscriber that such a consolidation might occur. The law enters as silent factor into every contract. The subscriber by his contract, impliedly authorizes the railroad company for whose stock he has subscribed to consolidate with any other railroad company. He is not thereby released from liability, but with his implied consent he is brought into the same

The holder of negotiable bonds, however, takes them subject to all conditions which may affect their validity arising either from lack of authority or irregularity in the manner of their issue.[578]

§ 221. The payment of interest.

A public corporation, like an individual, is liable for the interest upon an indebtedness unless, by the terms of the instrument evidencing such debt, it is relieved from its payment. The time, the manner and the medium of payment are usually provided for in the bond or the coupon which is a separate and express promise to pay one of the equal installments of interest due upon the principal of a debt.[579]

contractual relations with the consolidated company which he occupied with the company for whose stock he subscribed."

[578] Otis v. Cullum, 92 U. S. 447. Hughson v. Crane, 115 Cal. 404. "If the benefits received and enjoyed by the district under his performance of the contract give him an equitable right of recovery therefor, such right is independent of any liability of the district upon the bonds. If the bonds were issued to him in violation of the statute, they cannot in his hands be valid obligations against the district even though they were taken in payment for his work. The law is well settled that one dealing with a municipal corporation is charged with a knowledge of all the limitations upon the power of its officers and that he can have no right of action upon its written obligation if it was entered into in disregard of statutory requirements."

[579] Respublica v. Mitchell, 2 Dall. (Pa.) 101; State of Louisiana v. Pilsbury, 105 U. S. 278; State v. Thompson, 10 Ark. 61; Bates v. Gerber, 82 Cal. 550; Davis v. City of Sacramento, 82 Cal. 562; Kendall v. Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; St. Louis County Com'rs v. Nettleton, 22 Minn. 356; Coler v. Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; Mall v. City of Portland, 35 Or. 89, 56 Pac. 654.

Bassett v. City of El Paso, 88 Tex. 168, 30 S. W. 893. A city ordinance authorizing the issue of bonds and providing for the payment of interest and principal is a part of the contract between the holder of the bonds and the municipality. State v. Rathbun, 22 Wash. 651. But the following cases hold that in the absence of express contract or the statutory direction, a public corporation is under no obligation to pay interest upon the principal or interest of a debt after its maturity. Town of Mt. Morris v. Williams, 38 Ill. App. 401, following City of Pekin v. Reynolds, 31 Ill. 529. Also, City of Chicago v. English, 80 Ill. App. 163.

Sinking Fund Com'rs of Louisville v. Zimmerman, 101 Ky. 432, 41 S. W. 428; State v. Mayes, 28 Miss. 706. "As a general rule the state is not

The obligation to pay interest becomes as full and complete an obligation as that of meeting the principal when it becomes due. The usual and, generally, the only source of revenue of a public corporation is by the levying and collection of taxes. If constitutional or statutory provisions do not prevent, the corporation must levy a tax sufficient to meet the interest upon its indebtedness. This is a duty which, it has been held, is mandatory in its character and the performance of which, and on the part of the public officials, can be compelled by writ of mandamus.[580]

The levying of taxes where an obligation exists is not considered discretionary on the part of the corporation when within statutory or constitutional limitations. So far as the means of payment is concerned, the courts will not consent to a willful or dishonest repudiation of legal or moral obligations and a failure on the part of public officials to provide for the payment of either principal or interest of a debt is no defense in an action brought by bondholders to enforce such obligation. The corporation cannot be released from its liabilities by a failure to provide a means of payment when such is within its power.[581]

§ 222. The rule as to the payment of void bonds.

When bonds are held void, either for want of authority or other reasons, it may release the public corporation from the obligation to pay according to their terms. It does not, however, always relieve it from its obligation to pay the debt which may arise through the transaction. The authorities are quite unanimous in holding that where bonds have been issued, sold and the proceeds arising from such sales appropriated by the

bound to pay interest." Attorney-General v. Cape Fear Nav. Co., 37 N. C. (2 Ired. Eq.) 444; Milne v. Rempublicam, 3 Yeates (Pa.) 102; Auditorial Board v. Arles, 15 Tex. 72.

[580] Sibley v. City of Mobile, 3 Woods, 535, Fed. Cas. No. 12,829; Flagg v. City of Palmyra, 33 Mo. 440; St. Joseph & D. C. R. Co. v. Buchanan County Ct., 39 Mo. 485. See, also, City of Memphis v. Brown, 97 U. S. 300; Rock Island County Sup'rs v. United States, 71 U. S. (4 Wall.) 435; and Riggs v. Johnson County, 73 U. S. (6 Wall.) 166.

[581] Knox County v. Aspinwall, 21 How. (U. S.) 539; New York Life Ins. Co. v. Cuyahoga County Com'rs, 106 Fed. 123; Reis v. State, 133 Cal. 593, 65 Pac. 1102, reversing 59 Pac. 298; Moore v. City of New Orleans, 32 La. Ann. 726; State v. City of New Orleans, 32 La. Ann. 763; Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899.

public corporation to its proper purposes, there exists a debt or obligation due and owing from the corporation to the party advancing moneys which can be enforced generally in an action on a quantum meruit or valebant for moneys or goods had and received.[582]

[582] Marsh v. Fulton County, 77 U. S. (10 Wall.) 676. "The obligation to do justice rests upon all persons, natural and artificial and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In City of Louisiana v. Wood, 102 U. S. 294, Waite, C. J., said: "It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. The objection goes only to the way it was done. * * * While therefore, the bonds cannot be enforced because defectively executed, the money paid for them may be recovered back."

Read v. City of Plattsmouth, 107 U. S. 568. A purchaser of bonds for full value without notice of any informality in their issue, to whom the city paid the interest thereon for four years, brought suit to recover the amount of the coupons then due and unpaid. The money was used to erect a schoolhouse. The court said: "As the City of Plattsmouth was bound, by force of the transaction to repay the purchaser of its void bonds the consideration received and used by it, or a legal equivalent the statute which recognized the existence of that obligation and by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and promise cannot be said to be a special act conferring upon the city any new corporate power."

Gause v. City of Clarksville, 1 Fed. 353; Deyo v. Otoe County, 37 Fed. 246; Bangor Sav. Bank v. City of Stillwater, 49 Fed. 721; Jefferson County v. Hawkins, 23 Fla. 223, 2 So. 362. A legal debt cannot be paid by the issue and delivery of a void bond.

Brown v. City of Atchison, 39 Kan. 37. "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or to enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with

§ 223. Payment of securities through provisions for a sinking fund.

The charter, statutes or constitution may provide that before a public corporation can incur an indebtedness either through an issue of negotiable bonds or otherwise, it must provide for ultimate payment of the principal by the creation of a sinking fund, so termed. This fund to be raised by imposing a certain annual tax, either general in its character or falling upon specific property, the accumulations of which, it is calculated, will at the time the indebtedness falls due be sufficient to meet it.[582] Such provisions, however, are usually held mandatory in

the terms of the contract as the law and equity will permit."

State v. Hart, 46 La. Ann. 54; People v. Porter & Calvin Tp., 18 Mich. 101; State v. Dickerman, 16 Mont. 278, 40 Pac. 698; Town of Lyons v. Chamberlin, 25 Hun (N. Y.) 49; City of Plattsmouth v. Fitzgerald, 10 Neb. 401; Hoag v. Town of Greenwich, 133 N. Y. 152. Commissioners issued bonds payable in twenty years instead of thirty years as required by the statute; it was held that the bonds were void as such, but as the commissioners had the authority to borrow the money which the bonds were meant to secure, they, by doing so, bound the town to repay it; and it appearing that the parties, both borrower and lender, acted in good faith and with the intention to comply with the statute, a provision on the part of the town to repay the loan at the time and in the manner prescribed by the statute would be implied and an action thereon against the town was maintainable. Borough of Rainsburg v. Fyan, 127 Pa. 74, 4 L. R. A. 336; Livingston v. School Dist. No. 7, 11 S. D. 150, 76 N. W. 301; Paul v. City of Kenosha, 22 Wis. 266; Citizens' Bank v. City of Terrell, 78 Tex. 456, 14 S. W. 1003. But see City of Litchfield v. Ballou, 114 U. S. 190; Norton v. Town of Dyersburg, 127 U. S. 160; Morton v. City of Nevada, 41 Fed. 582; McPherson v. Foster Bros., 43 Iowa, 48; Town of Milan v. Tennesee Cent. R. Co., 79 Tenn. 329.

[583] Siebert v. Lewis, 122 U. S. 284; Fazende v. City of Houston, 34 Fed. 94. A municipal corporation under an ordinance authorized by their charter, issued bonds to provide a fund for building a market house. By their terms the revenue of the market was to be devoted to the payment of the interest on the bonds and to the formation of a sinking fund to redeem them. As the ordinance was authorized by the charter and therefore valid, it constituted a contract between the holders of the bonds and the city and subsequent ordinances making other disposition of the market revenue were void and so much of a charter granted the city after the issue of the bonds as authorized the city council to divert any of such revenue from the special fund created in the ordinance under which the bonds were issued was inoperative, as impairing the obligation of a contract in viola-

their character in so far as the levying of the sinking fund tax depends upon the independent action of subordinate officials from time to time. Bonds issued under such provisions, legal at the time of issue, cannot be rendered void or become worthless by the neglect of a public duty devolving upon officials of public corporations.[584]

tion of the constitution. Quaker City Nat. Bank v. Nolan County, 59 Fed. 660. County bonds are invalid, even in the hands of bona fide purchasers, when issued without a compliance with a constitutional requirement that provision shall be made, at the time of incurring any debt for levying a sufficient tax to create a sinking fund of two per cent in addition to meeting the interest. Affirmed in (C. C. A.) 66 Fed. 883; Millsaps v. City of Terrell, 60 Fed. 193; Lee County v. Robertson, 66 Ark. 82, 48 S. W. 901. Moneys raised through the imposition of taxes provided for the payment of interest cannot be appropriated for general purposes. Kendall v. Porter, 120 Cal. 106, 45 Pac. 333, 52 Pac. 143; Wilkins v. City of Waynesboro, 116 Ga. 359, 42 S. E. 767; Sinking Fund Com'rs of Louisville v. Zimmerman, 10 Ky. L. R. 689, 41 S. W. 428; O'Bryan v. City of Owensboro, 24 Ky. L. R. 469, 68 S. W. 858; Wilson v. City of Shreveport, 29 La. Ann. 673; Knox v. City of Baton Rouge, 36 La. Ann. 427; Kelly v. City of Minneapolis, 63 Minn. 125, 30 L. R. A. 281; Baily v. City of Philadelphia, 184 Pa. 594; Galbreath v. City of Knoxville (Tenn.) 59 S. W. 178; Basset County v. City of El Paso, 88 Tex. 168, 30 S. W. 893; Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 879. See, however, National Life Ins. Co. v. Board of Education of Huron, 62 Fed. 778; Marion County v. Coler, 67 Fed. 60; and Basset v. City of El Paso (Tex. Civ. App.) 28 S. W. 554, holding bonds valid though issued without a provision for the constitutional sinking fund or annual tax.

The states of California, Idaho, Illinois, Kentucky, Missouri, New York, Pennsylvania, South Dakota, Texas and West Virginia have constitutional provisions requiring either the creation of a sinking fund or the levying of an annual tax for the payment of the principal and interest of the bonds as it falls due.

In Wade v. Travis County, 174 U. S. 499, the court in sustaining the validity of bonds held that in determining what laws of a state will be regarded as rules of decision, that it would look not only to its constitutions and statutes but at the decisions of its highest court giving construction to them and that if there was any inconsistency in the opinion of such highest court, the decisions of the United States supreme court would follow the latest settled adjudications in preference to earlier ones unless such earlier decisions sustained the validity of bonds while the later ones declared them invalid, in which case the earlier decisions would be followed. The supreme court announced its readiness to follow that line of decisions sustaining the validity of bonds irrespective of the time rendered.

[584] Wade v. Travis County, 174 U. S. 499, reversing Wade v. Travis County, 72 Fed. 985; Wade v. Travis

The duty to levy a sinking fund tax or a general tax for the payment of bonds may be compelled by the proper writ directed against designated public officials.[585] A provision for the establishment and maintenance of a sinking fund is a contract between the bondholder as creditor and the public corporation, and one which cannot be impaired or destroyed by subsequent legislation or action; it is a contract within the meaning of the Federal constitution.[586]

County (C. C. A.) 81 Fed. 742; Marion County v. Coler, 67 Fed. 70.

Howland v. San Joaquin County Sup'rs, 109 Cal. 152; City of Houston v. Voorhies, 70 Tex. 356, 8 S. W. 109; Howard v. Smith, 91 Tex. 8, 38 S. W. 15. Upon a failure to provide the sinking fund as required by the constitution of Texas at the time of the issue of bonds or the making of a contract, such bonds or contract will be void. This ruling, however, was reversed by the supreme court of the United States in the case of Wade v. Travis County, cited above, where the same question was raised. See, also, Nalle v. City of Austin (Tex. Civ. App.) 42 S. W. 780; Mitchell County v. City Nat. Bank, 91 Tex. 361.

[585] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; City of Galena v. Amy, 72 U. S. (5 Wall.) 705; Cape Girardeau County Ct. v. Hill, 118 U. S. 68; Kennedy v. City of Sacramento, 19 Fed. 580. But in United States v. Macon County, 99 U. S. 582, Chief Justice Waite said: "We have no power by mandamus to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. * * * In this case it appears that the special tax of one-twentieth of one per cent has been regularly levied, collected and applied, and no complaint is made as to the levy of one half of one per cent for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

United States v. Macon County Ct., 35 Fed. 483; Haumeister v. Porter (Cal.) 16 Pac. 187, following Bates v. Porter, 74 Cal. 224, 15 Pac. 732.

Dillon, Mun. Corp. § 855. "The proper mode of enforcing or compelling the performance of the duty of levying and collecting taxes in such cases is by mandamus and not by a bill in equity." Walkley v. City of Muscatine, 73 U. S. (6 Wall.) 481; Rees v. City of Watertown, 86 U. S. (19 Wall.) 107.

Federal courts have no power to issue a writ of mandamus as an original proceeding, a bondholder should first obtain judgment. Bath County v. Amy, 80 U. S. (13 Wall.) 244; Heine v. Carroll-Madison Levee Com'rs, 86 U. S. (19 Wall.) 655; Greene County v. Daniel, 102 U. S. 187; Osborne v. Adams County Com'rs, 7 Fed. 441. Though in most of the state courts a prior judgment is not always held necessary in order to obtain a mandamus. Riley v. Garfield Tp., 54 Kan. 463; Flagg v. City of Palmyra, 33 Mo. 440; Com. v. Select & Common Councils of Pittsburgh, 34 Pa. 496.

[586] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535. The court in

§ 224. The duty to levy taxes for the payment of interest or principal of negotiable bonds.

In a preceding section[587] the statement has been made that upon the creation of a valid obligation, there arises the moral and legal duty on the part of a public corporation to levy taxes or make other provisions for the payment of such obligation. The authority granted the corporation, so it is held, to issue interest-bearing negotiable bonds, carries with it the implied power to levy taxes to pay principal and interest.[588] The power may be expressly given, but if not, it is held to exist as an implied one and of such a character as to constitute a contract between the bondholder and the corporation which cannot be affected or destroyed until the contract is satisfied.[589] A public corporation

its opinion in this case in part said: "It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other." Citing, People v. Bond, 10 Cal. 570. Dominick v. Sayre, 5 N. Y. Super. Ct. (3 Sandf.) 555; Maenhaut v. City of New Orleans, 3 Woods, 1, Fed. Cas. No. 8,940; People v. Dubois, 19 Ill. 222.

State v. Cardozo, 8 S. C. (8 Rich.) 71. A pledge of receipts from specified sources to the payment of the principal and interest of certain bonds made at the time of their issue becomes a part of the contract with the holders of such bonds and the city has no right under art. 1, § 10, of the constitution of the United States to impair the obligation of a contract by devoting this fund to other purposes. See, also, authorities cited, § 217.

[587] Section 221.

[588] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; Ralls County Ct. v. United States, 105 U. S. 733; United States v. North Carolina, 136 U. S. 211. But there exists no implied liability on the part of a city to pay interest on its bonds after maturity. Sibley v. City of Mobile, 4 Am. Law. T. Rep. (N. S.) 226, Fed. Cas. No. 12,829; Young v. Tipton County Com'rs, 137 Ind. 323, 36 N. E. 1118; State v. Macon County Ct., 68 Mo. 29. A purchaser of bonds is, however, chargeable with knowledge of the limitation in the statutes under the authority of which they are issued in regard to the rate of taxation which may be imposed for their payment. This provision is regarded as a part of the contract between himself and the county. Com. v. Allegheny County Com'rs, 32 Pa. 218.

[589] Von Hoffman v. City of Quincy,

may be compelled by mandamus to levy the necessary taxes for the payment of either interest or principal notwithstanding the fact that the legislature of the state may have assumed or attempted to repeal the authority to levy such taxes.[590] A bond by its terms made payable from a fund raised in a specific manner or from taxes levied upon specific property and not so phrased as to constitute a general obligation of the public corporation issuing it is payable only from such fund or taxes. The obligation exists only to pay the net proceeds of such taxes or the amount which may be available in such fund.[591]

If negotiable bonds are phrased as general obligations of a municipality, although they may contain provisions for their payment from a special fund or tax upon specific property as in the case of "local improvement bonds," the authorities are quite uniform in holding that upon the exhaustion of such special fund or tax levy, the general revenues of the corporation can be drawn upon to meet the obligation.[592] The promise to pay is the primary contract; the obligation on the part of the municipality to raise a special fund or levy special taxes is a separate and independent one, the failure to perform which does not or cannot affect the validity of negotiable bonds.

These rules, however, may not apply where the bond lacks some or all of the requisites of negotiable paper, being uncertain as to the time of payment of either principal or interest.[593]

71 U. S. (4 Wall.) 535; Buck v. People, 78 Ill. 560.

[590] Von Hoffman v. City of Quincy, 71 U. S. (4 Wall.) 535; Hicks v. Cleveland, 106 Fed. 459; Bates v. Gregory (Cal.) 22 Pac. 683.

[591] Braun v. Benton County Com'rs, 66 Fed. 476; State v. Trammel, 106 Mo. 510; McCless v. Meekins, 117 N. C. 34; Baker v. Meacham, 18 Wash. 319. See, also, § 217.

[592] United States v. Knox County, 51 Fed. 880, following United States v. Clark County, 96 U. S. 211; United States v. Macon County, 99 U. S. 582; and Knox County Ct. v. United States, 109 U. S. 229; Vickrey v. Sioux City, 115 Fed. 437; Gable v. City of Altoona, 200 Pa. 15, 49 Atl. 367. "Even when a special tax is provided, the holder is not limited to such a tax, unless it is provided they shall not be paid in any other manner. Such bonds are the debts of the corporation and after the application of the proceeds of a special levy the holder is entitled to have the balance paid out of the general funds of the corporation." Simonton, Mun. Bonds, § 134; United States v. Clark County, 96 U. S. 211; Avery v. Job, 25 Or. 512, 36 Pac. 293.

[593] Washington County v. Williams, 111 Fed. 801.

§ 225. Rights of a holder to maintain an action.

The bona fide holder of negotiable bonds has the right to maintain an action against a corporation issuing them upon its failure to comply with the terms of the contract they contain. This right is not affected by a failure of corporate officials to perform their duties. The obligation on the part of the public corporation exists independent of the performance of official duties by its agents from time to time[594] even if the bonds in question are those known as "local improvement" bonds payable from a special fund or the proceeds of special taxes or assessments. Such fact does not prevent the holder from maintaining an action at law to enforce collection.[595] The statute of limitations, however, may be pleaded as a defense in an action either on the principal of a municipal bond or a coupon separate or attached.[596]

If the bonds in question are of an issue partly void as in excess of legal authority, the right of a holder to collect will depend upon the policy of the state which may be either that the excess should be held entirely void or that it should be distributed among the holders of the entire issue. This question of authority has been considered in a preceding section.[597]

[594] Robertson v. Blaine County, 85 Fed. 735. The statute of limitations may be pleaded as a defense to an action on municipal bonds. Marsh v. Town of Little Valley, 64 N. Y. 112; Thornburgh v. City of Tyler, 16 Tex. Civ. App. 439, 43 S. W. 1054.

[595] Waite v. City of Santa Cruz, 75 Fed. 967; Shepard v. Tulare Irr. Dist., 94 Fed. 1; Washington County v. Williams, 111 Fed. 801. Under such circumstances, however, the plaintiff is limited in his right of recovery to the amount under the terms of the contract.

Farson v. Sioux City, 106 Fed. 278. A court of equity may require an accounting and an enforcement of the trust which, it is held, exists as between a municipality issuing local improvement bonds payable from a special fund and the holder of such bonds.

Mather v. City & County of San Francisco (C. C. A.) 115 Fed. 37. In an action on such bonds it is unnecessary to join as parties defendant with the maker of the bonds the owners of property upon which taxes for their payment are to be levied. Hammond v. Place, 116 Mich. 628, 74 N. W. 1002; Murdock v. Aikin, 29 Barb. (N. Y.) 59.

[596] Clark v. Iowa City, 87 U. S. (20 Wall.) 583; Amy v. City of Dubuque, 98 U. S. 470; Underhill v. Trustees of Sonora, 17 Cal. 172.

[597] See § 203.

V. WARRANTS AND MISCELLANEOUS EVIDENCE OF INDEBTEDNESS.

§ 226. Warrants; definition; by whom drawn.

A public corporation may incur an indebtedness which, either at the time of its incurrment or upon the making of an appropriation for its payment, may be evidenced by an obligation or written promise to pay, commonly called a warrant. This is an instrument in writing executed by the proper officials acknowledging the indebtedness and directing the officials in charge of the fund from which it is payable to pay the same on demand or at some specified date.[598] The power to issue in anticipation of revenues for the necessary corporate expenses is usually implied;[599] this is not so when issued in anticipation of taxes levied but uncollected and where they are of such a character as to be considered under such circumstances, a "debt" or "indebt-

[598] City Council of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Little Rock v. United States (C. C. A.) 103 Fed. 418; City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Shawnee County Com'rs v. Carter, 2 Kan. 109; Burrton v. Harvey County Sav. Bank, 28 Kan. 390. Cities of the third class may anticipate the revenues of the year, and in payment of a debt, whether antecedent or one presently contracted, issue time warrants, payable at such time during the current year as the revenues may reasonably be expected to be collected. City of Alpena v. Kelley, 97 Mich. 550; Warren County Sup'rs v. Klein, 51 Miss. 807; Aull Sav. Bank v. City of Lexington, 74 Mo. 104; Slingerland v. City of Newark, 54 N. J. Law, 62; State v. Parkinson, 5 Nev. 15; City of Terrell v. Dessaint, 71 Tex. 770; Daggett v. Lynch, 18 Utah, 49. But there is an implied power to issue interest-bearing warrants. Ivinson v. Hance, 1 Wyo. 270.

The grant of authority to make a contract, it has been held, carries with it the implied power to issue warrants or orders in payment of the obligations of the contract. See the following cases: Kearney County Com'rs v. McMaster (C. C. A.) 68 Fed. 177; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Allen v. Town of Lafayette, 89 Ala. 641, 9 L. R. A. 497; Heal v. Jefferson Tp., 15 Ind. 431; Clayton v. McWilliams, 49 Miss. 311; and San Patricio County v. McClane, 58 Tex. 243.

[599] Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; Brown v. Sherman County Com'rs, 5 Fed. 274; Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899; Allen v. Town of La Fayette, 89 Ala. 641, 9 L. R. A. 497; Lindsey v. Rottaken, 32 Ark. 619; Cothran v. City of Rome, 77 Ga. 582; Fuller v. City of Chicago, 89 Ill. 282; Fuller v. Heath, 89 Ill. 296; Dively v. City of Cedar Falls, 21 Iowa, 565; Long v. Boone County, 32 Iowa, 181; Hooper v. Ely, 46 Mo. 505; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53.

edness." The issue of warrants is the method by which the ordinary and current expenses of a public corporation are paid from current revenues; funds for their payment are usually immediately available; they are commonly drawn in pursuance of direct charter or statutory authority that may or may not specify the required details preliminary to their issue. Without such charter or statutory provisions, it is clear that public officials have no power to bind their principal in this respect.[600]

Public corporations exercise their powers by and through agents of limited or special authority authorized to act for and on their behalf only concerning those matters which by some express provision of the law may be given to them to transact. That a warrant be valid, it is necessary then that it shall be issued or drawn by the proper official,[601] and authorized, audited

[600] People v. El Dorado County Sup'rs, 11 Cal. 170; Stratton v. Green, 45 Cal. 149; People v. Canty, 55 Ill. 33; Horne v. Mehler, 23 Ky. L. R. 1176, 64 S. W. 918; Flagg v. Parish of St. Charles, 27 La. Ann. 319; Hooper v. Ely, 46 Mo. 505. A county warrant cannot be issued to reimburse sureties for moneys expended by them in bringing back a defaulting and absconding county treasurer. Aull Sav. Bank v. City of Lexington, 74 Mo. 104.

[601] Kearney County Com'rs v. McMaster (C. C. A.) 68 Fed. 177; Connor v. Morris, 23 Cal. 447. The auditor of the county is the mere clerk of the board of supervisors; and he has no power or authority to draw his warrant on the county treasurer for the payment of a claim unless the board of supervisors have made an express order that it be paid. Stoddard v. Benton, 6 Colo. 508; Clark v. City of Des Moines, 19 Iowa, 199; Clark v. Polk County, 19 Iowa, 248; Tippecanoe County Com'rs v. Cox, 6 Ind. 402; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Alberts v. Torrent, 98 Mich. 512; Bailey v. City of Philadelphia, 167 Pa. 569; Dennis v. Table Mountain Water Co., 10 Cal. 369; Newgass v. City of New Orleans, 42 La. Ann. 163; Hull v. Inhabitants of Berkshire, 26 Mass. (9 Pick.) 553; Saline County v. Wilson, 61 Mo. 237; State v. Collins, 21 Mont. 448, 53 Pac. 1114; Oakley v. Valley County, 40 Neb. 900, following Walsh v. Rogers, 15 Neb. 309; Halstead v. City of New York, 5 Barb. (N. Y.) 218; Bailey v. City of Philadelphia, 167 Pa. 569; Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841. To sustain the validity of warrants drawn under the authority of law, it is not necessary that they shall be signed by officials de jure; if they are de facto merely, it is sufficient. Stephens v. City of Spokane, 11 Wash. 41, 39 Pac. 266; Ivinson v. Hance, 1 Wyo. 270; Hubbard v. Town of Lyndon, 28 Wis. 675.

Hainer, Mun. Secur., § 356. "The duties and powers of officers of the municipal corporation are prescribed by statute and every person dealing with them as such may know

or allowed by that corporate body or official to whom is delegated by law this particular duty.[602] This authority may be granted to some special official to whom discretionary powers are given to pass upon the legality of the claim or indebtedness to liquidate which the warrant is drawn or upon the sufficiency of the warrant itself In such a case, the duties performed by him are quasi judicial in their character, subject to the usual rules of law which govern and control the performance of duties of that nature.[603]

The law, however, may impose upon such officials the ministerial duty merely of drawing the warrant upon the presentation to them of a claim or charge audited or allowed by certain designated officers. Here the duty is obligatory and the official is given no discretionary powers in the matter; it may then become his duty to draw such warrant even without request of the party in whose favor it is to be issued.[604] If he neglect or refuse to

and is charged with a knowledge of the nature of these duties and the extent of these powers; and the want of corporate power or the want of authority in municipal officers cannot be supplied by their unauthorized action or representation."

[602] People v. Fogg, 11 Cal. 351; State v. Atkinson, 25 Wash. 283, 65 Pac. 531; Clark County Sup'rs v. Lawrence, 63 Ill. 32; Clark v. City of Des Moines, 19 Iowa, 199; Polk County v. Sherman, 99 Iowa, 60, 68 N. W. 562; Capmartin v. Police Jury, 19 La. Ann. 448; Saline County v. Wilson, 61 Mo. 237; People v. Booth, 49 Barb. (N. Y.) 31; People v. Roberts, 45 App. Div. 145, 61 N. Y. Supp. 148; Ex parte Florence Graded School Com'rs, 43 S. C. 11, 20 S. E. 794; Hubbard v. Town of Lyndon, 28 Wis. 674.

[603] Henderson v. People, 17 Colo. 587; Carlile v. Hurd, 3 Colo. App. 11, 31 Pac. 952; Ward v. Cook, 78 Ill. App. 111; Norman v. Kentucky Board of Managers of World's Columbian Exposition, 14 Ky. L. R. 529, 20 S. W. 901; State v. Hallock, 16 Nev. 373; People v. Wood, 35 Barb. (N. Y.) 653; People v. Booth, 49 Barb. (N. Y.) 31; People v. Green, 56 N. Y. 476; Commercial & Farmers' Bank v. Worth, 117 N. C. 146, 30 L. R. A. 261; Kensington Elec. Co. v. City of Philadelphia, 187 Pa. 446; In re Statehouse Commission (R. I.) 33 Atl. 453; State v. Lindsley, 3 Wash. St. 125.

[604] Wilson v. Neal, 23 Fed. 129; Board of Liquidation of Louisiana v. McComb, 92 U. S. 531; Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576; Babcock v. Goodrich, 47 Cal. 488; Sehorn v. Williams, 110 Cal. 621; McMurray v. Hayden, 13 Colo. App. 51, 56 Pac. 206; State v. Buckles, 39 Ind. 272; Prime v. McCarthy, 92 Iowa, 569, 61 N. W. 220; Alberts v. Torrent, 98 Mich. 512; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State v. Smith, 5 Mo. App. 427.

State v. Moore, 40 Neb. 854, 59 N. W. 755, 25 L. R. A. 774. A state auditor has no power to question the validity of an act or to inquire whether a certain amount appropri-

perform the duty, its performance can be compelled by mandamus directed against him.[605] Where the law specifies the manner of allowance and audit of claims preliminary to the drawing of a warrant for their payment, such provisions are usually considered mandatory in their character, necessary to be followed even to the slightest detail in order that there exist a legal authority for the warrant.[606] The reason for this ruling is apparent.

Unless the law otherwise provides, it is not necessary that there should be funds available for the payment of the warrant immediately upon its issue. The warrant is simply written evidence of an acknowledged legal claim against the public corporation; the time of its payment does not affect or determine the question of its validity.[607] In some states the making of an appropriation for the payment of a claim is necessary to the issuance of a warrant for that purpose, and then the authorities hold that no matter how just or equitable the claim may be, no obligation rests on the public officials upon whom the duty ordinarily devolves to issue a warrant for the liquidation

ated is excessive where the legislature has in the proper manner made an appropriation for such purpose. Hayes v. Davis, 23 Nev. 318, 46 Pac. 888; People v. Flagg, 16 Barb. (N. Y.) 503; People v. Haws, 36 Barb. (N. Y.) 59; Cunningham v. Mitchell, 67 Pa. 78; Pace v. Ortiz, 72 Tex. 437.

[605] Wilson v. Neal, 23 Fed. 129; Keller v. Hyde, 20 Cal. 594; Babcock v. Goodrich, 47 Cal. 488; Ray v. Wilson, 29 Fla. 342, 10 So. 613; Johns v. Orange County Com'rs, 28 Fla. 626. An officer cannot be compelled, by mandamus, to issue a warrant until the required action has been taken in respect to the allowance and certification of the claim where this is necessary. Rice v. Gwinn, 5 Idaho, 394, 49 Pac. 412; People v. Hastings, 5 Ill. App. 436; Campbell v. Polk County, 3 Iowa, 467; Evans v. McCarthy, 42 Kan. 426; State v. Clinton, 28 La. Ann. 47; Trustees of Paris Tp. v. Cherry, 8 Ohio St. 565; Merkel v. Berks County, 81½ Pa. 505; Callaghan v. Salliway, 5 Tex. Civ. App. 239; State v. Headlee, 19 Wash. 477, 53 Pac. 948. See, also, authorities under preceding note. But see Land v. Allen, 65 Miss. 455.

[606] Flagg v. Parish of St. Charles, 27 La. Ann. 319.

[607] Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749. The fact that no levy of taxes has been made for the purpose of paying warrants issued by county commissioners in payment of indebtedness does not invalidate them. City of Little Rock v. United States (C. C. A.) 103 Fed. 418; State v. Sherman, 46 Iowa, 415; Evans v. McCarthy, 42 Kan. 426, 22 Pac. 631; State v. Kenney, 10 Mont. 496, 26 Pac. 388.

of such claim until the making of an appropriation by the proper body for its payment unless there are moneys in the treasury available for such purpose.[608]

§ 227. Fund from which payable.

The usual method for the payment of the ordinary current expenses of a corporation is through the appropriation of moneys by a duly authorized body for this specified purpose. This appropriation may be a formal direction by the proper officials to pay, either from a fund raised or set aside especially for the settlement of specified claims or from the general revenues.[609] Where an appropriation is made for payment from a specific fund, the warrant can be drawn on and is payable only from such fund.[610] If there are no moneys available at the time of

[608] Goyne v. Ashley County, 31 Ark. 552. The fact that warrants are selling at a discount cannot be considered in making the appropriation for a certain purpose resulting in an increase of the appropriation. Cramer v. City & County of Sacramento Sup'rs, 18 Cal. 384; In re Appropriation by General Assembly, 13 Colo. 316; Henderson v. People, 17 Colo. 587; Collier & C. Lithographing Co. v. Henderson, 18 Colo. 259; Goodykoontz v. Acker, 19 Colo. 360, 35 Pac. 911; Goodykoontz v. People, 20 Colo. 374, 38 Pac. 473; Cook County v. Lowe, 23 Ill. App. 649; Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52. The statute of limitations will not start to run in favor of a city on its outstanding warrants until it has money in its treasury to satisfy such obligations. Snelling v. Joffrion, 42 La. Ann. 886; State v. Seibert, 99 Mo. 122; State v. Kenney, 9 Mont. 389, 24 Pac. 96; State v. Kenney, 10 Mont. 496, 26 Pac. 388; State v. Hickman, 11 Mont. 541, 29 Pac. 92. The rule stated in the text, however, does not apply to the payment of interest on public debts including outstanding warrants. State v. Lindsley, 3 Wash. St. 125.

[609] Carter v. Tilghman, 119 Cal. 104; Stevens v. Truman, 127 Cal. 155; Campbell v. Polk County, 3 Iowa, 467; Warren County Sup'rs v. Klein, 51 Miss. 807; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

[610] Peake v. City of New Orleans, 38 Fed. 779; Rose v. Estudillo, 39 Cal. 270; McGowan v. Ford, 107 Cal. 177, 40 Pac. 231; Jordan v. Hubert, 54 Cal. 260; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; Nance v. Stuart, 12 Colo. App. 125, 54 Pac. 867; Park v. Candler, 113 Ga. 647, 39 S. E. 89; Fuller v. Heath, 1 Ill. App. 118; Village of Marysville v. Schoonover, 78 Ill. App. 189; Union County Com'rs v. Mason, 9 Ind. 97; Phillips v. Reed, 107 Iowa, 331, 77 N. W. 1031, 44 L. R. A. 131, modifying judgment in 76 N. W. 850.

City of Atchison v. Leu, 48 Kan. 138. A city of the first class under the Kansas statutes is liable on warrants issued to pay for curbing and guttering a street although the money due it from special assessments levied for such purpose may

issue, payment is necessarily deferred until sufficient funds accumulate with which to discharge the particular obligation.[611]

The fiscal authorities cannot be compelled to pay warrants drawn against a special fund or appropriation from the general revenues.[612] Although a public corporation by drawing a warrant against a particular fund does not guarantee the existence of such a fund, it does guarantee the moneys in that fund legally belonging to it and if there has been a diversion or misappropriation of such moneys for other purposes, the corporation is liable from its general revenues to that extent.[613] A warrant for

not have been received. Labatt v. City of New Orleans, 38 La. Ann. 283; Abascal v. City of New Orleans, 48 La. Ann. 565; People v. Treasurer of Merritt Tp., 38 Mich. 243.

State v. Bartley, 41 Neb. 277, 59 N. W. 907. The holder of a general fund warrant may refuse to receive in payment moneys belonging to another fund the diversion of which to the settlement of his claim is unconstitutional. Kingsberry v. Pettis County, 48 Mo. 207; Campbell v. Polk County Ct., 76 Mo. 57; Moody v. Cass County, 85 Mo. 477; Morrow v. Surber, 97 Mo. 155; State v. Wright, 17 Mont. 565; State v. Cook, 13 Mont. 465, 34 Pac. 770; People v. Lathrop, 19 How. Pr. (N. Y.) 358; People v. Wood, 71 N. Y. 371; Hall v. State, 54 Neb. 280; Redmon v. Chacey, 7 N. D. 231; Theis v. Washita County Com'rs, 9 Okl. 643; Diggs v. Lobsitz, 4 Okl. 232, 43 Pac. 1069; Jones v. City of Portland, 35 Or. 512; Northup v. Hoyt, 31 Or. 524, 49 Pac. 754; La France Fire Engine Co. v. Davis, 9 Wash. 600.

Potter v. Black, 15 Wash. 186. If there is not sufficient money in a particular fund to pay the whole of a warrant presented and chargeable against such fund, its payment in part can be compelled. Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080; Kenyon v. City of Spokane, 17 Wash. 57, 48 Pac. 783; Wilson v. City of Aberdeen, 19 Wash. 89; Townsend Gas & Elec. Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778; Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197; Montague v. Horton, 12 Wis. 599.

[611] Scruggs v. Underwood, 54 Ala. 186; Day v. Callow, 39 Cal. 593; State v. State Treasurer, 32 La. Ann. 177; Wilson v. Knox County, 132 Mo. 387, 34 S. W. 45, 477; Andrew County v. Schell, 135 Mo. 37, 36 S. W. 206; Campbell v. Polk County, 49 Mo. 214; State v. Johnson, 162 Mo. 621, 63 S. W. 390; State v. Wilson, 71 Tex. 291, 9 S. W. 155. A state is not liable for the loss sustained by a warrant holder obliged to sell at a discount for lack of funds. But see Potter v. Black, 15 Wash. 186, where it is held that part of a warrant must be paid when there are insufficient moneys to pay the whole of it.

[612] Potter v. City of Whatcom, 25 Wash. 207, 65 Pac. 197.

[613] Peake v. City of New Orleans, 38 Fed. 779; Wilder v. City of New Orleans (C. C. A.) 87 Fed. 843; Hockaday v. Chaffee County Com'rs, 1 Colo. App. 362; Shotwell v. City of New Orleans, 36 La. Ann. 938;

the payment of a specific claim may be held invalid where it is general in its terms but the authority for its payment is special. The party to whom such a warrant may be issued is usually held charged with knowledge of the provisions of the law allowing the claim and making the appropriation.[614]

§ 228. Formal issue.

In common with other evidences of indebtedness, a warrant is not issued until it is delivered and this involves the question of its issue and delivery to the proper person.[615]

§ 229. Audit and allowance of claims as preliminary to issuance.

The audit and allowance of a claim is a recognition of its existence as a valid outstanding indebtedness and where the law provides for such action, if not done, warrants although drawn by the proper officials are not binding.[616] After the issuance of a warrant upon an audit and allowance, the public corporation

Valleau v. Newton County, 72 Mo. 593; McGlue v. City of Philadelphia, 10 Phila. (Pa.) 348; Potter v. City of New Whatcom, 20 Wash. 589.

See, also, the following cases holding to a general liability where there is a neglect on the part of the corporation to collect or create the special fund designated. Warner v. City of New Orleans, 167 U. S. 467, affirming 87 Fed. 829; City of New Orleans v. Warner, 175 U. S. 120; Denny v. City of Spokane, 79 Fed. 719; Mills County Nat. Bank v. Mills County, 67 Iowa, 697; Reilly v. City of Albany, 112 N. Y. 30, 2 L. R. A. 648; Commercial Nat. Bank v. City of Portland, 24 Or. 188; Jones v. City of Portland, 35 Or. 512; Bank of British Columbia v. City of Port Townsend, 16 Wash. 450. But see Stephens v. City of Spokane, 11 Wash. 41; and McEwan v. City of Spokane, 16 Wash. 212.

[614] Sutro v. Dunn, 74 Cal. 593, 16 Pac. 505; City of New Orleans v. City Hotel, 28 La. Ann. 423.

[615] Jeffersonian Pub. Co. v. Hilliard, 105 Ala. 576; San Juan County Com'rs v. Oliver, 7 Colo. App. 515; State v. Miller, 145 Ind. 598; State v. Pierce, 52 Kan. 521. To issue county warrants or orders means "to send out to deliver, or to put into circulation." Craig v. Mason, 64 Mo. App. 342; State v. Lewis, 6 Ohio Dec. 198; Clark County Sup'rs v. Lawrence, 63 Ill. 32. It is not necessary to the validity of a warrant that it be delivered in the county in which it is issued.

[616] Keller v. Hyde, 20 Cal. 594; Sawyer v. Colgan (Cal.) 33 Pac. 911; Capmartin v. Police Jury of Natchitoches, 19 La. Ann. 448; State v. City of New Orleans, 50 La. Ann. 880; Wilson v. State, 53 Neb. 113, 73 N. W. 456; State v. Hallock, 20 Nev. 326, 22 Pac. 123; In re Statehouse Bills, 19 R. I. 390, 35 Atl. 21[illegible]

is estopped to set up as a defense, in an action upon it, irregularities in the audit or allowance; to illustrate, the audit and allowance at a special instead of a regular meeting of the board upon whom such duty rests.[617]

§ 230. Their legal character.

Warrants issued by public corporations, purchased before maturity and for value, are subject to all defenses or equities, although in contradiction to their recitals, which may exist between the parties to the transaction whether such bona fide holder is the original payee or a subsequent purchaser for value.[618] In this respect they differ radically from negotiable bonds or securities issued by public corporations. The rules of law concerning the issue of warrants are applied with less strictness than in the case of negotiable bonds for this reason. The courts will imply authority to issue, when under the same circumstances, no such authority would be implied with respect to negotiable securities and they will overlook irregularities in the form or manner of issue when such irregularities would render negotiable bonds absolutely void even in the hands of bona fide holders.[619]

[617] Warner v. City of New Orleans (C. C. A.) 87 Fed. 829; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Los Angeles County v. Lankershim, 100 Cal. 525.

[618] School Dist. Tp. v. Lombard, 2 Dill. 493, Fed. Cas. No. 12,478; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Watson v. City of Huron (C. C. A.) 97 Fed. 449.

[619] Young v. Camden County, 19 Mo. 309. Sections of an act prescribing a form for county warrants are merely directory and a departure from the form prescribed is no defense to an action on the warrant. The court say: "The provisions of the act which have been relied upon by the counsel for the county, are directory to the county courts in issuing warrants, and the chief design of those enactments was, to prevent the making of paper by county courts which could be used as a circulating medium having the appearance of ordinary bank paper. * * * "When a party like the present plaintiff, has performed labor, or rendered services to the county, and holds a warrant issued upon the treasury of the county by the county court, his claim to the money is not affected by the taste of the court in ornamenting their warrants, although they are forbidden to use such ornaments by the county. The words of the warrant have the same meaning, and import the same obligation whether the ends of the paper upon which it is printed have ornaments or not."

Warrants are not negotiable instruments in the full sense of the term as used in the law merchant. They are non-negotiable and merely prima facie evidence of a valid claim against the corporation issuing them.[620]

[620] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468. "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the city, orders or drafts drawn by one city officer upon another, or any other device of the kind used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But to invest such documents with the character and incidents of commercial paper, so as to render them in the hands of bona fide holders absolute obligations to pay, however irregularly or fraudulently issued, is an abuse of their true character and purpose."

Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Lake County Com'rs v. Keene Five-Cents Sav. Bank (C. C. A.) 108 Fed. 505; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Crawford County v. Wilson, 7 Ark. 214; Police Jury of Tensas v. Britton, 82 U. S. (15 Wall.) 566; Wall v. County of Monroe, 103 U. S. 74. "The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that, when held, by bona fide purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them, in the hands of such payee.

There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere prima facie and not conclusive evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the legality of the claims; and when this is conceded, the instruments conclude nothing as to other demands between the parties." The court also in speaking of the decision in Crawford County v. Wilson, 7 Ark. (2 Eng.) 214, said: "This case in the supreme court of Arkansas, is cited as showing that a different rule prevails in that state. The language of the opinion, that county warrants are endowed with the properties of negotiable instruments, must be read in connection with the point involved, which was whether county warrants were transferable by mere delivery, so as to vest the legal interest in the holder. To this extent they may be called negotiable, but no court of Arkansas has held that they were negotiable in the sense of the law merchant, so as to shut out, in the hands of a bona

They are negotiable only so far that, when endorsed, they become transferable by delivery and the holder may maintain an action thereon in his own name. But in such action, whether brought by the original payee or a subsequent purchaser for value, all irregularities in the manner of issue, lack of authority or the purpose for which the funds were used, are available as defenses.[621] In a case decided by the supreme court of the United

fide purchaser, inquiries as to their validity or preclude defenses which could be made to them in the hands of the original parties. The law is not different there from that which obtains in other states."

Hill v. City of Memphis, 134 U. S. 198; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; People v. El Dorado County Sup'rs, 11 Cal. 170; Pacific Pav. Co. v. Mowbray, 127 Cal. 1; Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; Delfosse v. Metropolitan Nat. Bank, 98 Ill. App. 123; People v. Johnson, 100 Ill. 537; Davis v. Steuben School Tp., 19 Ind. 694, 50 N. E. 1; Clark v. City of Des Moines, 19 Iowa, 199; Walnut Tp. v. Jordan, 38 Kan. 562, 16 Pac. 812; Garfield Tp. v. Crocker, 63 Kan. 272, 65 Pac. 273; Sturtevant v. Inhabitants of Liberty, 46 Me. 457; Emery v. Inhabitants of Mariaville, 56 Me. 315; Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; Matthis v. Inhabitants of Cameron, 62 Mo. 504; International Bank of St. Louis v. Franklin County, 65 Mo. 105, overruling Howell v. Reynolds County, 51 Mo. 154; Chandler v. City of Bay St. Louis, 57 Miss. 326; Great Falls Bank v. Farmington, 41 N. H. 32; State v. Cook, 43 Neb. 318; D County Com'rs v. Sauer, 8 Okl. 235; Borough of Port Royal v. Graham, 84 Pa. 426; East Union Tp. v. Ryan, 86 Pa. 459; Hyde v. County of Franklin, 27 Vt. 185; Bardsley v. Sternberg, 18 Wash. 612; West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015. See, also, many authorities collected in 21 Am. & Eng. Enc. Law (2d Ed.) p. 26, note to par. 12.

[621] Wall v. Monroe County, 103 U. S. 74; Ouachita County v. Wolcott, 103 U. S. 559; Watson v. City of Huron (C. C. A.) 97 Fed. 449; Crawford County v. Wilson, 7 Ark. 214; Apache County v. Barth (Ariz.) 53 Pac. 187; People v. Gray, 23 Cal. 125; Jones v. Smith, 64 Ga. 711; People v. Rio Grande County Com'rs, 11 Colo. App. 124, 52 Pac. 748; Goodwin v. Town of East Hartford, 70 Conn. 18; Newell v. School Directors of Dist. No. 1, 68 Ill. 514; City of Hammond v. Evans, 23 Ind. App. 501; Davis v. Steuben School Tp., 19 Ind. App. 694, 50 N. E. 1; Clark v. City of Des Moines, 19 Iowa, 199; Clark v. Polk County, 19 Iowa, 248.

First Nat. Bank of Arkansas City v. Gates, 66 Kan. 505, 72 Pac. 207. "Such paper (commercial) is made free from defenses in the hands of such holders in order to facilitate the circulation thereof, and thereby promote the transaction of business. But paper non-negotiable for any reason is not thus protected. The very fact of its being non-negotiable is a sign of warning to the prospective purchaser and places him on his guard. Municipal war-

States, it was held that a warrant drawn by state authorities receivable in payment of certain obligations due the state was not a bill of credit or other instrument intended to circulate as money.[622] Some authorities hold that an executive warrant directing the payment of money in pursuance of an appropriation made by law does not partake of the nature of a contract but is merely a license of power and revocable so long as the payment authorized is not made.[623]

§ 231. Form.

A public corporation transacts its business, exercises all its powers and performs all its duties through its duly appointed or elected agents. To protect the corporation therefore, there are well defined and established rules of law controlling and regulating the manner in which and the acts that may be done by such agents for and in behalf of their principal. This is espe-

rants though negotiable in form, are non-negotiable in fact; hence they are not within the protection of the rule which guards commercial paper. The warrant in question being such an instrument, it was thereby, in the eye of the law, non-negotiable, though as to form and in other respects of a negotiable character. It therefore took its place in the list of non-negotiable paper for all purposes. In other words, an instrument non-negotiable between the original parties remains non-negotiable through successive transfers. The bank, knowing that it was non-negotiable must take and hold it as it would any other non-negotiable paper.

Long v. McDowell, 107 Ky. 14, 52 N. W. 812; Klein v. Pipes, 43 La. Ann. 359; Emery v. Inhabitants of Mariaville, 56 Me. 315; School Dist. No. 2 v. Stough, 4 Neb. 357; State v. Cook, 43 Neb. 318; Smith v. Town of Epping, 69 N. H. 558, 45 Atl. 415; McPeeters v. Blankenship, 123 N. C. 651; Gilman v. Gilby Tp., 8 N. D. 627; Capital Bank of St. Paul v. School Dist. No. 53, 1 N. D. 479; Crawford v. Noble County Com'rs, 8 Okl. 450. But see Snyder Tp. v. Bovaird, 122 Pa. 442, 15 Atl. 910, as holding that a blank assignment does not vest in the holder of a township warrant the right to maintain an action in his own name against the township. Hubbell v. Town of Custer City, 15 S. D. 55, 87 N. W. 520; Lane v. Hunt County, 13 Tex. Civ. App. 315, 35 S. W. 10; Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499; West Philadelphia Title & Trust Co. v. City of Olympia, 19 Wash. 150, 52 Pac. 1015; Chehalis County v. Hutcheson, 21 Wash. 82, 57 Pac. 341. See, also, authorities cited in preceding note.

[622] Houston & T. C. R. Co. v. Texas, 177 U. S. 66. See, also, City of New Orleans v. Mount, 24 La. Ann. 37.

[623] Fletcher v. Renfroe, 56 Ga. 674.

cially true of all those acts by or through which a pecuniary responsibility or obligation may be imposed upon a public corporation. The law or custom may require warrants in their form to be phrased in a certain manner,[624] signed by certain officials, endorsed by others[625] and sealed with the seal of the corporation, if any.[626] Where a warrant in its mechanical execution does not comply with such reasonable requirements of the law, it may be considered invalid and the official to whom it is directed and whose duty it is to pay valid warrants, can properly refuse to recognize them.[627] This may be not only a discretionary matter

[624] Shipman v. Forbes, 97 Cal. 572, 32 Pac. 599; Witter v. Bachman, 117 Cal. 318, 49 Pac. 202; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; State v. Pilsbury, 29 La. Ann. 787; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23, 19 So. 834; Callaghan v. Salliway, 5 Tex. Civ. App. 239; Minor v. Loggins, 14 Tex. Civ. App. 15, 37 S. W. 1086.

[625] Apache County v. Barth (Ariz.) 53 Pac. 187; National Bank of D. O. Mills & Co. v. Herold, 74 Cal. 603, 16 Pac. 507 (the omission of an official designation not material); State v. Dickerman, 16 Mont. 278, 40 Pac. 698; State v. Morton, 51 S. C. 323, 28 S. E. 945. It is not necessary that each member of the board of trustees of a school district sign a warrant to render it valid. Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499. A city is not liable for a fraudulent re-issue of warrants by its treasurer in payment of the original indebtedness.

[626] Smeltzer v. White, 92 U. S. 390; Springer v. Clay County, 35 Iowa, 241; Thompson v. Fellows, 21 N. H. (1 Fost.) 425. A warrant issued by selectmen need not be under seal. State v. Morton, 51 S. C. 323, 28 S. E. 945; Heffleman v. Pennington County, 3 S. D. 162. "The statute is very explicit as to how a claim against a county shall be presented and passed upon by its board of county commissioners. The duty of the board is to judicially investigate the validity and justice of the claim, and to allow or disallow the same in whole or in part, as to such board shall appear just or lawful. While the immediate purpose of the warrant is to enable the claimant to whom it is delivered to draw from the county treasury the amount of money therein named, yet it rests upon, and its issue and payment could only be justified upon, the theory that after a full investigation the county had found itself to be so indebted; so that the warrant is a formal and deliberate acknowledgment by the county of such indebtedness."

[627] Hamilton County Com'rs v. Sherwood (C. C. A.) 64 Fed. 103. A county warrant regular in its form but issued for an account which was not verified as required by Gen. St. Kan. 1889, c. 25, § 28, is not utterly void, unless issued fraudulently without consideration or authority.

Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260. The failure of a city treasurer to record, as required by law, warrants presented,

with such official but an imperative duty; the right to refuse payment may also exist where the appropriation has been made to a certain individual for a specific purpose and the warrant as drawn is to another individual and without specifying the purpose. No rule of universal applicability, however, can be given but charter or statutory provisions must be consulted to determine the validity of the warrant in this respect.

§ 232. Wording.

Provisions that a warrant shall show upon its face the purpose for which it is drawn are usually considered mandatory and in the absence of such recital, no recovery can be had even by a bona fide purchaser.[628] A substantial compliance, however, with charter or statutory provisions, satisfies legal requirements and payment can then be enforced.[629] Where they are issued containing certain recitals and the law in full under which they are issued, subsequent legislation cannot be passed which changes or affects the terms or conditions upon which they are payable. Such legislation will be considered an impairment of the obligation of the contract between the holder and the maker.[630] The party to whom payable is usually determined by law. Ordinarily, a warrant is only valid when issued in favor of the one so designated. This principle has been applied in the issue of a warrant to the assignee of one holding the original claim and invalidating it.[631]

does not defeat the right of a warrant holder to enforce it. See also holding that statutory provisions fixing the form of warrants are directory and that the addition of other words does not necessarily destroy their effect. City of Burrton v. Harvey County Sav. Bank, 28 Kan. 390; and Young v. Camden County, 19 Mo. 309.

[628] Raymond v. People, 2 Colo. App. 329, 30 Pac. 504, following Travelers' Ins. Co. v. City of Denver, 11 Colo. 434, 18 Pac. 556; San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362. For cases passing upon questions relative to the phraseology or ornamentation of warrants see Foote v. City of Salem, 96 Mass. (14 Allen) 87; Young v. Camden County, 19 Mo. 309; and Kenyon v. City of Spokane, 17 Wash. 57.

[629] Goldsmith v. Stewart, 45 Ark. 149; San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362; Ray v. Wilson, 29 Fla. 342, 10 So. 613, 14 L. R. A. 773; City of East St. Louis v. Flannigen, 36 Ill. App. 50.

[630] Brooklyn Park Com'rs v. Armstrong, 45 N. Y. 234; Wabash & E. Canal Co. v. Beers, 2 Black (U. S.) 448.

[631] Sheerer v. Edgar, 76 Cal. 569; but see Hadley v. Dague, 130 Cal.

§ 233. Validity.

(a) In general. There does not exist usually, an implied authority on the part of public corporations to issue warrants. The power must be found in some provision of the laws of the state or charter of the municipality before it can be exercised. To be valid, there must exist the legal authority for their issue assuming the absence of irregularities in other respects.[632] The presumption of

207, 62 Pac. 500. "The contract was originally awarded to John T. Long and before its completion was assigned to the Western Contracting and Construction Company. The warrant issued with the assessment was in favor of 'the Western Contracting and Construction Company, assignee of John T. Long, agents or assigns.' The appellant contends that the warrant should have been issued in the name of the original contractor, and that its issuance in favor of his assignee was unauthorized. The form of warrant which is prescribed in the street improvement act in terms authorizes and empowers the contractor, his agents or assigns to demand and receive the several assessments, and the act declares that the warrant to be issued shall be 'substantially' in this form. The right of the contractor to assign the contract prior to the completion of the work is recognized in many portions of the act and has been recognized by this court.

Anderson v. De Urioste, 96 Cal. 404. After he has ceased to have any interest in the contract, or in the assessment therefor, there would seem to be no reason for the issuance of the warrant in his name especially since the statute does not specifically require it. Sections 9 and 10 of the act designated the assignee as the proper person to whom the warrant and assignment are to be delivered. We hold therefore, that a warrant in favor of one who is therein named as the assignee of the original contractor, whose name is also given, is 'substantially' in the form prescribed in the act." Travelers' Ins. Co. v. City of Denver, 11 Colo. 434; International Bank of St. Louis v. Franklin County, 65 Mo. 105.

[632] City of Little Rock v. United States, 103 Fed. 418; Farmers' & M. Nat. Bank v. School Dist. No. 53, 6 Dak. 255. In this case a school board had issued warrants to pay for a school house site. In speaking of their validity the court said: "The fact that the legislature has in no place, nor under any circumstances, clothed the district board with power to create debts that should be binding obligations upon the district, except by and with the consent of the inhabitants of the district, is sufficient evidence that it supposed the authority to incur obligations would be more wisely exercised by those who had them to pay than by a board which peradventure might in that regard be moved by some ulterior purpose. In any event, the legislature, within the statutory limitations has left the matter entirely with the inhabitants of the district and empowered the district board to act only in consonance with the will of the voters of the district, as expressed at

law is, however, in favor of the legality of warrants, orders or other like evidences of indebtedness and the burden of proof is upon the party denying such validity.[633] The rule of law which applied to the issue of negotiable bonds or the increasing of indebtedness by a de facto corporation also applies to the validity of warrants issued by a de facto organization. These are, if otherwise valid, held good in the hands of third parties to whom they have been sold. Obligations incurred by the inhabitants of a certain district as a rule cannot be avoided by the tax-paying interests of such territory. The obligation exists not against the individuals but against the district.[634] In preceding sections the subject of

the district meetings. The district board in issuing these orders acted without any authority whatever and such orders are therefore, invalid for any purpose."

Clark v. City of Des Moines, 19 Iowa, 199; Jefferson County Sup'rs v. Arrighi, 54 Miss. 668; Andrews v. School Dist. of McCook, 49 Neb. 420, 35 L. R. A. 444; Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932, following Pomerene v. School Dist. No. 56, 56 Neb. 126, 76 N. W. 414; State v. Omaha Nat. Bank, 59 Neb. 483, 81 N. W. 319. See, also, authorities cited § 224, note 1.

[633] Wall v. Monroe County, 103 U. S. 74; George D. Barnard & Co. v. Knox County, 37 Fed. 563, 2 L. R. A. 426; Aylesworth v. Gratiot County, 43 Fed. 350; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749; Seward County Com'rs v. Aetna Life Ins. Co. (C. C. A.) 90 Fed. 222; Rollins v. Rio Grande County Com'rs (C. C. A.) 90 Fed. 575; Grayson v. Latham, 84 Ala. 546; Lusk v. Perkins, 48 Ark. 238; Apache County v. Barth (Ariz.) 53 Pac. 187; San Juan County Com'rs v. Oliver, 7 Colo. App. 515; Lake County Com'rs v. Standley, 24 Colo. 1; Ray v. Wilson, 29 Fla. 342, 14 L. R. A. 773; People v. Johnson, 100 Ill. 537; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Hospers v. Wyatt, 63 Iowa, 264; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Mountain Grove Bank v. Douglas County, 146 Mo. 42; Custer County Com'rs v. De Lana, 8 Okl. 213; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593, 12 L. R. A. 705; Chehalis County v. Hutcheson, 21 Wash. 82; Brown v. School Directors of Jacobs, 77 Wis. 27.

[634] Board of Education of Atchison v. De Kay, 143 U. S. 591; Speer v. Kearney County Com'rs (C. C. A.) 88 Fed. 749. The point was urged here that the warrants were invalid because the law under which they were given was unconstitutional. Upon this the court said: "Such a law passes the scrutiny and receives the approval of the attorney general, of the lawyers who compose the judiciary committees of the legislative bodies, of the legislature and of the governor before it reaches the statute book. * * * Courts declare its invalidity with hesitation and after long deliberation and much consideration, even when its violation of the organic

incurring indebtedness by public corporations has been discussed, whether such indebtedness exists as negotiable bonds or in other forms and in this connection attention has been called to the constitutional or statutory provisions found in every state and which limit the amount of indebtedness that can be legally incurred by public corporations. Indebtedness incurred in excess of such limitations is usually held void and not capable of enforcement.[635] Whether warrants as ordinarily issued constitute

law is clear and never when it is doubtful. Until the judiciary has declared it void, men act and contract and they ought to act and contract on the presumption that it is valid and where before such a declaration is made, their acts and contracts have affected public interest or private rights, they must be treated as valid and lawful. The acts of a de facto corporation or officer under an unconstitutional law before its invalidity is challenged in or declared by the judicial department of the government cannot be avoided as against the interests of the public or of third parties who have acted or invested in good faith in reliance upon their validity by any ex-post facto declaration or decision that the law under which they acted was void." Merchants' Nat. Bank v. McKinney, 2 S. D. 106, 48 N. W. 841. The payment of warrants was sought to be avoided on the ground that there were no county officers and therefore no county. The court said: "So we say here the county existed from the moment it was segregated from the other portions of the territory, its boundaries defined, and its name given to it, and all the offices provided by law existed. They were vacant, it is true, but they nevertheless existed, ready to be filled whenever certain conditions should exist. * * * We conclude therefore, that there were de jure county offices existing in Douglas county to be filled and that, when filled, the officers were at least, de facto officers and their acts good as to third persons and the public; and that the board of county commissioners of said Douglas county in issuing the warrants in controversy, constituted a de facto board and the warrants issued by it are prima facie valid and binding upon the county."

[635] See §§ 148 et seq. Farmers' & M. Nat. Bank v. School Dist. No. 53, 6 Dak. 255. "We think it was the purpose of the legislature to restrict within the limits specified by the statute, the amount of actual expenditures which could be made by the district in any one year. Any other construction of this statute would be equivalent to holding that it has no force or effect and that school districts or school boards may incur any amount of indebtedness and bind the district with its immediate payment."

Andrew County v. Schell, 135 Mo. 31, 36 S. W. 206; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; D County Com'rs v. Sauer, 8 Okl. 235; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; City of Sherman v. Smith, 12 Tex. Civ. App. 580, 35 S. W. 294; Baker v. City of Seat-

an "indebtedness" within the meaning of such constitutional or statutory phrases may depend upon the decisions of a particular state following what might be termed a local public policy[636] or upon the construction given by some courts to such instruments that if drawn against a tax levy or funds already within the control and possession of the corporation they do not constitute an indebtedness.[637] Those provisions which require, before an indebtedness can be legally incurred, the affirmative vote of the electors, must be followed where warrants are regarded as an indebtedness, and if issued without are invalid.[638]

tle, 2 Wash. St. 576. Invalid warrants, however, can be validated under legislative authority. Duryee v. Friars, 18 Wash. 55. The constitutional limitation does not apply to obligations incurred in matters essential to governmental maintenance and therefore warrants issued after such limitation had been reached are prima facie valid. Roe v. Town of Philippi, 45 W. Va. 785, 32 S. E. 224. The fact of a debt in excess of a constitutional limitation must, however, clearly appear. Kane v. School Dist., 52 Wis. 502.

[636] George D. Barnard & Co. v. Knox County, 37 Fed. 563, 2 L. R. A. 426, following Potter v. Douglas County, 87 Mo. 240; Koppikus v. State Capitol Com'rs, 16 Cal. 248; Henderson v. People, 17 Colo. 587. Every appropriation in excess of the constitutional limitation should be regarded as void. City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Fuller v. City of Chicago, 89 Ill. 282; In re State Warrants, 25 Neb. 659; State v. Parkinson, 5 Nev. 15; Lorence v. Bean, 18 Wash. 36.

School Dist. No. 3 v. Western Tube Co., 5 Wyo. 185, and Fenton v. Blair, 11 Utah, 78, hold warrants void issued in excess of the Federal limitation on indebtedness.

[637] Fuller v. Heath, 89 Ill. 296; Phillips v. Reed, 107 Iowa, 331. "If it appeared that the indebtedness to the payment of which the satisfaction of plaintiff's warrant is sought to be postponed was incurred in excess of the prescribed limit * * * the decision of this case would be a matter of no difficulty. It is true, the petition alleges that at the times when this indebtedness was contracted the city was in debt to the limit of the amount allowed. But it does not follow from this that the indebtedness as represented by these warrants was necessarily invalid. If the city had on hand or in prospect, at the time these warrants were issued, funds with which to meet them without trenching upon the rights of creditors, for current expenses of the city, then the warrants were valid, although such funds may have been thereafter wrongfully applied to other purposes." Darling v. Taylor, 7 N. D. 538, 75 N. W. 766; Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598; Lawrence County v. Meade County, 10 S. D. 175, 72 N. W. 405.

[638] Farquharson v. Yeargin, 24 Wash. 549, 64 Pac. 717. The rule, however, does not apply to warrants issued in excess of a constitutional limitation without the consent of

(b) Warrants invalid because of purpose for which issued. Again a warrant may be invalid because issued for a purpose which is not considered or regarded by the courts as a public one; the basis of all legal expenditure of public moneys by public corporations is the fact of the disbursement for some purpose germane to their organization and the transaction of public business by them. Clearly, therefore, if warrants are issued by public corporations, although regular in their form, for a purpose not public in its character, they will be regarded as illegal, and not being considered negotiable in their character, this question can be raised even where they have passed into the hands of bona fide holders for value and before maturity.[639]

the required affirmative vote when issued in payment of compulsory obligations. The cost of constructing a court house and the salaries of county officials are of such a character. The court in part say: "It is contended that the warrants issued after the county had reached its limit of indebtedness were illegal. It appears that these warrants were issued for salary purposes and to complete the payment upon the county court house. * * * At the time the court house was erected such a county building was absolutely necessary for county officers and a proper care of the county records. Republic, the county seat, was a new mining camp and but a short time before had been destroyed by fire. Most of the buildings were small frame cabins none of them being suitable places to deposit the county records or to accommodate the county offices. While, ordinarily, warrants issued in payment of money expended in building a court house would not fall under the class of compulsory obligations the conditions existing in Republic at the time of the erection of the court house were such as to bring the warrants for the erection of this particular court house within the rule * * * because it may be fairly inferred that no other building could be had for the purpose owing to the destruction of the town by fire." Rauch v. Chapman, 16 Wash. 568, 36 L. R. A. 407.

[639] First Nat. Bank of Lansdale v. Wyandotte County Com'rs (C. C. A.) 68 Fed. 878; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Long v. Boone County, 32 Iowa, 181. Warrants valid issued in payment of a contract for grading and improving the public roads of a county.

Salamanca Tp. v. Jasper County Bank, 22 Kan. 696; D County Com'rs v. Sauer, 8 Okl. 235; Custer County Com'rs v. De Lana, 8 Okl. 213, 57 Pac. 162. The presumption, however, exists that such warrants are issued for lawful corporate purpose. King v. Sullivan County, 67 Tenn. (8 Baxt.) 329; James v. City of Seattle, 22 Wash. 654, 62 Pac. 84. The payment of expenses incurred by city officials while on a trip to various cities investigating municipal affairs was not held as a public purpose. The court say in part: "The members of the city council are trustees. The body holds a trust for the inhabitants of the city. The

(c) Invalidity resulting from character. By the constitution of the United States the states are prohibited from coining money, emitting bills of credit or making anything but gold and silver coin a legal tender in payment of debts. At times states have authorized the issuance of warrants which are receivable within the state for taxes, debts or other obligations due them; the question of their validity has arisen, the contention being made that such warrants are "currency" within the meaning of the Federal constitution, the emission of which is there prohibited. The decisions, however, have been adverse to such contention.[640]

terms of the trust are fixed by legislation and no expenditure of money belonging to the city can be made without express authority or implied authority by reason of a necessary granted power. Where this authority does not exist the council is without power to authorize the payment of the claim against the city, and upon sound principle it cannot be conceded that the council had the power to authorize the payment of the claim of appellant. * * * Where the council is without power to authorize the payment of the claim, the officer may properly refuse to countersign the warrant directing the payment of such claim."

[640] Houston & T. C. R. Co. v. Texas, 177 U. S. 66. "These warrants were payable to the individual to whom the state was indebted, or to bearer, and were issued to a creditor of the state. That the legislature may have desired to facilitate the use of the warrants by these provisions is perhaps true but the members of the legislature knew that to issue the warrants to circulate as money would be to condemn them from the start. That the promise should be made to receive them in payment of debts due the state would add to their usefulness and to the willingness of people to take them in payment of debts due them from the state and that while in their hands others might receive them in payment of debts, was a possibility or probability depending upon whether the person taking them had opportunity to use them to pay some of his own debts to the state. That he might on some occasion be able to so use the warrant as to enable him to thereby discharge an obligation from himself to a third person who was willing to accept it does not bring the warrant so used within the ordinary meaning of the term 'money.' It is not money in that sense." See, also, Craig v. Missouri, 4 Pet. (U. S.) 410; Briscoe v. Bank of Kentucky, 11 Pet. (U. S.) 257; Woodruff v. Trapnall, 10 How. (U. S.) 190; Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; Sprott v. United States, 87 U. S. (20 Wall.) 459; Poindexter v. Greenhow, 114 U. S. 270 (Virginia coupon cases); Baldy v. Hunter, 171 U. S. 388; Lindsey v. Rottaken, 32 Ark. 619; Cothran v. City of Rome, 77 Ga. 582; Dively v. City of Cedar Falls, 21 Iowa, 565; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53.

(d) Refunding. Warrants issued for the refunding of a prior indebtedness will partake of the original character of such indebtedness. Void debts cannot be rendered valid by a mere change of form,[641] and the reverse of this rule is also true that indebtedness which is valid and binding cannot be rendered invalid by the issue of warrants for which there is no authority.[642] As a rule, in the absence of authority, warrants outstanding cannot be funded by the issue of negotiable bonds, an instrument of a different character and which, owing to this fact, may increase the debt beyond a constitutional limit; such refunding bonds are usually held void.[643]

§ 234. Interest payable.

Warrants are non-interest bearing, prima facie evidences of indebtedness. If made payable at a certain date, they bear interest from and after that date if presented and payment is refused.[644] A demand is generally necessary to start interest run-

[641] Royster v. Granville County Com'rs, 98 N. C. 148.

[642] Otis v. Inhabitants of Stockton, 76 Me. 506; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173. Neither can a valid debt as evidenced by a warrant be rendered invalid by the issue of either void refunding warrants or bonds. See O'Connor v. Parish of East Baton Rouge, 31 La. Ann. 221; City of Plattsmouth v. Fitzgerald, 10 Neb. 401.

[643] Whitwell v. Pulaski County, 2 Dill. 249, Fed. Cas. No. 17,605; Richards v. Klickitat County, 13 Wash. 509. This can be done, however, if constitutional authority exists.

[644] City of New Orleans v. Warner, 175 U. S. 120, modifying decree in (C. C. A.) 81 Fed. 645; Marks v. Purdue University, 37 Ind. 155; Rooney v. Dubuque County, 44 Iowa, 128. An actual tender of an amount due on a warrant, alone can suspend the accumulation of interest. Creole Steam Fire Engine Co. v. City of New Orleans, 39 La. Ann. 981; State v. Hickman, 11 Mont. 541, 29 Pac. 92. No special appropriation necessary for the payment of interest on outstanding warrants. Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821. Holding unconstitutional compiled statutes, division 5, § 794 relating to the payment of interest on unpaid warrants after demand.

Read v. City of Buffalo, 74 N. Y. 463; Shipley v. Hacheney, 34 Or. 303; Seton v. Hoyt, 34 Or. 266, 55 Pac. 967; Monteith v. Parker, 36 Or. 170, 59 Pac. 192. Where unpaid warrants are funded, the holder is entitled to interest from the date of the original warrant.

Davidson County v. Olwill, 72 Tenn. (4 Lea) 28; Gibson County v. Rains, 79 Tenn. (11 Lea) 22; Langdon v. City of Castleton, 30 Vt. 285; Seymour v. City of Spokane, 6

ning upon them. This rule also applies where they are payable on demand and on presentation payment is refused.[645]

§ 235. Actions on warrants.

Warrants being non-negotiable and merely prima facie evidence of indebtedness against the public corporation issuing them are subject to all equities existing between parties even when they are in the hands of a bona fide holder who has purchased the same and paid value therefor before maturity. In an action brought by such a holder against the maker with its consent,[646] in case of a refusal to pay, all the defenses which may

Wash. 362; City of Scranton v. Hyde Park Gas Co., 102 Pa. 382; McIntosh v. Salt Lake County, 23 Utah, 504, 65 Pac. 483; Alexander v. Oneida County, 76 Wis. 56, 45 N. W. 21.

Where the statutes prohibit the payment of interest on county orders, it cannot be recovered, but see the following cases holding that municipal warrants or orders do not bear interest after they have become due and payable or after demand and nonpayment for want of funds. Madison County v. Bartlett, 2 Ill. (1 Scam.) 67; Hardin County v. McFarlan, 82 Ill. 138; City of Chicago v. English, 80 Ill. App. 163; Hall v. Jackson County, 95 Ill. 352; Warren County Sup'rs v. Klein, 51 Miss. 807; Com. v. Philadelphia County Com'rs, 4 Serg. & R. (Pa.) 125; Ashe v. Harris County, 55 Tex. 49; Alexander v. Oneida County, 76 Wis. 56.

[645] City of New Orleans v. Warner, 175 U. S. 120. The commencement of a suit will be sufficient demand to make the warrant carry interest from that time. Ter. v. Cascade County Com'rs, 8 Mont. 396, 7 L. R. A. 105; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971; Monteith v. Parker, 36 Or. 170, 59 Pac. 192; Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080. Interest is not payable on improvement warrants until after the city issuing them is entitled to interest on delinquent taxes due under the assessment forming the fund for the payment of such warrants. Special statutes of particular states may provide for the payment of interest on warrants presented for payment and remaining unpaid for want of funds. Such provisions will, of course, establish rights not otherwise existing. See Jacks & Co. v. Turner, 36 Ark. 89. Such a statute held unconstitutional in Arkansas being in contravention of the constitutional provision prohibiting counties from issuing interest-bearing evidences of indebtedness.

Hall v. Jackson County, 95 Ill. 353; Marks v. Purdue University, 37 Ind. 155; Rooney v. Dubuque County, 44 Iowa, 128; Robbins v. Lincoln County Ct., 3 Mo. 57; Skinner v. Platte County, 22 Mo. 437; State v. Trustees of Town of Pacific, 61 Mo. 155; Higgins v. Edwards, 2 Mont. 585; Seton v. Hoyt, 34 Or. 266, 43 L. R. A. 634; Monteith v. Parker, 36 Or. 170, 59 Pac. 192; Freeman v. City of Huron, 10 S. D.

be available or to which they were subject in the hands of the original payee may be taken advantage of by the defendant.[647] And all conditions which under other circumstances would create an estoppel against one of the parties to the transaction will operate here to the same effect.[648] It is not necessary for the holder to proceed by mandamus against the proper disbursing officer of the corporation, but he may sue it direct.[649] Mandamus may, however, be the ordinary or exclusive remedy for the collection of a corporate warrant.[650] If warrants are payable, as stated in a preceding section,[651] from a specific fund or by their terms are made payable from such fund, there does not exist a general obligation to pay them from revenues or funds raised in

368; Williams v. Shoudy, 12 Wash. 362; City of New Orleans v. Warner, 175 U. S. 120.

[646] Klein v. Warren County Sup'rs, 51 Miss. 878. See, also, Klein v. Smith County Sup'rs, 54 Miss. 254.

[647] Coffin v. Kearney County Com'rs, 114 Fed. 518. The defense that warrants issued in excess of the statutory limitation as to amount held not available where the fact is undisputed that there has been no assessment upon which to base a determination of what is the statutory amount.

Grayson v. Latham, 84 Ala. 546; Pulaski County v. Lincoln, 9 Ark. 320; Wood v. Bangs, 1 Dak. 179. An action for equitable relief involving the validity of warrants cannot be maintained until the parties are placed in statu quo. Polk v. Tunica County Sup'rs, 52 Miss. 422; Crawford v. Noble County Com'rs, 8 Okl. 450. See, also, § 230, supra.

[648] Thompson v. Searcy County (C. C. A.) 57 Fed. 1030, following Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353.

[649] Jerome v. Rio Grande County Com'rs, 18 Fed. 873; Thompson v. Searcy County (C. C. A.) 57 Fed. 1030; School Dist. No. 7 v. Reeve, 56 Ark. 68; Travelers' Ins. Co. v. City of Denver, 11 Colo. 434; Cook County v. Schaffner, 46 Ill. App. 611; People v. Clark County Sup'rs, 50 Ill. 213; City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184; Wood v. State, 155 Ind. 1; Campbell v. Polk County, 3 Iowa, 467; Mills County Nat. Bank v. Mills County, 67 Iowa, 697; Benham v. Parish of Carroll, 28 La. Ann. 343; International Bank v. Franklin County, 65 Mo. 105; Knapp v. City of Hoboken, 38 N. J. Law, 371; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Goldsmith v. Baker City, 31 Or. 249, 49 Pac. 973; Simmons v. Davis, 18 R. I. 46; Alexander v. Oneida County, 76 Wis. 56; Brown v. School Directors of Jacobs, 77 Wis. 27.

[650] Davenport v. Dodge County, 105 U. S. 237; Chickaming Tp. v. Carpenter, 106 U. S. 663; State v. Clay County, 46 Mo. 231; Mansfield v. Fuller, 50 Mo. 338; Klein v. Smith County Sup'rs, 58 Miss. 540; Greeley v. Cascade County, 22 Mont. 580; Abernethy v. Town of Medical Lake, 9 Wash. 112.

[651] See § 227.

any other manner or for any other purpose. The holder of such warrants is limited in his recovery to the fund existing for their payment.[652] This principle, however, is not applied to the extent that a public corporation will be justified in refusing to levy or collect the taxes or special assessments which form the specified fund. In case of refusal on the part of public officers they can be compelled by mandamus to perform the duties imposed upon them by law in this regard.[653] Neither will a public corporation be excused, by a plea of lack of funds, from paying warrants drawn upon a special fund where the moneys in this fund have been illegally withdrawn and used for other purposes,[654] or where the public corporation has rendered itself in-

[652] Warner v. City of New Orleans, 167 U. S. 467. Where a municipality issues warrants payable from a certain fund, it is estopped to set up in defense an action against it on such warrants that it had discharged claims against such fund in excess of the amount collected; the maintenance of such fund being practically abandoned.

United States v. King, 74 Fed. 493; Wilder v. City of New Orleans, 87 Fed. 843. The holders of special drainage warrants not restricted for their payment to the special fund from which they were originally designed to be paid. Bush v. Wolf, 55 Ark. 124; Forbes v. Grand County Com'rs, 23 Colo. 344; Bank of Nacona v. March (Tex. Civ. App.) 51 S. W. 266; Northwestern Lumber Co. v. City of Aberdeen, 22 Wash. 404.

[653] United States v. Macon County Ct., 75 Fed. 259; Warner v. City of New Orleans, 87 Fed. 829; City of New Orleans v. Warner, 175 U. S. 120; Knapp v. City of Hoboken, 38 N. J. Law, 371. In this case the remedy of the warrant holder was held to be by action of debt not by mandamus to compel the enforcement of assessments. Theis v. Washita County Com'rs, 9 Okl. 643. The proceeding by mandamus may be the proper one authorized by law and holders of warrants may not have the option to proceed in any other manner to enforce their obligations against the corporation. Citing Knox County Com'rs v. Aspinwall, 24 How. (U. S.) 376; Rock Island County Sup'rs v. United States, 71 U. S. (4 Wall.) 435; City of Davenport v. Lord, 76 U. S. (9 Wall.) 409; Washington County Sup'rs v. Durant, 76 U. S. (9 Wall.) 415; Riggs v. Johnson County, 73 U. S. (6 Wall.) 166; Elliott County v. Kitchen, 77 Ky. (14 Bush) 289; Limestone County Com'rs Ct. v. Rather, 48 Ala. 434; Diggs v. Lobsitz, 4 Okl. 232; Com. v. Select & Common Councils of Pittsburgh, 34 Pa. 496.

Bank of British Columbia v. City of Port Townsend, 16 Wash. 450; Sharp v. City of Mauston, 92 Wis. 629.

[654] Hockaday v. Chaffee County Com'rs, 1 Colo. App. 362, 29 Pac. 287; Schulenburg & Boeckler Lumber Co. v. City of East St. Louis, 63 Ill. App. 214; Valleau v. New-

capable of creating such fund in the manner originally intended.[655] In the absence of the necessary moneys in the proper fund, no right of action will accrue against the public corporation where the taxes or assessments have been properly levied and collected or remain partially uncollected. It is generally optional with the holder of warrants in case of a refusal to levy taxes for their payment to compel by mandamus the officials to perform their duties or to sue the public corporation.[656] The legal character of different classes or kinds of warrants as bringing them within the operation of the statutes of limitation depends entirely upon the construction given them by the courts of

ton County, 72 Mo. 593. The rule in the text, however, does not apply to warrants issued without authority, and for a debt which the city could not legally contract.

Pollock v. Stanton County, 57 Neb. 399; Ayres v. Thurston County, 63 Neb. 96, 88 N. W. 178; Brewer v. Otoe County, 1 Neb. 373; Blackman v. City of Hot Springs, 14 S. D. 497, 85 N. W. 996; State Sav. Bank v. Davis, 22 Wash. 406; New York Security & Trust Co. v. City of Tacoma, 21 Wash. 303, 57 Pac. 810. The rule applies where funds applicable to the payment of certain warrants have been placed for deposit in banks subsequently becoming insolvent with a resultant loss of such moneys.

Quaker City Nat. Bank v. City of Tacoma, 27 Wash. 259, 67 Pac. 710. The city held not generally liable, the remedy of the warrant holder being an action in damages for the misappropriation.

[655] City of New Orleans v. Warner, 175 U. S. 120; Louisiana Nat. Bank v. Board of Liquidation, 30 La. Ann. 1356.

[656] Board of Improvement v. McManus, 54 Ark. 446; Mills County Nat. Bank v. Mills County, 67 Iowa, 697. "The question is, how is the owner of the warrants to enforce payment? There is no such privity between him and the taxpayers that any action or proceeding can be maintained against them. It is claimed that a demand should be made on the board of supervisors to levy a tax and that no suit can be maintained without such demand. This position cannot be maintained. It is the duty of the county to make the levy without a demand. It might with the same propriety, be claimed that the holder of any other warrant upon the county must make a demand that a tax be levied to pay his warrant before he can maintain an action. The county has an undoubted right to make any proper and lawful defense to these warrants. If it has no defense, the plaintiff is entitled to judgment and to the enforcement of payment by the levy of a tax in obedience to the requirements of the statute. * * * The law contemplates that the owners of property benefited by the ditch must pay the cost of its construction and if the plaintiff obtains judgment upon the warrants, the method of raising means for its payment is plainly pointed out by statute." Hunter v. Mobley, 26 S. C. 192.

a state.[657] In actions against public corporations on warrants valid on their face, the presumption of law exists that they were lawfully and legally issued and the burden of establishing their illegality or the fraudulent and illegal character of the claims upon which they were based is on the defendant.[658]

§ 236. Their payment.

Where the power to audit, allow and authorize the issuance of warrants is by law placed in the hands of certain designated officials of the public corporation upon the presentation of a warrant duly issued, other officials have no discretion in regard to its payment; this exists as an imperative duty capable of enforcement if there are sufficient funds.[659] The fact that the cor-

[657] Knox County v. Morton (C. C. A.) 68 Fed. 787, construing Rev. St. Mo. 1889, § 3195, relating to county warrants. Hintrager v. Richter, 85 Iowa, 222, 52 N. W. 188; Wilson v. Knox County, 132 Mo. 387, 34 S. W. 45, 477; Borough of Port Royal v. Graham, 84 Pa. 426; Leach v. Wilson County, 68 Tex. 353.

[658] San Juan County Com'rs v. Oliver, 7 Colo. App. 515, 44 Pac. 362; Everts v. District Tp. of Rose Grove, 77 Iowa, 37; Mountain Grove Bank v. Douglas County, 146 Mo. 42, 47 S. W. 944; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23, 19 So. 834; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260. The defendant urged on appeal that the plaintiff had not shown the statute not complied with so far as the books of the treasurer were concerned. The court said: "The city treasurer is an officer of the city, over whom the warrant holder has no control and for whose neglect to perform his duty he is not responsible. If, therefore, the books of the treasurer were not properly kept and the proper entries made therein, the failure is the failure of the city by its officers, and it cannot take advantage of such omission as against a warrant holder who has done all that the law requires him to do, namely to present his warrant for payment and have it registered for payment. As it was in fact registered, the court will presume that he paid or tendered the required fee, or that payment of the same was waived by the treasurer."

Scott v. School Directors of Armstrong, 103 Wis. 280, 79 N. W. 239.

[659] Keller v. Hyde, 20 Cal. 593; Von Schmidt v. Widber, 105 Cal. 151; Bank of Staten Island v. City of New York, 68 App. Div. 231, 74 N. Y. Supp. 284; Bush v. Geisy, 16 Or. 355; Simmons v. Davis, 18 R. I. 46; Culberson v. Gilmer Bank, 20 Tex. Civ. App. 565, 50 S. W. 195; Collier v. Peacock, 93 Tex. 255, 54 S. W. 1025; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. If a payment of warrants is marked by haste and with apparent collusion in face of lack of funds to meet them, the officers paying them may be personally liable for the repayment of the money disbursed.

poration issuing the warrant may be its owner is ordinarily no ground for the refusal of a subordinate board or official to refuse payment.[660] Where warrants are authorized under law to be issued by a certain designated official body, an order for payment of a certain claim by another court predicated upon a judgment rendered by it will be sufficient authority for the payment of a warrant issued upon such judgment.[661] When refunding bonds have been issued to take up outstanding warrants and the bonds are subsequently established as void, the warrants in the meantime having been destroyed, this does not give a holder of such warrants any right of action for damages against the corporation for the destruction; he can recover, however, the full value of the warrants,[662] and this is true where the same state of facts exist except the destruction of warrants and the question of damages.[663] The payment of warrants issued in settlement of a claim subsequently held invalid or of like warrants can be prohibited and all officials will be bound by orders of the proper authorities to this effect.[664] The payments of warrants illegally drawn or issued may be enjoined and the warrants directed canceled by a court of equity upon the complaint of a taxpayer.[665]

§ 237. Presentation for payment.

As a rule, warrants must be presented to and a demand made for payment of the proper disbursing officer of the corporation. This is necessary that the holder may proceed by mandamus against the official to compel a payment or to bring an action based upon them and that interest may commence to run.[666]

[660] Louisiana Nat. Bank v. Board of Liquidation, 30 La. Ann. 1356.

[661] United States v. King, 74 Fed. 493.

[662] O'Connor v. Parish of East Baton Rouge, 31 La. Ann. 221.

[663] Gause v. City of Clarksville, 1 McCrary, 78, 1 Fed. 353; Deyo v. Otoe County, 37 Fed. 247; Coffin v. Kearney County Com'rs, 114 Fed. 518; City of Plattsmouth v. Fitzgerald, 10 Neb. 401.

[664] Polk County v. Sherman, 99 Iowa, 60; Taylor v. Chickasaw County Sup'rs, 74 Miss. 23; Hayes v. Davis, 23 Nev. 318; Ter. v. Browne, 7 N. M. 568; Frankl v. Bailey, 31 Or. 285, 50 Pac. 186; State v. Walker (Tenn.) 47 S. W. 417; Lane v. Hunt County, 13 Tex. Civ. App. 315.

[665] Andrews v. Pratt, 44 Cal. 309; Ackerman v. Thummel, 40 Neb. 95; Crawford v. Noble County Com'rs, 8 Okl. 450; Dorothy v. Pierce, 27 Or. 373; State v. Metschan, 32 Or. 372, 41 L. R. A. 692; Savage v. Sternberg, 19 Wash. 679; Webster v. Douglas County, 102 Wis. 181.

[666] Warner v. City of New Orleans, 87 Fed. 829; Grayson v. Latham, 84

§ 238. Payment; the amount.

Public officers have no authority to bind their principal for the payment of more than the face of a warrant although it may be at a discount and the sum realized from its sale at the discount price will bring to the holder a sum less than the bill or account rendered by him which has been approved, audited and allowed by the proper authorities.[667] A warrant issued either by fraud or mistake for an amount in excess of the sum actually due on the account or bill rendered and to pay which it was intended, is valid only for the amount for which it should have been properly issued.[668]

Ala. 546; Apache County v. Barth (Ariz.) 53 Pac. 187. The statute of limitation does not commence to run on county warrants until there is a fund in the treasury for their payment.

City of Central v. Wilcoxen, 3 Colo. 566; Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690; Bodman v. Johnson County, 115 Iowa, 296, 88 N. W. 331; Hubbell v. City of South Hutchinson, 64 Kan. 645, 68 Pac. 52; Oliver v. Board of Liquidation, 40 La. Ann. 321, 4 So. 166; State v. Board of Liquidation, 31 La. Ann. 273; Varner v. Inhabitants of Nobleborough, 2 Me. (2 Greenl.) 121; Ferguson v. City of St. Louis, 6 Mo. 499; Wilson v. Knox County (Mo.) 28 S. W. 896; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260. "The next contention of appellants we shall notice is that the court erred in allowing interest on these warrants from the date of their presentation and registration. In this we think the court ruled correctly. The warrants were payable upon presentation for payment; and payment being refused for want of funds, the holder was thereafter entitled to interest under the provision of sections 3721, 4746 Comp. Laws, until the treasurer set apart funds to pay them, as provided by section 1674, Comp. Laws. This and the preceding section clearly assume that such warrants bear interest after presentation and registration."

San Patricio County v. McClane, 58 Tex. 243; Bardsley v. Sternberg, 18 Wash. 612; State v. Young, 22 Wash. 547.

[667] Morgan v. District of Columbia, 19 Ct. Cl. 156; Shirk v. Pulaski County, 4 Dill. 209, Fed. Cas. No. 12,794; Dorsey County v. Whitehead, 47 Ark. 205; Foster v. Coleman, 10 Cal. 278; Clark v. City of Des Moines, 19 Iowa, 199; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Bauer v. Franklin County, 51 Mo. 205; Cleveland County Com'rs v. Seawell, 3 Okl. 281; Municipal Security Co. v. Baker County, 33 Or. 338, 54 Pac. 174; Arnott v. City of Spokane, 6 Wash. 442; Million v. Soule, 15 Wash. 261.

[668] Foster v. Coleman, 10 Cal. 278; People v. State Treasurer, 40 Mich. 320; Chandler v. City of Bay St. Louis, 57 Miss. 326; Erskine v. Steele County, 4 N. D. 339, 60 N. W. 1050, 28 L. R. A. 645; Arnott v. City of Spokane, 6 Wash. 442, 33 Pac. 1063.

§ 239. Manner of payment.

In the absence of restrictive legislation, a public corporation or the state may issue its warrants payable in gold coin of the United States or other legal tender. It may also make its warrants as well as other due bills or orders receivable by the public corporation issuing them in payment of debts due such corporation.[669] Pursuant, therefore, to such provisions, the holder of warrants may insist upon their payment in the manner and mode prescribed or may compel an acceptance, in accordance with their terms by the public officials, in payment of taxes[670] or other obligations due from him to the corporation. Usually, a public corporation where warrants are at a discount, does not possess the power to issue them at such a rate as to make them a cash equivalent.[671]

[669] White v. State (Ark.) 11 S. W. 765; State v. Miller, 145 Ind. 598, 44 N. E. 309; Kentucky Chair Co. v. Com., 20 Ky. L. R. 1279, 49 S. W. 197. State treasury warrants not available for the payment of a debt due the state. Long v. McDowell, 21 Ky. L. R. 605, 52 S. W. 812; Alberts v. Torrent, 98 Mich. 512. A mayor has no authority to deduct from a valid warrant due an individual a sum illegally received by him from the city. Raton Waterworks v. Town of Raton, 9 N. M. 70, 49 Pac. 898; Lee v. Roberts, 3 Okl. 106.

[670] State v. Rives, 12 Ark. 721; Hill v. Logan County, 57 Ark. 400, 21 S. W. 1063; McKibben v. State, 31 Ark. 46; Lindsey v. Rottaken, 32 Ark. 619, to the contrary, Loftin v. Watson, 32 Ark. 414.

Fry v. Reynolds, 33 Ark. 450; Howell v. Hogins, 37 Ark. 110; Thorpe v. Cochran, 7 Kan. App. 726, 52 Pac. 107; State v. Payne, 151 Mo. 663, 52 S. W. 412; Sheridan v. City of Rahway, 44 N. J. Law, 587; Western Town-Lot Co. v. Lane, 7 S. D. 1, 62 N. W. 982. "A city undoubtedly may, for its own convenience, make an estimate of the money it may require for each particular city purpose; but when it makes its levy, all those various sums must be aggregated, and the levy made for the total amount required for general municipal purposes. Of course, if the city makes any levy for bonded indebtedness, for interest, for the payment of any judgments or for any other special purpose authorized by law, the levy may be special as to those purposes. Its general municipal expenses cannot, however, be divided and subdivided and appropriations made for specific purposes in advance, so as to cut off the rights of holders of warrants on its general fund, as was attempted to be done in the case at bar. Such a system, if permitted, would in a great measure, repeal the laws of the state. * * * Holders of valid city warrants have vested rights that cannot be ignored. Payment of such warrants in the manner provided by the law cannot be suspended at the mere will and pleasure of the city council."

Town of Marinette v. Oconto County Sup'rs, 47 Wis. 216.

[671] Clayton v. McWilliams, 49 Miss.

§ 240. Time of payment.

Warrants where not otherwise provided are usually payable on demand.[672] Payment may also be due at a date specified,[673] in the order of their registration with designated public officers,[674] or in

311; Bauer v. Franklin County, 51 Mo. 205. See preceding section.

[672] Shelley v. St. Charles County Ct., 21 Fed. 699; United States v. King, 74 Fed. 493; United States v. Macon County Ct., 75 Fed. 259; People v. Austin, 11 Colo. 134, 17 Pac. 485; McDonald v. Bird, 18 Cal. 195; Shaw v. Statler, 74 Cal. 258; Phillips v. Reed, 109 Iowa, 188; Thorpe v. Cochran, 7 Kan. App. 726, 52 Pac. 107; State v. Burke, 35 La. Ann. 457. Warrants issued in favor of the Louisiana University take precedence of all others drawn on the general fund except those in favor of officers whose salaries are fixed by the constitution; this case also holds that warrants issued by the Louisiana board of health are not entitled to preference of payment out of the general fund, and Klein v. Pipes, 43 La. Ann. 362, holds that warrants issued for the support of the University for the Education of Negroes should not in payment take precedence. State v. Johnson, 162 Mo. 621, 63 S. W. 390; Morrow v. Surber, 97 Mo. 155; Andrew County v. Schell, 135 Mo. 31; State v. Hortsman, 149 Mo. 290; State v. Allison, 155 Mo. 325; Greeley v. Cascade County, 22 Mont. 580, 57 Pac. 274; Esser v. Spaulding, 17 Nev. 289; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Shannon v. City of Huron, 9 S. D. 356; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; La France Fire-Engine Co. v. Davis, 9 Wash. 600; Lorence v. Bean, 18 Wash. 86. A warrant issued in payment of a judgment should not be postponed in favor of other claims or necessary expenses. Bardsley v. Sternberg, 18 Wash. 612.

[673] Frankford Real-Estate, Trust & Safe-Deposit Co. v. Jackson County (C. C. A.) 98 Fed. 942; Miller County v. Gazola, 65 Ark. 353, 46 S. W. 423; Markey v. School Dist. No. 18, 58 Neb. 479, 78 N. W. 932. "The contract and order in question each required the amount therein specified to be paid at a date which had not then arrived. School district officers can contract for the furnishing of school houses only with reference to money on hand and at the time available for that purpose. The officers of the school district possessed no authority to make a contract or give a district order payable at a future time. This principle has been frequently stated and applied by this court." Citing School Dist. No. 2 v. Stough, 4 Neb. 360; State v. Sabin, 39 Neb. 570; A. H. Andrews & Co. v. School Dist. of McCook, 49 Neb. 420.

[674] Taylor v. Brooks, 5 Cal. 332; McCall v. Harris, 6 Cal. 281; La Forge v. Magee, 6 Cal. 285; First Nat. Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738; Shepherd v. Helmers, 23 Kan. 504; First Nat. Bank of Garden City v. Morton County Com'rs, 7 Kan. App. 739, 52 Pac. 580; Monroe v. Crawford, 9 Kan. App. 749, 58 Pac. 232; State v. Allison, 155 Mo. 325; O'Donnell v. City of Philadelphia, 2 Brewst. (Pa.) 481.

State v. Campbell, 7 S. D. 568,

the order of their issuance by number or date.[675] The weight of authority is to the effect that after issue they become a prima facie evidence of indebtedness which cannot be affected by subsequent legislation either as to the time, the mode or manner of payment.[676] Where the law contains provisions for their registration or record by certain officials, a failure to properly record or register them does not invalidate the warrants; their validity cannot be destroyed by such failure or neglect. If a certain provision is made or a certain fund is raised for the payment of specific indebtedness represented by them, it is usually not necessary that the fund or provision should be available as an entirety before payment can be commenced. A distribution or payment should be made immediately upon any of the funds becoming available for such purpose provided payment can be properly demanded at such time.[677] This rule is applied to avoid the payment of interest upon warrants demanded and payment of which is refused, although there may be funds to pay on account.

64 N. W. 1125. In this case the court prepared the following syllabus: "Every lawfully issued and valid municipal warrant should be paid in the order of its registration for payment, although the same was issued in payment of an indebtedness of a prior year."

Shannon v. City of Huron, 9 S. D. 356, 69 N. W. 598; Freeman v. City of Huron, 10 S. D. 368, 73 N. W. 260; Stewart v. Custer County, 14 S. D. 155, 84 N. W. 764.

[675] McCall v. Harris, 6 Cal. 281; Mitchell v. Speer, 39 Ga. 56; La France Fire Engine Co. v. Davis, 9 Wash. 600; Munson v. Mudgett, 15 Wash. 321; Bardsley v. Sternberg, 18 Wash. 612; Potter v. City of New Whatcom, 20 Wash. 589; Eidemiller v. City of Tacoma, 14 Wash. 376, 44 Pac. 877; Hull v. Ames, 26 Wash. 272, 66 Pac. 391.

[676] United States v. Macon County Ct., 45 Fed. 400; Read v. Mississippi County, 69 Ark. 365, 63 S. W. 807; State v. Barret, 25 Mont. 112, 63 Pac. 1030; Shipley v. Hacheney, 34 Or. 303, 55 Pac. 971.

[677] United States v. Macon County Ct., 75 Fed. 259; Beals v. Evans, 10 Cal. 459; Day v. Callow, 39 Cal. 593. A judgment authorizing a county treasurer to satisfy warrants partially paid out of a special fund from moneys that might thereafter come into such fund is to this extent erroneous. Jordan v. Hubert, 54 Cal. 260; First Nat. Bank of Northampton v. Arthur, 10 Colo. App. 283, 50 Pac. 738; State v. Windle, 156 Ind. 648, 59 N. E. 276; Klein v. Pipes, 43 La. Ann. 362; Sheidley v. Lynch, 95 Mo. 487, 8 S. W. 434; Haydon v. Ormsby County Sup'rs, 2 Nev. 371; State v. Grant, 31 Or. 370, 49 Pac. 855. A partial payment of a warrant cannot be compelled.

§ 241. To whom payable.

Warrants although not considered negotiable instruments according to the common rules of law are usually assignable, and when properly assigned and endorsed they become, in the hands of the holder subject to prior equities, an enforceable demand by him against the corporation.[678] The assignee of a warrant

[678] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Ouachita County v. Wolcott, 103 U. S. 559; Watson v. City of Huron (C. C. A.) 97 Fed. 449; Bayerque v. City of San Francisco, McAll. 175, Fed. Cas. No. 1,137; Crawford County v. Wilson, 7 Ark. 214; People v. El Dorado County Sup'rs, 11 Cal. 170. "County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred or in what faith they may have been taken. If illegal when issued, they are illegal for all time. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. Were this otherwise, it is easy to see that the county would be entirely at the mercy of the board."

Tippecanoe County Com'rs v. Cox, 6 Ind. 403; Thayer v. City of Boston, 36 Mass. (19 Pick.) 511; Hyde v. Franklin County, 27 Vt. 185; Averett's Adm'r v. Booker, 15 Grat. (Va.) 163; People v. Hall, 8 Colo. 485; Cook County v. Lowe, 23 Ill. App. 649. County warrants drawn contrary to Starr & C. Ann. St. Ill. p. 2460, held void.

Garvin v. Wiswell, 83 Ill. 215; Clark v. Polk County, 19 Iowa, 248. "On the contrary if such warrants are held non-negotiable, it is completely in the power of all persons to protect themselves from loss, since the law and the public records necessarily afford to every person the means of ascertaining the facts as to the legality and validity of every warrant issued, so, that, by such non-negotiability, both the counties and individuals are abundantly and fully protected. There is no validity or force in the assumption that by such ruling the credit of the counties would be impaired and their necessary municipal operations be impeded. No honest person would refuse to labor or furnish material to a county because he could only receive a fair and just compensation, nor because by judicial construction, it was furnished with a coat of mail guarding it against the assaults and machinations of the dishonest. A warrant properly issued, if not as readily sold, would yield more value to the seller when sold. In view of this concurrence of principle, authority and public policy we have no hesitation in holding that county warrants are not negotiable at the law merchant. They are, of course, assignable under our statute, and suit may be brought thereon in the name of the assignee, but subject to any defense which might be made as against the payee."

McCormick v. Grundy County, 24 Iowa, 382; Crawford v. Noble Coun-

may demand payment and sue upon refusal to pay.[679] The manner in which the transfer must be made to give the transferee the privileges and rights of his transferor may depend largely upon statutory provisions prescribing the manner in which this shall be done;[680] otherwise, if the transfer is made in the customary manner for the sale and assignment of paper or articles of like character, it will be sufficient.[681] Public officials cannot draw warrants for the payment of their salaries or personal claims which they may have against the corporation.[682] In an action brought by the holder of a warrant whether the original payee, his assignee or bearer, its presentation and possession by plaintiff at the time of trial is prima facie evidence of his ownership though it is denied in the pleadings.[683]

ty Com'rs, 8 Okl. 450; Heffleman v. Pennington County, 3 S. D. 162; Gibson County v. Rain 79 Tenn. (11 Lea) 20; Leach v. Wilson County, 62 Tex. 331; Brown v. School Directors of Jacobs, 77 Wis. 27.

Some cases, however, hold to the contrary. See Savage v. Mathews, 98 Ala. 535; Dana v. City & County of San Francisco, 19 Cal. 486; and East Union Tp. v. Ryan, 86 Pa. 459.

[679] Laughlin v. District of Columbia, 116 U. S. 485; Beals v. Evans, 10 Cal. 459; Marshall v. Platte County, 12 Mo. 88; State v. Barret, 25 Mont. 112, 63 Pac. 1030. An assignee of state warrants succeeds to all the rights of his assignor, including that of demanding and receiving interest. State v. Van Wyck, 20 Wash. 39, 54 Pac. 768; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. See, also, authorities cited in preceding note.

[680] Savage v. Mathews, 98 Ala. 535; Martin v. City & County of San Francisco, 16 Cal. 285; People v. Gray, 23 Cal. 125.

[681] Watson v. City of Huron (C. C. A.) 97 Fed. 449; Crawford County v. Wilson, 4 Ark. 215; Sweet v. Carver County Com'rs, 16 Minn. 106 (Gil. 96); Crawford v. Noble County Com'rs, 8 Okl. 450.

[682] Cricket v. State, 18 Ohio St. 9.

[683] Heffleman v. Pennington County, 3 S. D. 162. "Appellant's remaining point is that, having in his answer denied the alleged transfer to an ownership by the respondent, the mere possession of and presentation by respondent at the trial was not sufficient evidence of the assignment and ownership. There being no other evidence as to ownership, there is here no question of preponderance, but simply, did possession of and dominion over these warrants tend to prove title? As possession is usually an incident of ownership, unexplained possession is always some evidence of ownership. It may be very slight, and easily overcome but actual possession is a fact, and, in the absence of other facts, it will be presumed to be rightful. These warrants were in form payable to bearer. They were in the possession of and presented by respondent and were received from him without objec-

§ 242. Miscellaneous forms of indebtedness.

A public corporation may, under authority of law, issue, as an evidence of an indebtedness legally incurred, orders,[684] negotiable certificates,[685] school orders,[686] or other acknowledgments of a similar character.[687] These miscellaneous forms of indebtedness when issued without authority are invalid;[688] but if the corporation had the power to make the contract creating the indebtedness, the payee may then maintain an action for money or things had and received or services rendered.[689]

tion. In the absence of any evidence whatever tending to question respondent's ownership, or tending to show that his absolute possession ought not to support the usual presumption we think his ownership was sufficiently maintained until attacked by some evidence."

[684] McCutchen v. Town of Freedom, 15 Minn. 217 (Gil. 169); State v. Corzilius, 35 Ohio St. 69; Stoll v. Johnson County Com'rs, 6 Wyo. 231.

[685] Brown v. Town of Canton, 4 Lans. (N. Y.) 409.

[686] Whitney v. Inhabitants of Stow, 111 Mass. 368; Edinburg American Land & Mortg. Co. v. City of Mitchell, 1 S. D. 593.

[687] Bloomfield v. Charter Oak Bank, 121 U. S. 121; Parsel v. Barnes, 25 Ark. 261; In re Certificates of Indebtedness, 18 Colo. 566; Foote v. City of Salem, 96 Mass. (14 Allen) 87; Richardson v. City of Brooklyn, 31 Barb. (N. Y.) 152.

[688] Bloomfield v. Charter Oak Bank, 121 U. S. 121; Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899. In the absence of special statutory authority, a city has no right to issue certificates of indebtedness in negotiable form, even in payment for property which it has authority to buy.

City of Lockport v. Gaylord, 61 Ill. 276; Sullivan v. Highway Com'rs, 114 Ill. 262. Highway commissioners have no power to issue, under the statute, interest-bearing orders. Citizens' Bank v. Police Jury of Parish of Concordia, 28 La. Ann. 263; Smith v. Madison Parish, 30 La. Ann. 461; Parsons v. Inhabitants of Monmouth, 70 Me. 262; Abbott v. Inhabitants of North Andover, 145 Mass. 484; Smallwood v. Lafayette County, 75 Mo. 450; Town of Hackettstown v. Swackhamer, 37 N. J. Law, 191; Chosen Freeholders of Hudson County v. Buck, 51 N. J. Law, 155; Smith v. Epping, 69 N. H. 558; Stewart v. Otoe County, 2 Neb. 177; Parker v. Saratoga County Sup'rs, 106 N. Y. 392; Loan & Exch. Bank v. Shealey, 62 S. C. 337; Biddle v. City of Terrell, 82 Tex. 335; Exchange Bank of Virginia v. Lewis County, 28 W. Va. 273.

[689] In Hitchcock v. City of Galveston, 96 U. S. 341, 350, Justice Strong said: "It is enough for them (the plaintiffs) that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work as well as to assume liabilities; that the city has re-

Municipal evidences of indebtedness may be divided into two classes, based upon legal character and characteristics as affected by or depending for validity, in the hands of the original payee or a bona fide holder for value, on the availability, as a defense in an action upon the indebtedness, of equities existing between the payee and the public corporation. These two classes as suggested are, first, negotiable bonds or securities, and second, warrants or other evidences of a similar character. In the case of negotiable bonds and securities, the rule of law is clearly established that in the hands of a bona fide purchaser for value, equities between original parties are not available as a defense. Warrants, as stated in a preceding section,[690] and all other evidences of a similar character are merely prima facie evidences of indebtedness and at no time can the maker of them be prevented from setting up as a defense equities that may have originally existed.[691] The miscellaneous forms of indebtedness considered in this section are subject to the rules of law, in regard to their issue, their form and their payment, applying to warrants and discussed in preceding sections.[692] As a matter of conveni-

ceived and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all."

Bangor Sav. Bank v. City of Stillwater, 49 Fed. 721; Morgan v. Town of Guttenberg, 40 N. J. Law, 394.

[690] See § 230, supra.

[691] Newell v. School Directors, 68 Ill. 514 (School order); Hall v. Jackson County, 95 Ill. 352; Farmers' Bank of Frankfort v. Orr, 25 Ind. App. 71, 55 N. E. 35; Wood v. State, 155 Ind. 1; Sheffield School Tp. v. Andress, 56 Ind. 157 (School district promissory note); Abascal v. City of New Orleans, 48 La. Ann. 565 (Floating debt certificate); Emery v. Inhabitants of Mariaville, 56 Me. 315 (Town orders); School Dist. No. 2 v. Stough, 4 Neb. 359 (School district orders); Rensselaer County Sup'rs v. Weed, 35 Barb. (N. Y.) 136 (Draft drawn upon county treasurer); Loan & Exch. Bank v. Shealey, 62 S. C. 337 (School warrant); Texas Transp. Co. v. Boyd, 67 Tex. 153; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53. Although a warrant if signed by the proper officers prima facie imports validity, its issuance may be shown to be ultra vires. Warrants issued to workmen in payment of wages for engraving illegal scrip are void.

[692] People v. Munroe, 100 Cal. 664. A writing purporting to be a sale or assignment of the unearned salary of a public school

ence the authorities relating to special forms of indebtedness as distinguished by specific names are collected here.

The weight of authority is to the effect that the power to issue an evidence of indebtedness, negotiable in its character, cannot be implied but must be expressly given in some charter, statutory or constitutional provision. Under this ruling the making of a promissory note by the officials of a public corporation has been held unauthorized even where the indebtedness is one that the public corporation could legally incur.[693] It is considered

teacher is the subject of forgery. Clark County Sup'rs v. Lawrence, 63 Ill. 32; Kelley v. City of Brooklyn, 4 Hill (N. Y.) 263; Brown v. Town of Jacobs, 77 Wis. 29; Strong v. District of Columbia, 4 Mackey (D. C.) 242.

[693] City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; Merrill v. Town of Monticello, 138 U. S. 673; Chisholm v. City of Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686; White v. City of Rahway, 11 Fed. 853; Bangor Sav. Bank v. City of Stillwater, 49 Fed. 721. Where negotiable certificates of indebtedness issued by a city, and sued upon by the payee have been declared invalid, the payee may maintain an action for money had and received, provided the city had power to make the contract out of which the indebtedness arose.

Ladd v. Town of Franklin, 37 Conn. 53; Bourdeaux v. Coquard, 47 Ill. App. 254; Coquard v. Village of Oquawka, 192 Ill. 355, affirming 91 Ill. App. 648; Craig School Tp. v. Scott, 124 Ind. 72; Carter v. City of Dubuque, 35 Iowa, 416. A contract of guaranty is not negotiable and the power of a city to sell negotiable paper held by it does not carry with it as an incident the power to execute a guaranty thereof.

Capmartin v. Police Jury, 23 La. Ann. 190; Breaux v. Iberville Parish, 23 La. Ann. 232; Flagg v. Parish of St. Charles, 27 La. Ann. 319; State v. Fisher, 30 La. Ann. 514; Newgass v. City of New Orleans, 42 La. Ann. 163. In the absence of express legislative authority, a municipal corporation has no power to utter unconstitutional obligations to pay money.

Parsons v. Inhabitants of Monmouth, 70 Me. 262; Robbins v. School Dist. No. 1, 10 Minn. 340 (Gil. 268); Atlantic City Waterworks Co. v. Smith, 47 N. J. Law, 473; Halstead v. City of New York, 5 Barb. (N. Y.) 218; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Clark v. Saratoga County Sup'rs, 107 N. Y. 553; Vaughn v. Forsyth County Com'rs, 117 N. C. 429; Stewart v. Otoe County, 2 Neb. 177.

In West v. Town of Errol, 58 N. H. 233, it is held that the selectmen may without vote of the town negotiate promissory notes upon which the town will be liable on a showing that the money went to its use or that the transaction was ratified. In City of Mineral Wells v. Darby (Tex. Civ. App.) 51 S. W. 351, it is held that a municipality may execute its note in payment of a legal obligation.

desirable to avoid the granting of a power to public corporations which will enable them to issue valid securities or evidences of indebtedness not subject to defense or an investigation of equities which may exist between the parties.

§ 243. The same subject; legal character.

The Federal government has the exclusive power of coining money and issuing currency or certificates constituting a legal tender for the payment of debts. Where public corporations have issued certificates of indebtedness, promissory notes or other instruments either in the similitude of bank notes or other usual forms of currency, such have been held illegal in their character and the corporation held without power or authority to issue

See the following cases in the supreme court of the United States discussing the question of the power of a public corporation to issue, without express authority, promissory notes or negotiable paper: Police Jury v. Britton, 82 U. S. (15 Wall.) 566; City of Nashville v. Ray, 86 U. S. (19 Wall.) 468; City of Nashville v. Lindsey, 86 U. S. (19 Wall.) 485; Claiborne County v. Brooks, 111 U. S. 400; Town of Concord v. Robinson, 121 U. S. 165; Kelley v. Town of Milan, 127 U. S. 139; Norton v. Town of Dyersburg, 127 U. S. 160; Young v. Clarendon Tp., 132 U. S. 340; Hill v. City of Memphis, 134 U. S. 198; Merrill v. Town of Monticello, 138 U. S. 673; Brenham v. German-American Bank, 144 U. S. 173. See, also, the following authorities: Desmond v. City of Jefferson, 19 Fed. 483; Gause v. City of Clarksville, 5 Dill. 165, Fed. Cas. No. 5,276; Law v. People, 87 Ill. 385; Hewitt v. Board of Education of Normal School Dist., 94 Ill. 528; Miller v. Dearborn County Com'rs, 66 Ind. 162; City of Richmond v. McGirr, 78 Ind. 192; State v. Babcock, 22 Neb. 614; Douglass v. Virginia City, 5 Nev. 147; Town of Hackettstown v. Swackhamer, 37 N. J. Law, 191; Knapp v. City of Hoboken, 39 N. J. Law, 394; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; Bank of Chillicothe v. Town of Chillicothe, 7 Ohio (pt. 2) 31; City of Williamsport v. Com., 84 Pa. 487; City of Waxahachie v. Brown, 67 Tex. 519; Mills v. Gleason, 11 Wis. 470; Jones, Ry. Secur. 283; Burroughs, Pub. Secur. p. 185.

Dillon, Mun. Corp. (4th Ed.) § 126, "That merely as incidental to the discharge of its ordinary corporate functions no municipal or public corporation has the right to invest any instrument it may issue whatever its form with that supreme and dangerous attribute of commercial paper which insulates the holder for value from defenses, and equities which attach to its inception. This point ought to be guarded by the courts with the utmost vigilance and resolution." Simonton, Mun. Bonds, c. II.

them.[694] Securities of any form intended to circulate as money are held invalid.

Legality based upon purpose for which issued follows the rule of law well settled and constantly referred to. If any such miscellaneous forms of indebtedness are issued as evidence of an indebtedness incurred for a purpose other than that authorized by law since they are subject to all equities, they will be held invalid. Public authorities cannot, by the use of an authorized

[694] Thomas v. City of Richmond, 79 U. S. (12 Wall.) 349; City of Little Rock v. Merchants' Nat. Bank, 98 U. S. 308, 5 Dill. 299, Fed. Cas. No. 9,455. Here bonds had been issued having the form and appearance of treasury notes which were afterwards redeemed and legal bonds issued in their place. The city failing to pay, a holder brought suit. The city resisted on the ground that the original bonds issued in the form of currency were illegal and their surrender was not a valuable consideration for the bonds given in lieu thereof. The court said: "It can scarcely be doubted that whoever is capable of entering into an ordinary contract to obtain or receive the means with which to build houses or wharves or the like, may, as a general rule, bind himself by an admission of his obligation. The capacity to make contracts is at the basis of the liability. The first liability of the city was disputed by it. It had gone beyond its power, as it said, in making a debt in the form of bank notes. If it had not denied its power, judgment and an execution might have gone against it, and the creditor would have obtained his money. This privilege of nonresistance every person retains, and continues to retain. He can reconsider at any time, and confess and admit what the moment before he denied." In 1874, the City of Little Rock did reconsider. It said: "We will purge the transaction of illegality. We had the authority to accept from you in satisfaction of amounts received by us for legitimate purposes the sums in question. We did so receive and expend for legitimate purposes. We erred in making the payment to you in an objectionable form. We now pay our just and lawful debt by canceling the bank notes issued by us, and delivering to you obligations in the form of bonds, to which form there is no legal objection."

Wesley v. Eells, 90 Fed. 151; Lindsey v. Rottaken, 32 Ark. 619. Where the city has illegally issued "city money," the holder thereof has no remedy. Dively v. City of Cedar Falls, 21 Iowa, 565. But see the same case, 27 Iowa, 227; Cothran v. City of Rome, 77 Ga. 582; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Allegheny City v. McClurkan, 14 Pa. 81; State v. Cardozo, 5 S. C. (5 Rich.) 297. Certificates of indebtedness issued by a state treasurer made receivable in payment of taxes or other dues to the state, not held bills of credit within the sense of that term as used in the Constitution of the

instrument, create an indebtedness for an illegal purpose which will be binding upon the corporation.[695]

§ 244. Form and phraseology.

The law takes into consideration at all times the bona fides of the parties and the relative condition and circumstances attending the character of the corporation and the issuing of the particular indebtedness. Where the public corporation authorized is what may be termed a public quasi corporation and where the officers of such corporation are not presumed to have the same degree or extent of intelligence, experience and learning as that, which it is presumed similar officers of a higher grade of corporation may have acquired or possess, the law will consider such circumstances or conditions and will hold an instrument valid issued by them which may be technically defective in its form but which substantially complies with the law authorizing its issue. But the question of the payment aside from mere form or execution of such instruments depends upon the principles considered in preceding sections. At all times, questions based upon equities existing between the original parties can be raised and payment or nonpayment depend upon their determination.[696]

§ 245. Mode and time of payment.

The manner of payment,[697] the time,[698] the fund[699] from which payable, and the rights of parties holding such instruments

United States. See, also, authorities cited, § 233.

[695] Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; Merkel v. Berks County, 81½ Pa. 505; Isaacs v. City of Richmond, 90 Va. 30.

[696] Clark v. City of Des Moines, 19 Iowa, 199, 87 Am. Dec. 423; City of New Orleans v. Strauss, 25 La. Ann. 50; Chandler v. City of Bay St. Louis, 57 Miss. 326; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Knapp v. City of Hoboken, 38 N. J. Law, 371; Inhabitants of North Bergen v. Eager, 41 N. J. Law, 184.

[697] Allen v. McCreary, 101 Ala. 514; Armstrong v. Truitt, 53 Ark. 287; Marshall v. City of San Antonio (Tex. Civ. App.) 63 S. W. 138.

[698] Owen v. Lincoln Tp., 41 Mich. 415. Notes issued by a city not having been presented for redemption within the time prescribed by the act, the city is not under any obligation in law or equity to redeem them.

Brewer v. Otoe County, 1 Neb.

whether the original payee or his assignee,[700] all depend upon the principles sufficiently discussed.

VI. The Power to Contract.

§ 246. In general.

The discussion of the power of a public corporation to contract in this and succeeding sections will be confined to certain peculiarities and rules applying to and controlling the making of contracts by such corporations. The general principles of law regarding contracts, their form, execution and enforcement, will not be considered except as they may be incidentally treated.

373. In Nebraska it has been held that one receiving a warrant in which no time of payment is fixed takes it with the expectation, if there are no available funds in the treasury, of waiting until the money can be raised in the ordinary way.

Miller v. City of Lynchburgh, 20 Grat. (Va.) 330; Terry v. City of Milwaukee, 15 Wis. 490. An order drawn on the city treasurer directing him "to pay," no date of payment being mentioned, imports that the order was payable on demand.

Packard v. Town of Bovina, 24 Wis. 382. A town is not liable, on an order drawn against its treasurer, until after demand and refusal of payment.

[699] Meath v. Phillips County, 108 U. S. 553; Mobile County v. Powers, 103 Ala. 207; Allen v. Watts, 88 Ala. 497; Mitchell v. Speer, 39 Ga. 56; Gamble v. Clark, 92 Ga. 695; Board of Education v. Foley, 88 Ill. App. 470 (School district warrants); Tobin v. Emmetsburg Tp., 52 Iowa, 81; District Tp. of Coon v. Board of Directors of Providence, 52 Iowa, 287; Mills County Nat. Bank v. Mills County, 67 Iowa, 697, 25 N. W. 884. Suit may be brought without first requesting the levy of a tax to replenish the particular fund out of which they are payable.

Hopper v. Inhabitants of Union Tp., 54 N. J. Law, 243, 24 Atl. 387. Certificates of indebtedness for local improvements. Wyoming County v. Bardwell, 84 Pa. 104; Bank of Spring City v. Rhea County (Tenn.) 59 S. W. 442; Terry v. City of Milwaukee, 15 Wis. 490. School orders are evidences of indebtedness, upon which, if payment is refused by the city treasurer for want of funds, an action will lie against the city.

[700] Terrell v. Town of Colebrook, 35 Conn. 188. The assignee of an authorized note can recover from the town. Ladd v. Town of Franklin, 37 Conn. 53. A town promissory note held void in the hands of a purchaser for value who took it after the fact of the failure of the contract had been established. People v. Clark County Com'rs, 50 Ill. 213; National State Bank v. Independent Dist. of Marshall, 39 Iowa, 490; City of Springfield v. Weaver (Mo.) 37 S. W. 509; Flemming v. City of Hoboken, 40 N. J. Law, 270; Eaton v. Manitowoc County Sup'rs, 40 Wis. 668.

A public corporation, it must be remembered, is first an artificial person, and second an artificial person of such a character that, as compared with others, its powers are still further restricted and limited. This principle arises from the fact, so often repeated, that a public corporation is a governmental agent, one organized for the benefit and advantage of the community at large without special reference to any individual, family or class. The right to contract is one of the powers usually conferred upon public corporations through charter,[701] statutory,[702] or constitutional[703] provisions as construed and defined by court decisions. The tendency of the courts is to confine the exercise of corporate powers strictly to such as are clearly given, and following this rule the power to contract, of a particular public corporation of whatever class, will be determined not by the application of general rules or principles of law but by the specific right given to such corporation in some grant of legal authority. Public corporations have only such rights and powers as are especially granted them or absolutely necessary to carry into effect the rights and powers so granted. This rule applies with its full force to the making of contracts,[704] therefore, we find many cases where the legality of the contract, as executed by a public cor-

[701] City of Memphis v. Brown, 87 U. S. (20 Wall.) 289; Ex parte City of Birmingham, 116 Ala. 186, 22 So. 454; Hall v. Cockrell, 28 Ala. 507; Zottman v. City & County of San Francisco, 20 Cal. 96; Covington & M. R. Co. v. City of Athens, 85 Ga. 367; Goodrich v. City of Detroit, 12 Mich. 279; Rae v. City of Flint, 51 Mich. 526; Kelly v. Broadwell, 3 Neb. Unoff. 617, 92 N. W. 643; Kernitz v. Long Island City, 50 Hun (N. Y.) 428; Francis v. City of Troy, 74 N. Y. 338, reversing 10 Hun, 515; City of Buffalo v. Bettinger, 76 N. Y. 393; Noel v. City of San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263.

[702] Berry v. Mitchell, 42 Ark. 243; Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30; Ramish v. Hartwell, 126 Cal. 443. Construing Street Improvements Act, § 6, fixing time for commencement and completion of street improvement work.

Nelson v. City of La Porte, 33 Ind. 258; Stidger v. City of Red Oak, 64 Iowa, 465; Swift v. Inhabitants of Falmouth, 167 Mass. 115; Rumsey Mfg. Co. v. Inhabitants of Schell, 21 Mo. App. 175; City of Lexington v. Lafayette County Bank, 165 Mo. 671; Chamberlain v. City of Hoboken, 38 N. J. Law, 110; Hubbard v. Norton, 28 Ohio St. 116; Blackburn v. Oklahoma City, 1 Okl. 292. The contracts of a de facto corporation can be enforced. Town of Levis v. Black River Imp. Co., 105 Wis. 391, 81 N. W. 669.

[703] State v. Hogan, 22 Mont. 384. The approval by the governor and treasurer necessary to the validity of a contract under Const. art. 5,

poration, depends upon a local construction of some legal provision under which the right to contract is claimed.[705] A public corporation may, in the ordinary course of the exercise of its powers, enter into contracts pursuant to the authority suggested above, and necessary to the proper management and regulation of its finances and governmental affairs.[706] Assuming the ex-

§ 30, and Pol. Code, § 710. Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495.

[704] City of Mobile v. Moog, 53 Ala. 561; City of Oakland v. Carpentier, 13 Cal. 540; City of New London v. Brainard, 22 Conn. 552; Jackson Tp. v. Barnes, 55 Ind. 136; City of Leavenworth v. Rankin, 2 Kan. 357; Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 294. The right of municipal officers to enter into a contract of suretyship denied as not being derived from any express authority or from any general authority under the claim of necessity, convenience or public interest.

Patterson v. City of New Orleans, 20 La. Ann. 103; Roberts v. City of Cambridge, 164 Mass. 176; Mayo v. Dover & F. V. Fire Co., 96 Me. 539; Ketchum v. City of Buffalo, 14 N. Y. (4 Kern.) 356; In re Board of Water Com'rs, 176 N. Y. 239; Fawcett v. Town of Mt. Airy, 134 N. C. 125, 45 S. E. 1029; City of Brenham v. Brenham Water Co., 67 Tex. 542.

[705] Union Coal Co. v. City of La Salle, 34 Ill. App. 93, affirmed in 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326, determining the right of a municipality to contract for the mining of coal under its streets. Challiss v. Parker, 11 Kan. 394; Webb City & C. Waterworks Co. v. Webb City, 78 Mo. App. 422; Woodside Water Co. v. City of Long Island City, 23 App. Div. 78, 48 N. Y. Supp. 686; Erwin v. Town of Richmond, 42 Vt. 557.

[706] American Stave & Cooperage Co. v. Butler County, 93 Fed. 301; City of Memphis v. Brown, 11 Am. Law Reg. (N. S.) 629; McBean v. City of Fresno, 112 Cal. 159, 31 L. R. A. 794; City of Rome v. Cabot, 28 Ga. 50 (Contract for waterworks); City of McPherson v. Nichols, 48 Kan. 430 (Care of sick); Bietry v. City of New Orleans, 24 La. Ann. 21; State v. Natal, 41 La. Ann. 887; Conery v. New Orleans Waterworks Co., 41 La. Ann. 910. The securing of a water supply held a legitimate purpose of a contract.

Willard v. Inhabitants of Newburyport, 29 Mass. (12 Pick.) 227; Hale v. Houghton, 8 Mich. 458; St. Louis Hospital Ass'n v. City of St. Louis, 15 Mo. 592 (Care of insane); Robinson v. City of St. Louis, 28 Mo. 488; State v. Fortinberry, 54 Miss. 316; City of Newark v. Bonnel, 57 N. J. Law, 424, 31 Atl. 408; Tucker v. Virginia City, 4 Nev. 20. Contract for care of indigent sick at private hospital held good. Utica Water-works Co. v. City of Utica, 31 Hun (N. Y.) 426. Contract with private corporation for water supply held void.

Reynolds v. City of Albany, 8 Barb. (N. Y.) 597. The power to provide furniture for a public building includes the right to purchase a portrait of the governor of the state as an ornament for the wall.

istence of a legal authority for the making of a contract it does not necessarily follow that in all cases contracts executed are valid. The purpose or end of the contract may be one in furtherance of an act which the corporation is prohibited by general principles or specific restrictions of law from doing as not coming within the scope of the objects or the purpose for which it was incorporated.[707] Aid, donations or assistance rendered pri-

Harlem Gas Light Co. v. City of New York, 33 N. Y. 309. Contracts for the lighting of public buildings and streets held valid. Pullman v. City of New York, 54 Barb. (N. Y.) 169; Reynolds v. Stark County Com'rs, 5 Ohio, 204; City of Cincinnati v. Cameron, 33 Ohio St. 336; Town of Royalton v. Royalton & W. Turnpike Co., 14 Vt. 311. Contract for constructing roads. Jackman v. Town of New Haven, 42 Vt. 591; Miller v. City of Milwaukee, 14 Wis. 642. Construction of a breakwater.

See, also, the following cases withholding the power, the purpose of the contract not being in furtherance of the public welfare or not coming within the scope of powers expressly granted or those absolutely necessary to carry such into effect: Burrill v. City of Boston, 2 Cliff. 590, Fed. Cas. No. 2,198. Securing volunteers for the army. The Maggie P., 25 Fed. 202. Not a public duty to pump out and raise boats which sink at public levees. Hamilton v. City of Shelbyville, 6 Ind. App. 538; City of Peru v. Gleason, 91 Ind. 568. Contract for maintenance of private drain. Penley v. City of Auburn, 85 Me. 278, 21 L. R. A. 657; Gamble v. Village of Watkins, 7 Hun (N. Y.) 448. The public entertainment of a party of newspaper representatives.

Sillcocks v. City of New York, 11 Hun (N. Y.) 431. A city is not liable for gold medals furnished each of the members of the city council; the court holding that such a contract was not for an object essentially necessary to corporate existence and further was not permitted by nor within the power of the municipality to make. Waterbury v. City of Laredo, 68 Tex. 565. Ferry contract.

The same rule will apply to all those attempts of a public corporation to enter into contracts which abridge or restrict it in the performance of its proper duties toward the public or which in any way control or embarrass its legislative powers and duties. See the following cases: Higgins v. City of San Diego, 118 Cal. 524; City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 18 L. R. A. 256; East St. Louis Gas Light & Coke Co. v. City of East St. Louis, 47 Ill. App. 411; Long v. City of Duluth, 49 Minn. 280; Flynn v. Little Falls Electric & Water Co., 74 Minn. 180; City of Jackson v. Bowman, 39 Miss. 671; Brick Presbyterian Church v. City of New York, 5 Cow. (N. Y.) 538; Britton v. City of New York, 21 How. Pr. (N. Y.) 251; City of New York v. Second Ave. R. Co., 32 N. Y. 261; Columbus Gas Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 19 L. R. A. 510; City of Wellston v. Morgan, 59 Ohio St. 147; Waterbury v. City of Laredo, 68 Tex. 565.

[707] Parsons v. Inhabitants of

vate individuals in the advancement of private enterprises or purposes are invariably prohibited by law. Public means or agencies cannot be used for the advancement of private interests.[708]

§ 247. The implied power to contract.

The implied power to contract on the part of a public corporation does not exist except so far as may be necessary to carry into effect those powers and rights which have been by law expressly granted. This rule precludes, except in exceptional cases, the existence of an implied or discretionary power to contract.[709] The law, however, presumes that the authority exists to contract in the manner and for the purpose designated.[710] The principle that there cannot exist an implied power to make a contract must be distinguished, however, from the one that where the authority exists in the absence of an express contract when the public corporation has received services or goods of value, an implied contract will be held to exist sufficient to enable the party rendering the services or supplying the articles to recover their reasonable value.[711] If the lack of authority is questionable or the contract

Goshen, 28 Mass. (11 Pick.) 396; Stetson v. Kempton, 13 Mass. 272; Norton v. Mansfield, 16 Mass. 48; Brick Presbyterian Church v. City of New York, 5 Cow. (N. Y.) 538. See authorities cited § 246, note 707, supra.

[708] Sutherland-Innes Co. v. Village of Evart (C. C. A.) 86 Fed. 597; Park v. Modern Woodmen of America, 181 Ill. 214. See, also, §§ 145 et seq.; 172 et seq; 412 et seq.

[709] Burrill v. City of Boston, 2 Cliff. 590, Fed. Cas. No. 2,198; City of Litchfield v. Ballou, 114 U. S. 190; Berlin Iron Bridge Co. v. City of San Antonio, 62 Fed. 882; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Town of Newport v. Batesville & B. R. Co., 58 Ark. 270; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; City of Alton v. Mulledy, 21 Ill. 76; Root v. City of Topeka, 63 Kan. 129, 65 Pac. 233; Smith v. City of Nashville, 72 Tenn. (4 Lea) 69; Dolloff v. Inhabitants of Ayer, 162 Mass. 569; New Jersey Car Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544; City of Weliston v. Morgan, 65 Ohio St. 219; Springfield Mill. Co. v. Lane County, 5 Or. 265; Carolina Nat. Bank v. State, 60 S. E. 465.

[710] City of Newport News v. Potter (C. C. A.) 122 Fed. 321; City of Chicago v. Peck, 196 Ill. 260.

[711] Steele County v. Erskine (C. C. A.) 98 Fed. 215, affirming 87 Fed. 630; City of Austin v. Bartholomew, 107 Fed. 349; Fernald v. Town of Gilman, 123 Fed. 797; Garrison v. City of Chicago, 7 Biss. 480, Fed.

Cas. No. 5,255; Brush Electric Light & Power Co. v. City Council of Montgomery, 114 Ala. 433; Capital Gas Co. v. Young, 109 Cal. 140, 29 L. R. A. 463; Callaway v. City of Milledgeville, 48 Ga. 309; Seagraves v. City of Alton, 13 Ill. 366; Tubbs v. City of Maquoketa, 32 Iowa, 564; Turner v. Cruzen, 70 Iowa, 202; Fouke v. Jackson County, 84 Iowa, 616; Clinton School Tp. v. Lebanon Nat. Bank, 18 Ind. App. 42, 47 N. E. 347; Clark School Tp. v. Grossius, 20 Ind. App. 322, 50 N. E. 771; Condran v. City of New Orleans, 43 La. Ann. 1202; Parks v. Inhabitants of Waltham, 120 Mass. 160; Carey v. City of East Saginaw, 79 Mich. 73; Methodist Episcopal Church South v. City of Vicksburg, 50 Misc. 601; Bryson v. Johnson County, 100 Mo. 76; State v. City of St. Louis, 174 Mo. 125, 61 L. R. A. 593; Tucker v. Virginia City, 4 Nev. 20; Rider v. City of Portsmouth, 67 N. H. 298; Little v. Union Tp., 40 N. J. Law, 397; Taylor v. City of Lambertville, 43 N. J. Eq. 107; Leonard v. Long Island City, 65 Hun, 621, 20 N. Y. Supp. 26; Port Jervis Water Works Co. v. Village of Port Jervis, 71 Hun, 66, 24 N. Y. Supp. 497; People v. Grout, 79 App. Div. (N. Y.) 61; Kramrath v. City of Albany, 127 N. Y. 575; Memphis Gas Light Co. v. City of Memphis, 93 Tenn. 612; Thomson v. Town of Elton, 109 Wis. 589. See, also, cases cited in § 259.

But see Argenti v. City of San Francisco, 16 Cal. 255; Zottman v. City & County of San Francisco, 20 Cal. 96; City of Alton v. Mulledy, 21 Ill. 76; Huntington County Com'rs v. Boyle, 9 Ind. 296; Trustees of Belleview v. Hohn, 82 Ky. 1; Dolloff v. Inhabitants of Ayer, 162 Mass. 569; City of Baltimore v. Poultney, 25 Md. 18; French v. City of Auburn, 62 Me. 452; Boston Elec. Co. v. City of Cambridge, 163 Mass. 64; City of Jeffersonville v. Steam Ferryboat John Shallcross, 35 Ind. 19; Tucker v. City of Grand Rapids, 104 Mich. 621; Crutchfield v. City of Warrensburg, 30 Mo. App. 456; Virginia City Gas Co. v. Virginia City, 3 Nev. 320.

McDonald v. City of New York, 68 N. Y. 23. "It is plain that if the restriction put upon municipalities by the legislature for the purposes of reducing and limiting the incurring of debt and the expenditure of the public money may be removed upon the doctrine now contended for (that is, that the defendant having appropriated the materials of the plaintiff and used them, is bound to deal justly and pay him the value of them,) there is no legislative remedy for the evils of municipal government which of late have excited so much attention and painful foreboding. Restrictions and inhibition by statute are practically of no avail if they can be brought to naught by the unauthorized action of every official of lowest degree, acquiesced in or not repudiated by his superiors. * * * The views here set forth are not to be extended beyond the facts of the case. It may be that where a municipality has come into the possession of the money or the property of a person without his voluntary intentional action concurring therein, the law will fix a liability and imply a promise to repay or return it. Thus money paid by mistake, money collected for an illegal tax or assessment, property taken and used by an official as that of the city when not so—in such cases it may be that the stat-

not void on its face, the right will be presumed and the public corporation may enter into a contract and incur a liability for its breach.[712]

§ 248. Ultra vires contracts.

A public corporation may do an act in excess of or beyond its lawful authority; such an act is termed ultra vires.[713] A contract made by such a corporation may be ultra vires and therefore incapable of enforcement because of a lack of authority, an unlawful result or purpose or because in violation of some provision of paramount law, namely, the constitution of the United States or of a particular state within which the corporation may be located. These questions will be considered in succeeding sections.[714]

§ 249. For want of authority.

A public corporation is, as already suggested, an artificial person and as such capable of doing such acts and exercising such powers only as may be conferred upon it by the charter of its

ute will not act as an inhibition. The statute may not be carried further than its intention, certainly not further than its letter. Its purpose is to forbid and prevent the making of contracts by unauthorized official agents for supplies for the use of the corporation. This opinion goes no further than to hold that where a person makes a contract with the city of New York for supplies to it without the requirements of the charter being observed, he may not recover the value thereof upon an implied liability." Keane v. City of New York, 88 App. Div. (N. Y.) 542; People v. Phillips, 88 App. Div. (N. Y.) 560; and Salsbury v. City of Philadelphia, 44 Pa. 303.

[712] The Maggie P., 25 Fed. 202; Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Ogden City v. Weaver, 108 Fed. 564; Brown v. Board of Education of Pomona, 103 Cal. 531; City of Chicago v. Peck, 196 Ill. 260; Town of Gosport v. Pritchard, 156 Ind. 704; City of Louisville v. Gosnell, 22 Ky. L. R. 1524, 60 S. W. 410; 61 S. W. 470.

[713] City of Mobile v. Moog, 53 Ala. 561. The invalidity of contracts because ultra vires is more strictly maintained in favor of municipal corporations than private corporations.

[714] Brick Presbyterian Church Corp. v. City of New York, 5 Cow. (N. Y.) 538. Municipal corporations have no power to make contracts which will embarrass or control their legislative powers and duties. City of New York v. Second Ave. R. Co., 32 N. Y. 261. See, also, § 246.

creation or as are necessarily implied to carry into effect powers directly granted. The legal authority to execute a contract, therefore, lies at the basis of its validity; this may be found in charter, statutory or constitutional provisions and the absence of such authority acts as a limitation upon the right of the public corporation to contract. Contracts entered into without such authority or beyond the power of the corporation are necessarily void.[715] Persons dealing with public corporations

[715] Hitchcock v. City of Galveston, 96 U. S. 341. A contract partly lawful and partly unlawful if separable can be enforced to the extent that it is lawful.

Manhattan Trust Co. v. City of Dayton (C. C. A.) 59 Fed. 327; Erskine v. Steele County, 87 Fed. 630; City of Ft. Scott v. W. G. Eads Brokerage Co. (C. C. A.) 117 Fed. 51; Higgins v. San Diego Water Co., 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Colusa County v. Welch, 122 Cal. 428. A lobbying contract held invalid.

House v. Los Angeles County, 104 Cal. 73; Contra Costa Water Co. v. Breed, 139 Cal. 432; Heublein v. City of New Haven, 75 Conn. 545; City Council of Dawson v. Dawson Water-Works Co., 106 Ga. 696; Valparaiso v. Valparaiso City Water Co., 30 Ind. App. 316, 65 N. E. 1063; Carter v. City of Dubuque, 35 Iowa, 416; Marion Water Co. v. City of Marion, 121 Iowa, 306, 96 N. W. 883; City of Ft. Wayne v. Lehr, 88 Ind. 62. The employment of private persons to perform public duties held ultra vires. Nicholasville Water Co. v. Councilmen of Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; South Covington Dist. v. Kenton Water Co. (Ky.) 78 S. W. 420.

Waters v. Trovillo, 47 Kan. 197. The employment of counsel to try a case properly to be conducted by the county attorney unauthorized. Pleasant View Tp. v. Shawgo, 54 Kan. 742; Gurley v. City of New Orleans, 41 La. Ann. 75. Contracts held ultra vires which provide for the performance of public duties by private persons employed for such purpose by the city, nor can the duty imposed by statute on one officer be transferred to another officer by the municipality.

Greenough v. Inhabitants of Wakefield, 127 Mass. 275. The payment of salaries due members of a private fire organization unauthorized. Westminster Water Co. v. City of Westminster, 98 Md. 551, 56 Atl. 990; Lamson v. City of Marshall, 133 Mich. 250, 95 N. W. 78; Coit v. City of Grand Rapids, 115 Mich. 493. A contract separable in its parts can be enforced as to those which are valid. City of Chaska v. Hedman, 53 Min. 525; Sang v. City of Duluth, 58 Minn. 81.

Grannis v. Blue Earth County Com'rs, 81 Minn. 55. The employment of outside persons to perform public services held unauthorized. So held in the collection of back taxes. Saxton v. City of St. Joseph, 60 Mo. 153; City of Unionville v. Martin, 95 Mo. App. 28, 68 S. W. 605; State v. Butler, 178 Mo. 272, 77 S. W. 560; Barber Asphalt Paving Co. v. Hunt, 100 Mo. 22, 8 L. R. A. 110. The possession of the

are charged with notice of their right to contract upon the subject-matter and in the manner contemplated,[716] or of the legal authority of public officials to act on behalf of their principal.[717] The acceptance of work under a contract void for lack of authority does not usually validate it.[718]

exclusive right to use a patented article by the contractor does not necessarily make a contract invalid. See, also, Verdin v. City of St. Louis, 131 Mo. 26.

City of St. Louis v. Davidson, 102 Mo. 149. Construing a contract for hiring work-house prisoners to an independent contractor. Joslyn v. Dow, 19 Hun (N. Y.) 494; Suburban Elec. Light Co. v. Town of Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443. Validity of contract based upon petition of prescribed number of taxable inhabitants. Wilson v. City of Mitchell (S. D.) 97 N. W. 741; Galveston County v. Ducie, 91 Tex. 665. A contract void in part and severable can be enforced as to its valid provisions. City of Winchester v. Redmond, 93 Va. 711; City of Aberdeen v. Honey, 8 Wash. 251; Abernethy v. Town of Medical Lake, 9 Wash. 112; Perry v. Superior City, 26 Wis. 64. See, also, cases cited § 246, supra.

[716] City of Ft. Scott v. W. G. Eads Brokerage Co. (C. C. A.) 117 Fed. 51; Wallace v. City of San Jose, 29 Cal. 180; Griswold v. City of East St. Louis, 47 Ill. App. 480; Johnson v. Common Council of Indianapolis, 16 Ind. 227; F. C. Austin Mfg. Co. v. Smithfield Tp., 21 Ind. App. 609, 52 N. E. 1011; McKee v. City of Greensburg, 160 Ind. 378; McPherson v. Foster, 43 Iowa, 48; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189; Osgood v. City of Boston, 165 Mass. 281; Black v. Common Council of Detroit, 119 Mich. 571, 78 N. W. 660; State v. Minnesota Transfer R. Co., 80 Minn. 108, 50 L. R. A. 656; Jewell Belting Co. v. Bertha, 91 Minn. 9, 97 N. W. 424; Perkinson v. City of St. Louis, 4 Mo. App. 322; Saxton v. City of St. Joseph, 60 Mo. 153; Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775; Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Swift v. City of Williamsburgh, 24 Barb. (N. Y.) 427; Suburban Elec. Light Co. v. Town of Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443; Parr v. Village of Greenbush, 72 N. Y. 463; Moore v. City of New York, 73 N. Y. 238; Roberts v. City of Fargo, 10 N. D. 230; Kerr v. City of Bellefontaine, 59 Ohio St. 446; McAleer v. Angell, 19 R. I. 688, 36 Atl. 588; City of Bryan v. Page, 51 Tex. 532; Schneider v. City of Menasha, 118 Wis. 298.

[717] Tamm v. Lavalle, 92 Ill. 263; Johnson v. Common Council of Indianapolis, 16 Ind. 227; Jay County Com'rs v. Fertich, 18 Ind. App. 1, 46 N. E. 699; Osgood v. City of Boston, 165 Mass. 281; Mister v. City of Kansas, 18 Mo. App. 217; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Sprague v. Town of Cornish, 59 N. H. 161; New Jersey & N. E. Tel. Co. v. Fire Com'rs of Jersey City, 34 N. J. Eq. 117; Briggs v. City of New York, 2 Daly (N. Y.) 304; Storey v. Murphy, 9 N. D. 115. See, also, authorities cited § 275.

[718] Brady v. City of New York,

§ 250. Because of purpose or result.

Public corporations are organized for the purpose of accomplishing certain specific ends in connection with government; they are public agencies and not considered in the conduct of their ordinary business as private corporations. Considering the result sought to be effected, without any express limitation or restriction, it follows necessarily, therefore, that an act or contract is void not in furtherance of the purpose or aim for which they are incorporated; the purpose of all acts, the result of all powers exercised by them, must be the public advantage; the advancement of the general welfare or the carrying out as a public agent of some one or more of the functions of government.[719] This prevents, by a process of exclusion, the granting of aid directly or indirectly to private enterprises and the making of contracts which do not clearly and unquestionably have for their end the accomplishment of some governmental purpose; it excludes all acts and contracts attempted under specious socialistic theories regarding the proper sphere of governmental duties and powers.[720]

20 N. Y. 312. See post, §§ 258, 259, 279-282.

[719] Sutherland-Innes Co. v. Village of Evart (C. C. A.) 86 Fed. 597; House v. Los Angeles County, 104 Cal. 73. So held of a contract of employment where its purpose was to collect taxes due a county. Hayward v. Trustees of Town of Red Cliff, 20 Colo. 33. A contract for the purchase and sale of town site patents will be invalid. City of Chicago v. Williams, 182 Ill. 135. The employment of a stenographer by city council in a case to which the city was not a party unauthorized. Roberts v. City of Cambridge, 164 Mass. 176. Contracts sustained. City of Bay St. Louis v. Hancock County, 80 Miss. 364, 32 So. 54.

Town of Verona v. Peckham, 66 Barb. (N. Y.) 103. The validity of an agreement for the procurement of volunteers for the United States army considered and determined. Arnold v. City of Pawtucket, 21 R. I. 15. See generally cases cited under §§ 246-248, supra.

[720] Akin v. Ordinary of Bartow County, 54 Ga. 59. A contract having for its purpose the support of indigent families of Confederate soldiers held not in a legal sense as being in aid of the Rebellion. Gillett v. Logan County Sup'rs, 67 Ill. 256; City of Peru v. Gleason, 91 Ind. 566; Strahan v. Town of Malvern, 77 Iowa, 454 (Gift of railroad right of way); City of Cleburne v. Brown, 73 Tex. 443. See, also, as discussing the underlying principles relative to the granting of aid to private enterprises or individuals, §§ 145 et seq.; 172 et seq.

§ 251. Contracts protected by constitutional provisions.

Valid contracts made by public corporations are protected by Federal or state constitutional provisions. The clause most ordinarily invoked is that of the Federal constitution which prohibits a state from passing a law impairing the obligation of a contract. The judicial interpretation based upon the term "law" in this provision is broad and includes not only a law passed by a legislative body but also a constitutional amendment or provision, decree of court or any act which may be ultimately given the force and effect of law and which impairs the obligation of a contract previously entered into by a public corporation.[721] A contract between an individual and a public corporation is fully protected by constitutional provisions against the impairment of a contract obligation. A contract express or implied may or may not arise as against a public corporation in the making of a grant or conveyance; the issue of a license either for the sale of merchandise or the carrying on of an occupation or profession; the levy of taxes or an exemption from taxation; the grant of a bounty or pension; the location of a county seat; a change of the time and method for paying indebtedness; a diversion of property or funds from the purpose for which they were devoted or created; imposing conditions precedent to the payment of municipal indebtedness; the use of highways for railways, telephone and telegraph lines or in proceedings for the construction of local improvements,—all of which questions have been or will be considered in their proper place to be found by reference to the index.

§ 252. Contracts ultra vires because of constitutional provisions.

There are frequently found constitutional or statutory provisions limiting the amount of the indebtedness which can be legally incurred by public corporations or prohibiting appropriations in the absence of the necessary funds either in cash or in process of collection pursuant to some tax levy.[722] The incurring

[721] Houston & T. C. R. Co. v. State of Texas, 177 U. S. 66; Board of Liquidation of New Orleans v. State of Louisiana, 179 U. S. 622; People v. Otis, 24 Hun (N. Y.) 519; New York Sanitary Utilization Co. v. Public Health Dept., 32 Misc. 577, 67 N. Y. Supp. 324.

[722] Brazoria County v. Youngstown Bridge Co. (C. C. A.) 80 Fed.

of indebtedness may, it has been frequently held, be accomplished through the making of a contract because there will arise as the result of a contract an obligation on the part of the corporation of indebtedness may, it has been frequently held, be accomplished which must be paid or satisfied. This obligation is an indebtedness, although it may not be an express one but merely implied, and the ultimate monetary obligation, when in excess of the debt limit fixed by law, to such an extent, will be void.[723]

10; Defiance Water Co. v. City of Defiance, 90 Fed. 753; Keith v. City of Du Quoin, 89 Ill. App. 36; Sullivan v. Highway Com'rs of Deer Park, 114 Ill. 262. Such a contract is valid where a tax sufficient to satisfy the corporate obligations thereunder has been levied and in process of collection.

Field v. Stroube, 103 Ky. 114, 44 S. W. 363; Jackson Elec. R., Light & Power Co. v. Adams, 79 Miss. 408; Hurley v. City of Trenton, 67 N. J. Law, 350, 51 Atl. 1109; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; Kingsland v. City of New York, 5 Daly (N. Y.) 448; Woodside Water Co. v. Long Island City, 23 App. Div. 78, 48 N. Y. Supp. 686; Kingsley v. City of Brooklyn, 78 N. Y. 200; Roberts v. City of Fargo, 10 N. D. 230; Fire Extinguisher Mfg. Co. v. City of Perry, 8 Okl. 429; City of Lancaster v. Miller, 58 Ohio St. 558; North Pac. Lumbering & Mfg. Co. v. City of East Portland, 14 Or. 3; Reuting v. City of Titusville, 175 Pa. 512. If the expenditure contemplated is within the funds available for such purpose, the contract is valid. City of Harrisburg v. Shepler, 190 Pa. 374; Beyer v. Town of Crandon, 98 Wis. 306.

[723] Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 396; Kimball v. City of Cedar Rapids, 100 Fed. 802. If a contract is separable in its provisions, those which are valid may be enforced without regard to the invalidity of others. Rice v. Trustees of Town of Haywards, 107 Cal. 398; Prince v. City of Quincy, 128 Ill. 443 (Contract for water supply; payable in monthly instalments); City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 45 N. E. 588, 35 L. R. A. 686; Beard v. City of Hopkinsville, 95 Ky. 239; Johnston v. Becker County Com'rs, 27 Minn. 64; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70; People v. Fielding, 36 App. Div. 401, 55 N. Y. Supp. 530; Peck-Williamson Heating & Ventilating Co. v. Board of Education of Oklahoma City, 6 Okl. 279; Carter v. Thorson, 5 S. D. 474, 24 L. R. A. 734.

Berlin Iron-Bridge Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408. Contract will be valid, however, if it involves an expenditure included within a debt already incurred. Spilman v. City of Parkersburg, 35 W. Va. 605. See, however, authorities cited under §§ 152 and 159, which establish the conditions or circumstances under which a contract is valid extending over a term of years, the consideration of which is payable in regular instalments conditional upon the furnishing of the commodity contracted for. Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill.

§ 253. The same subject continued.

Public corporations may make contracts which are ultra vires and therefore void because in violation of constitutional provisions or rights other than those above noted. They usually provide that no citizen or class of citizens shall be given privileges or immunities not granted to all;[724] that the right which every citizen possesses to contract, except as prohibited by law shall remain inviolate;[725] and that no person shall be deprived

App. 325; Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681; Frantz v. Jacob, 88 Ky. 525; Newgass v. City of New Orleans, 42 La. Ann. 163.

[724] Van Harlingen v. Doyle, 134 Cal. 53, 66 Pac. 44, 54 L. R. A. 771; Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591. § 1807, Rev. Code does not discriminate either against nonresidents or those whose places of business are situated in another state. The sole requirement of the section is that county printing shall be done within the state.

[725] United States v. Martin, 94 U S. 400. The scope of the Act of Congress of June 25, 1868 (15 Stat. 77) declaring "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed or who may be hereafter employed by or on behalf of the government of the United States" was under consideration by the supreme court of the United States. Justice Hunt in delivering the opinion of the court said in part: "Principals, so far as the law can give the power, are entitled to employ as many workmen and of whatever degree of skill and at whatever price they think fit and, except in some special cases, as of children or orphans, the hours of labor and the price to be paid are left to the determination of the parties interested. The statute of the United States does not interfere with this principle. It does not specify any sum which shall be paid for the labor of eight hours nor that the price shall be more when the hours are greater, or less when the hours are fewer. It is silent as to everything except the direction to its officers that eight hours shall constitute a day's work for a laborer. * * * We regard the statute chiefly as in the nature of a direction from a principal to his agent, that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. * * * We are of the opinion, therefore, that contracts fixing or giving a different length of time as the day's work are legal and binding upon the parties making them."

United States v. Gates, 148 U. S. 134. Letter carriers' right to extra pay for more than eight hours' work considered. Holden v. Hardy, 169 U. S. 366, affirming 14 Utah, 71. The supreme court of the United States in this case held, sustaining the constitutionality of a Utah statute Sess. Laws 1896, p. 219, regulating the hours of employment in underground mines and in smelters and ore reduction works, that it was a valid exercise of the police power

of the state and the fact that both parties were of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality or where the public health demands that one party to the contract shall be protected against himself. The court in its opinion by Mr. Justice Brown cited with approval 14 Utah, 99, "'The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government.' The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self interest is often an unsafe guide, and the legislature may properly interpose its authority. * * * We have no disposition to criticise the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employes, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression, or spoliation of a particular class. The distinction between these two different classes of enactments cannot be better stated than by a comparison of the views of this court found in the opinions in Barbier v. Connolly, 113 U. S. 27; Soon Hing v. Crowley, 113 U. S. 703; with those later expressed in Yick Wo v. Hopkins, 118 U. S. 356."

Leep v. St. Louis, I. M. & S. R. Co., 58 Ark. 407, 23 L. R. A. 264; In re House Bill No. 203, 21 Colo. 27; In re Morgan, 26 Colo. 415, 47 L. R. A. 52; Luske v. Hotchkiss, 37 Conn. 219; Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; Fiske v. Peo-

of his life, liberty or property without due process of law,[726] the term property including the right to labor.[727]

ple, 188 Ill. 206, 52 L. R. A. 291. A contract including a provision fixing the length of time which shall constitute a day's work is void as infringing on the right which every citizen possesses to contract except as prohibited by law. McChesney v. People, 200 Ill. 146 (Eight-hour and alien labor contract); State v. Martindale, 47 Kan. 147 (Eight-hour statute); In re Dalton, 61 Kan. 257, 47 L. R. A. 380 (Eight-hour statute); State v. McNally, 48 La. Ann. 1450, 36 L. R. A. 533; Com. v. Hamilton Mfg. Co., 120 Mass. 383; Com. v. Perry, 155 Mass. 117, 14 L. R. A. 325; Low v. Rees Printing Co., 41 Neb. 127, 24 L. R. A. 702. Holding unconstitutional a statute which provided that for all classes of mechanics, servants and laborers excepting those engaged in farm and domestic labor, a day's work should not exceed eight hours. Brooks v. Cotton, 48 N. H. 50 (Ten hours statute); Taylor v. Porter, 4 Hill (N. Y.) 140; People v. Beck, 10 Misc. 77, 30 N. Y. Supp. 473; People v. Featherstonhaugh, 172 N. Y. 112, 64 N. E. 802, 60 L. R. A. 768.

People v. Orange County Road Const. Co., 37 Misc. 341, 75 N. Y. Supp. 510; McCarthy v. City of New York, 96 N. Y. 1; People v. Coler, 166 N. Y. 1, 52 L. R. A. 814; People v. Coler, 166 N. Y. 144; City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775; City of Portland v. Baker, 8 Or. 356. Regarding employment of Chinese labor on public improvements. State v. Peel Splint Coal Co., 36 W. Va. 802, 17 L. R. A. 385.

[726] People v. Coler, 166 N. Y. 1, 52 L. R. A. 814. Considering the New York "prevailing rate of wages" act, Laws 1897, c. 415, as amended by Laws 1899, cc. 192, 567, and holding it unconstitutional.

[727] Ex parte Kuback, 85 Cal. 274, 9 L. R. A. 482. Chinese labor. Marshall & Bruce Co. v. City of Nashville, 109 Tenn. 495, 71 S. W. 815, 65 Alb. Law J. 102. The court held "an ordinance providing that all city printing should bear a union label void; because it deprives those not using the label from pursuing their avocation so far as such printing is concerned and hence contravenes the 14th amendment of the United States Constitution; it is against public policy; and it restricts competition in violation of the charter."

City of Atlanta v. Stein, 111 Ga. 789, 51 L. R. A. 335; Grey v. People, 194 Ill. 486, 62 N. E. 894. Referring to ordinance invalid because restricting the hiring of labor to members of labor unions. Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79; Adams v. Brenan, 177 Ill. 194, 42 L. R. A. 718. Contract stipulating that only union labor shall be employed held invalid. Holden v. City of Alton, 179 Ill. 318. A contract where the statute requires a letting to the lowest bidder is void let to one not the lowest bidder because of the employment of non-union labor by him. Fiske v. People, 188 Ill. 206, 52 L. R. A. 291. Contracts providing that only union labor shall be employed by contractors constructing public improvements are unconstitutional and void.

§ 254. Contracts ultra vires because contravening some exclusive right.

The government of the United States is a dual one consisting of the National or Federal organization and that of the different states. To the Federal government is given, by the Federal constitution, certain exclusive rights. A contract entered into by a state or a public corporation organized under the laws of any state which infringes upon or attempts to regulate any such exclusive right, privilege or power is clearly void.

§ 255. Contracts ultra vires because of a beneficial interest resulting to the public officers executing them.

An officer, agent or employe of a public corporation occupies as towards such corporation what is termed a fiduciary or trust relation. This same relation exists as between the officers of a

St. Louis Quarry & Const. Co. v. Von Versen, 81 Mo. App. 519. An ordinance provision that all dressed rock used in connection with a specified public work must be dressed within the limits of the state of Missouri held void.

State v. Julow, 129 Mo. 163, 29 L. R. A. 257. Members of labor union. Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161. An injunction will issue at the suit of a taxpayer to prevent the waste of county funds by the letting of a contract for the construction of a county building to a higher bidder who agrees to employ only union labor.

Frame v. Felix, 167 Pa. 47, 27 L. R. A. 802. It is inconsistent with a statute requiring a contract to be let to the lowest bidder to limit contractors to those who will employ men not citizens of the United States and who will pay no less than $1.50 per day for their services. See, also, note 7 Mun. Corp Cas. p. 702. See, also, the following cases holding public contracts void in which there are provisions restricting competition: People v. Chicago Gas Trust Co., 130 Ill. 268, 8 L. R. A. 497; Foss v. Cummings, 149 Ill. 353; Fishburn v. City of Chicago, 171 Ill. 338, 39 L. R. A. 482.

Street v. Varney Electrical Supply Co., 160 Ind. 338, 66 N. E. 895. Approving People v. Coler, 166 N. Y. 1, 52 L. R. A. 814. An act of the legislature which required municipal corporations to pay for common labor employed on public works more than its market value was in this case held void and unconstitutional because "it deprives taxpayers of their privileges and immunities, of their property without due process of law and because it interferes unreasonably with the right of contract and is class legislation." City of Cleveland v. Clements Bros. Const. Co., 67 Ohio St. 197, 59 L. R. A. 775; Mazet v. City of Pittsburgh, 137 Pa. 548.

private corporation and the corporation and should apply in an intensified degree to public officials or employes. In a decision by the supreme court of the United States[728] the court in discussing the impossibility and inconsistency of one person representing or attempting to represent personal and adverse interests in the same transaction said:

"The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; * * * The disability * * * is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility that in some cases the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty."

The courts therefore hold uniformly to the rule that contracts executed by and in behalf of a public corporation in which the officers so executing them may directly or indirectly have a beneficial interest are absolutely void.[729] This rule is necessary for

[728] Michoud v. Girod, 4 How. (U. S.) 503.

[729] City of London Elec. Lighting Co. v. City of London, 82 Law T. (N. S.) 530. A contract, however, is not rendered invalid because one of the shareholders of the contracting company is a member of the common council, a commissioner of sewers or a member of the board of aldermen.

Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420; Capron v. Hitchcock, 98 Cal. 427; Capital Gas Co. v. Young, 109 Cal. 140, 29 L. R. A. 463. Such contract, however, is valid where by law the other party was obliged to supply the city with the contract commodity, namely, gas.

Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175. Contracts with themselves for the purchase of right of way by the trustees of a reclamation district, however, held valid where such right of way was necessary and the price paid not higher than for other lands of a similar character.

City of Macon v. Huff, 60 Ga. 221; Dorsett v. Garrard, 85 Ga. 734; West v. Berry, 98 Ga. 402; Nuckols v. Lyle, 8 Idaho, 589, 70 Pac. 401; Village of Dwight v. Palmer, 74 Ill. 295; Piatt County v. Republican Printing Co., 99 Ill. App. 411; White

the protection of public funds from dishonest and scheming public officials. As further emphasizing the rule suggested, many

v. City of Alton, 149 Ill. 626. An ex-member of the council, however, may bid upon a contract for street paving where the ordinance providing for such paving was passed while he was yet a member of the council.

City of Ft. Wayne v. Rosenthal, 75 Ind. 156; McGregor v. City of Logansport, 79 Ind. 166; Benton v. Hamilton, 110 Ind. 294; Trustees of United Brethren v. Rausch, 122 Ind. 167. The fact that an officer of the city was one of the contractor's bondsmen does not invalidate the contract or the assessment levied to pay for the improvement. City of Ft. Wayne v. Lake Shore & M. S. R. Co., 132 Ind. 558, 18 L. R. A. 367. Such a contract may be ratified, however, if the interested party is no longer a member of the city council.

Cason v. City of Lebanon, 153 Ind. 567. The fact that the contractor's relative was city engineer does not invalidate a contract for the making of certain street improvements. Perry County Com'rs v. Gardner, 155 Ind. 165; Manley v. City of Atchison, 9 Kan. 358; Holderness v. Baker, 44 N. H. 414; Stroud v. Consumers' Water Co., 56 N. J. Law, 422, 28 Atl. 578; Klemm v. City of Newark, 61 N. J. Law, 112, 38 Atl. 692. A contract for services outside the line of his official duties between a municipal officer and the city will be maintained.

West Jersey Traction Co. v. Board of Public Works of Camden, 56 N. J. Law, 431; Nunemacher v. City of Louisville, 98 Ky. 334; Com. v. Willis, 19 Ky. L. R. 962, 42 S. W. 1118; City of Winchester v. Frazer, 19 Ky. L. R. 1366, 43 S. W. 453; Goodrich v. City of Waterville, 88 Me. 39; People v. Township Board of Overyssel, 11 Mich. 222; Lewick v. Glazier, 116 Mich. 493, 74 N. W. 717. A contract is not invalid because the father of the contractor was also a village trustee and passed upon it.

Macy v. City of Duluth, 68 Minn. 452; State v. Rickards, 16 Mont. 145, 28 L. R. A. 298. A contract for public printing not affected by the fact that the manager of the publishing house who was paid a fixed salary was a member of the legislature at the time of the execution of the contract.

McElhinney v. City of Superior, 32 Neb. 744; City of Broken Bow v. Broken Bow Waterworks Co., 57 Neb. 548, 77 N. W. 1078. The fact that the mayor and other city officials are stockholders in a corporation will not invalidate a contract made with such corporation by the municipality.

Moreland v. City of Passaic, 63 N. J. Law, 208, 42 Atl. 1058. A contract with the firm, one of the partners being a member of the city council, is not invalid by reason of this fact; but see the case of Foster v. City of Cape May, 60 N. J. Law, 78, holding that a contract will be void even where a member of the city council held some of the stock of the contracting company as collateral to a loan.

Roosevelt v. Draper, 23 N. Y. 318; In re Taxpayers & Freeholders of Plattsburgh, 27 App. Div. 353, 50 N. Y. Supp. 356; Smith v. City of

states contain statutory provisions to the effect that public officials or agents shall not be directly or indirectly interested in any present or future contract they may make on behalf of the public corporation they represent.[730] Where, under a contract invalid

Albany, 61 N. Y. 444; In re Clamp, 33 Misc. 250, 68 N. Y. Supp. 345; Snipes v. City of Winston, 126 N. C. 374; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049. The rule, however, will not prevent the levying of a tax for the purpose of making payments upon a contract of such a character.

Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122. Duncan v. City of Charleston, 60 S. C. 532. What is considered the correct rule is held in this case, namely, that where members of a city council are also stockholders in a corporation this precludes the making of a contract by the city council with such corporation. There is no doubt of the soundness of the principle in the text; if it is to be maintained, the line between contracts valid or invalid because of the fact of a beneficial interest resulting to the officers of the corporation must be rigidly drawn and maintained.

Texas Anchor Fence Co. v. City of San Antonio, 30 Tex. Civ. App. 561; Land, Log & Lumber Co. v. McIntyre, 100 Wis. 258; Quayle v. Bayfield County, 114 Wis. 108. But see Tucker v. Howard, 122 Mass. 529; Nicoll v. Sands, 131 N. Y. 19; Stott v. Franey, 20 Or. 410; Trainer v. Wolfe, 140 Pa. 279; Albright v. Town Council of Chester, 9 Rich. Law (S. C.) 399; Pickett v. School Dist. No. 1, 25 Wis. 551.

[730] Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323; Gibbons v. Mobile & G. N. R. Co., 36 Ala. 410; Berka v. Woodward, 125 Cal. 119, 2 Mun. Corp. Cas. 566, 45 L. R. A. 420. "Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the situation here presented. This material was obtained from a member of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and judgment in determining these very questions."

Village of Dwight v. Palmer, 74 Ill. 295; McGregor v. City of Logansport, 79 Ind. 166; Case v. Johnson, 91 Ind. 477; Benton v. Hamilton, 110 Ind. 294; Nunemacher v. City of Louisville, 98 Ky. 334; Brackett v.

because of the principle stated above, the public corporation has received articles or services of value and which it properly could, many cases hold that though the contract cannot be enforced, still a recovery will be permitted on the basis of a quantum meruit for the services or things actually rendered or furnished.[731]

§ 256. Contracts ultra vires because of fraud or bribery.

A contract to which a public corporation is a party may be void and incapable of enforcement because of illegal or fraudulent means used either in its original procurement or in its actual execution. The general rule of law in this respect applies to such contracts.[732]

City of Boston, 157 Mass. 177; Goddard v. City of Lowell, 179 Mass. 496; State v. City of Great Falls, 19 Mont. 518; Stroud v. Consumers' Water Co., 56 N. J. Law, 422, 28 Atl. 578; State v. Funk, 16 Ohio Circ. R. 155; Com. v. Philadelphia County Com'rs, 2 Serg. & R. (Pa.) 193; Com. v. Thum, 10 Serg. & R. (Pa.) 418; Com. v. Hurd, 177 Pa. 481; Com. v. De Camp, 177 Pa. 112.

Marshall v. Elwood City Borough, 189 Pa. 348. Not applied to a contract where one of the members of the council was a stockholder in the contracting company, there being a majority of the council in favor of such contract exclusive of this member.

City of Northport v. Northport Town Site Co., 27 Wash. 543; Lillard v. Freestone County, 23 Tex. Civ. App. 363. See, also, Bell v. Quin, 4 N. Y. Super. Ct. (2 Sandf.) 146; and City of Anna v. O'Callahan, 3 Ill. App. 176, which holds that the statutory prohibition against city officials being interested in any contract work or business of the city does not prevent an officer from ordering an article by authority of the city and advancing the money to pay for it.

[731] Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855; Capital Gas Co. v. Young, 109 Cal. 140, 29 L. R. A. 463; City of Macon v. Huff, 60 Ga. 221; City of Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133; City of Niles v. Muzzy, 33 Mich. 61; Currie v. School Dist. No. 26, 35 Minn. 163; Grand Island Gas Co. v. West, 28 Neb. 853; Call Pub. Co. v. City of Lincoln, 29 Neb. 149; Gardner v. Butler, 30 N. J. Eq. 702; Pickett v. School Dist. No. 1, 25 Wis. 551. See, also, § 259 post, and authorities cited.

[732] Rice v. Trustees of Hayward, 107 Cal. 398; Woodward v. Collett, 20 Ky. L. R. 1066. An agreement that the successful bidder shall divide the work held not a fraudulent condition. Devlin v. City of New York, 4 Misc. 106, 23 N. Y. Supp. 888; Adamson v. Nassau Elec. R. Co., 12 Misc. 600, 33 N. Y. Supp. 732; State v. Kern, 51 N. J. Law, 259; Madden v. Van Wyck, 35 Misc. 645, 72 N. Y. Supp. 135. Complaint contained no allegations of fraud and held insufficient. In re Ander-

§ 257. Contracts ultra vires because extending beyond official term.

Many contracts made by public corporations are for supplies used by them in the conduct of their public business or in the carrying on of various proprietary interests. Such contracts when involving large expenditures usually extend over a period of years; this is especially true of contracts or franchises in the nature of contracts granted private corporations for furnishing supplies of water and light. These have been claimed as ultra vires because restricting or limiting the power of succeeding public officials or legislative bodies, it being vital to the public welfare that each legislative body or public official should be able to do whatever the varying circumstances and present exigencies require,[733] and in some instances because of their extending for what is urged as an unreasonable length of time. In regard to contracts made by public corporations for the securing of a supply of water and light, it was well said by Judge Lochren of the Federal bench in a recent case[734] in the Eighth Circuit, "Contracts on the part of a municipality for the supply to the municipality and to its citizens, of water and light are not made

son, 109 N. Y. 554; Byers v. Manley Mfg. Co. (Tenn. Ch. App.) 46 S. W. 547; City of Witchita Falls v. Skeen, 18 Tex. Civ. App. 632. The agreement to divide work secured by the successful bidder among those competing renders the contract void. Herman v. City of Oconto, 100 Wis. 391.

[733] Gale v. Village of Kalamazoo, 23 Mich. 344. The court by Judge Cooley in part said: "It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and again, as may be found needful or politic; and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency but must transmit them unimpaired to their successors. This is one of the fundamental maxims of government and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition." See, also, authorities for and against the rule cited and reviewed in Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 15 L. R. A. 354, where it is held that though a city may be powerless to make a contract for water supply for 21 years, still the contract should be upheld for a reasonable time.

[734] Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663.

in the exercise of the governmental powers vested in the municipal council, but of its proprietary or business powers. It is acting for the private benefit of itself and its inhabitants, and its contracts of that character are governed by the same rules that govern contracts of private individuals and corporations."

Such contracts usually held good require for their performance the expenditure of large sums of money and the erection of plants such as it has been learned through experience, a public corporation should not directly attempt. Private capital will not engage in such enterprises when the contract runs for a limited time because the returns for such period will not be commensurate with the capital invested and necessary skill.[735]

[735] Chenango Bridge Co. v. Binghampton Bridge Co., 70 U. S. (3 Wall.) 51. "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on government to provide for them; and as experience has proved that a state should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it."

Manhattan Trust Co. v. City of Dayton (C. C. A.) 59 Fed. 327, affirming 55 Fed. 181. Where a city is authorized to contract for ten years, a contract for twenty years or for a longer time is entirely void. It is not valid even for the period of ten years. Defiance Water Co. v. City of Defiance, 90 Fed. 753; City Council of Montgomery v. Montgomery Water-Works Co., 79 Ala. 233; Capital City Water Co. v. City Council of Montgomery, 92 Ala. 366; McBean v. City of Fresno, 112 Cal. 159, 44 Pac. 358, 31 L. R. A. 794. Five-year sewage contract valid. Higgins v. City of San Diego (Cal.) 45 Pac. 824. Twenty-year waterworks contract valid. Cartersville Imp. Gas & Water Co. v. City of Cartersville, 89 Ga. 683. The validity of a long term contract is dependent upon an affirmative popular vote as required by the state constitution.

Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill. App. 325; City of Carlyle v. Carlyle Water, Light & Power Co., 52 Ill. App. 577. In a contract for a supply of water for a term of thirty years the power is withheld to fix a price to apply during the entire period.

Unless some valid or consistent reason appears as suggested in this section, contracts are void made by public officials beyond

City of Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; City of Valparaiso v. Gardner, 97 Ind. 1; Crowder v. Town of Sullivan, 128 Ind. 486, 13 L. R. A. 647; City of Rushville v. Rushville Natural Gas Co., 132 Ind. 575, 15 L. R. A. 321; City of Vincennes v. Citizens' Gaslight Co., 132 Ind. 114, 16 L. R. A. 485. Contract running for twenty-five years authorized. Emmert v. De Long, 12 Kan. 67; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99, 15 L. R. A. 354. Twenty-one year water contract held good. New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188. Ten-year contract valid; not a restriction on legislative power of council.

State v. McCardy, 62 Minn. 509; Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598. A twenty-year contract not ultra vires. State v. City of Great Falls, 19 Mont. 518. The court said following the decision of Judge Lochren cited above that a city in contracting for waterworks exercised its proprietary powers as distinguished from its legislative and therefore a long-time contract for such purpose was not void as restricting the legislative powers of future municipal councils.

Blood v. Manchester Elec. Light Co., 68 N. H. 340, 39 L. R. A. 431; Davis v. Town of Harrison, 46 N. J. Law, 79; Van Giesen v. Inhabitants of Bloomfield, 47 N. J. Law, 442. Ten-year water contract held good. Atlantic City Water-works Co. v. Atlantic City, 48 N. J. Law, 378; Smith v. Borough of Avon-By-The-Sea, 68 N. J. Law, 243, 52 Atl. 226; Board of Finance of Jersey City v. Street & Water Com'rs, 55 N. J. Law, 230.

City of Wellston v. Morgan, 59 Ohio St. 147. Under the Ohio statutes, a municipal corporation may contract for the lighting of its streets for a period not exceeding ten years. A contract extending over a longer period of time is ultra vires and void. See, also, question discussed and authorities under section on exclusive franchises. But see to the contrary, Garrison v. City of Chicago, 7 Biss. 480, Fed. Cas. No. 5,255; Illinois Cent. Hospital for Insane v. City of Jacksonville, 61 Ill. App. 199; City of Somerset v. Smith, 20 Ky. L. R. 1488, 49 S. W. 456; Mealey v. City of Hagerstown, 92 Md. 741; Long v. City of Duluth, 49 Minn. 280; Flynn v. Little Falls Elec. & Water Co., 74 Minn. 180. See same case decided to the contrary by the Federal Court and referred to above. Little Falls Elec. & Water Co. v. Little Falls, 102 Fed. 663; Town of Kirkwood v. Meramec Highlands Co., 94 Mo. App. 637; Taylor v. City of Lambertville, 43 N. J. Eq. 107. Power to contract limited to one year under special charter provision.

Humphreys v. City of Bayonne, 55 N. J. Law, 241; Richmond County Gas-Light Co. v. Town of Middletown, 59 N. Y. 228; State v. Ironton Gas Co., 37 Ohio St. 45. A contract good only for the time permitted by city charter. Columbus Gas Light & Coke Co. v. City of Columbus, 50 Ohio St. 65, 19 L. R. A. 510. Construing contract rela-

their term of office or under circumstances indicating a lack of good faith.[736]

§ 258. Ultra vires contracts; their enforcement.

An unauthorized or an illegal contract executed by a public corporation is incapable of enforcement. It is absolutely void and neither the doctrine of estoppel nor ratification can be invoked to maintain it. The strict rule of law applying to ultra vires contracts of corporations as followed by the English courts and the Federal decisions in this country is strictly applied to the acts of public corporations.[737] However, some cases hold

tive to the grading and improvement of city streets. City of Brenham v. Brenham Water Co., 67 Tex. 549.

[736] People v. Ward, 107 Cal. 236; Millikin v. Edgar County, 142 Ill. 528, 32 N. E. 493, 18 L. R. A. 447; Shelden v. Butler County Com'rs, 48 Kan. 356, 16 L. R. A. 257; Coffey County Com'rs v. Smith, 50 Kan. 350, 32 Pac. 30; City Sav. Bank v. Wayne County Treasurer, 84 Mich. 391; Hendrickson v. City of New York, 38 App. Div. 480, 56 N. Y. Supp. 580; New York, N. H. & H. R. Co. v. Village of New Rochelle, 29 Misc. 195, 60 N. Y. Supp. 904; Vacheron v. City of New York, 34 Misc. 420, 69 N. Y. Supp. 608. Ten-year contract for sprinkling roads held invalid. But see the following cases as holding to the contrary where the contract was made in good faith: Wilson v. East Bridgeport School Dist., 36 Conn. 280; Hendersonville v. Price, 96 N. C. 423; Wait v. Ray, 67 N. Y. 36.

Marden v. Champlin, 17 R. I. 423, 22 Atl. 938. A contract duly made for a lease under proper authority cannot be ignored by a succeeding council, it is held in this case.

Webb v. Spokane County, 9 Wash. 103. A board of county commissioners, with power to contract for the services of a county physician have the right to make such a contract for a year, though the members of the board are about to go out of office in a few days. The court said: "For aught that appears the agreement was entered into in good faith and, if so, it ought not to be set aside for the reason assigned."

[737] Manhattan Trust Co. v. City of Dayton (C. C. A.) 59 Fed. 327; Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C. A.) 102 Fed. 417; Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628; Frick v. City of Los Angeles, 115 Cal. 512; City Council of Dawson v. Dawson Water-works Co., 106 Ga. 696; City of Chicago v. Peck, 196 Ill. 260; Hamilton v. City of Shelbyville, 6 Ind. App. 538; City of McPherson v. Nichols, 48 Kan. 430; State v. Lanier, 47 La. Ann. 110; City of Chaska v. Hedman, 53 Minn. 525. A city may, however, recover moneys paid out by its officers on account of an ultra vires contract. Grannis v. Blue Earth County Com'rs, 81 Minn. 55; Kansas City v. O'Connor, 82 Mo. App. 655; State

that the character of a contract will not prevent the right of the public to equitable relief,[738] nor will it prevent extending the American rule regarding ultra vires acts where the application of the strict rule would not accomplish justice but effect a legal wrong.[739]

§ 259. Availability of the doctrine of estoppel.

Where an application of the strict rule relative to the ultra vires contracts of private corporations would result in injustice, many courts hold that a more liberal one should be followed and that the equities as between the parties should be established and maintained. The courts, however, quite uniformly agree that this principle cannot be applied under the same conditions or circumstances to acts of public corporations; that the corporation can never be estopped to set up as a defense the fact that the contract sought to be enforced was ultra vires either because of lack of authority or because in contravention of some charter, constitutional or statutory provision.[740] But a party

v. Murphy, 134 Mo. 548, 34 L. R. A. 369; State v. City of Crete, 32 Neb. 568; Noel v. City of San Antonio, 11 Tex. Civ. App. 580; City of Winchester v. Redmond, 93 Va. 711; Young v. State, 19 Wash. 634; Perry v. Superior City, 26 Wis. 64.

[738] City of Detroit v. Detroit City R. Co., 56 Fed. 867. See, also, City of New Haven v. New Haven & D. R. Co., 62 Conn. 252, 18 L. R. A. 256.

[739] Town of Monticello v. Cohn, 48 Ark. 254; Paulding County v. Scoggins, 97 Ga. 253; Westbrook v. Middlecoff, 99 Ill. App. 327; State v. City of Helena, 24 Mont. 521, 55 L. R. A. 336; Parker v. City of Philadelphia, 92 Pa. 401; Edwards County v. Jennings, 89 Tex. 618. See, also, § 259, post.

[740] Willis v. Wyandotte County Com'rs (C. C. A.) 86 Fed. 872; Hays v. Ahlrichs, 115 Ala. 239; 22 So. 465. The lack of authority to make a certain contract cannot be inquired into in a collateral proceeding.

City Council of Montgomery v. Montgomery & W. Plank-Road Co., 31 Ala. 76. The rule also applies in favor of the other party to the contract. Wiegel v. Pulaski County, 61 Ark. 74. The acceptance of work under an ultra vires contract will not estop the county from setting up as a defense its illegal character.

National Tube-Works Co. v. City of Chamberlain, 5 Dak. 54. A mere informality, however, in the execution of a contract cannot be claimed by the city as a sufficient reason for holding it void. Hampton v. Logan County Com'rs, 4 Idaho, 646, 43 Pac. 324. No recovery under a quantum meruit for services rendered under an ultra vires contract.

F. C. Austin Mfg. Co. v. Smith-

dealing with a public corporation and after having received the benefits or advantages of the transaction is estopped to deny the authority of the corporation to engage in the transaction.[741] This principle does not seem correct, however, for it denies to the private individual through the operation of the doctrine of

field Tp., 21 Ind. App. 609, 52 N. E. 1011. A contract debt for supplies in excess of statutory authority cannot be enforced against the township even though the township receives, uses, and never returns them. Morrison v. Decatur County Com'rs, 16 Ind. App. 317, 44 N. E. 65, 1012. No recovery under a quantum valebat for supplies furnished under an ultra vires contract.

Axt v. Jackson School Tp., 90 Ind. 101; City of Leavenworth v. Rankin, 2 Kan. 357; Salt Creek Tp. v. King Iron Bridge & Mfg. Co., 51 Kan. 520; Hovey v. Wyandotte County Com'rs, 56 Kan. 577. An acceptance of the work performed under an ultra vires contract will not render the county liable. Mealey v. City of Hagerstown, 92 Md. 741; Newberry v. Fox, 37 Minn. 141; Bazille v. Ramsey County Com'rs, 71 Minn. 198; State v. Minnesota Transfer R. Co., 80 Minn. 108, 50 L. R. A. 656; Heidelburg v. St. Francois County, 100 Mo. 69. The acceptance or work does not render a county liable. State v. Murphy, 134 Mo. 548, 34 L. R. A. 369; Wheeler v. City of Poplar Bluff, 149 Mo. 36; Snyder v. Board of Education of Albuquerque, 10 N. M. 446, 62 Pac. 1090; Read v. Atlantic City, 49 N. J. Law, 558; Atlantic City Water Works Co. v. Read, 50 N. J. Law, 665, affirming by tie vote preceding case.

La France Fire-Engine Co. v. City of Syracuse, 33 Misc. 516, 68 N. Y. Supp. 894; Union Bank of Richmond v. Town of Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487; Roberts v. City of Fargo, 10 N. D. 230; McAleer v. Angell, 19 R. I. 688; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; A. H. Andrews & Co. v. Curtis, 2 Tex. Civ. App. 678; Noel v. City of San Antonio, 11 Tex. Civ. App. 580, 33 S. W. 263; Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495. An ultra vires contract cannot be ratified.

Indiana Road Mach. Co. v. City of Sulphur Springs (Tex. Civ. App.) 63 S. W. 908; State v. City of Pullman, 23 Wash. 583. A contract ultra vires is void from the beginning and incapable of ratification. Beyer v. Town of Crandon, 98 Wis. 306. But see as holding that the doctrine of estoppel may operate against the public corporation, The Maggie P., 25 Fed. 202; State v. Cockrem, 25 La. Ann. 356; City of New Orleans v. Crescent City R. Co., 41 La. Ann. 904; City of Natchez v. Mallery, 54 Miss. 499.

[741] City of Helena v. Turner, 36 Ark. 577; Town of Monticello v. Cohn, 48 Ark. 254; and City of St. Louis v. Davidson, 102 Mo. 149; City of New York v. Sonneborn, 113 N. Y. 423; City of Buffalo v. Balcom, 134 N. Y. 532; Town of Bristol v. Bristol & Warren Water Works, 19 R. I. 413, 32 L. R. A. 740; Schuessler v. Town of Mason (Tex. Civ. App.) 28 S. W. 42.

estoppel in favor of public corporations the right of recovery where that corporation has received the benefits of the transaction. The soundness of the principle has also been questioned because its application, some courts have said, tends to the exercise of unauthorized powers through collusion with individuals.[742] There are some decisions to the contrary and still other decisions hold that where, under an ultra vires contract, the public corporation has received and retained goods or services of value, there is an implied obligation on its part independent of the contract to return full value for benefits actually received.[743] As

[742] City Council of Montgomery v. Montgomery & W. Plank-Road Co., 31 Ala. 76; City of Helena v. Turner, 36 Ark. 577; Town of Monticello v. Cohn, 48 Ark. 254; City of St. Louis v. Shields, 62 Mo. 247; City of New York v. Sonneborn, 113 N. Y. 423; City of Buffalo v. Balcom, 134 N. Y. 532; Town of Bristol v. Bristol & Warren Water Works, 19 R. I. 413, 32 L. R. A. 740; Scheussler v. Town of Mason (Tex. Civ. App.) 28 S. W. 42.

[743] Warner v. City of New Orleans, 87 Fed. 829. This case decides that a municipality cannot, when it has enjoyed the benefits of a contract fairly made, set up as a defense the lack of corporate power to make it.

City Council of Montgomery v. Montgomery Water Works, 79 Ala. 233. In Argenti v. City of San Francisco, 16 Cal. 255, Chief Justice Field said: "The doctrine of implied municipal liability applies in cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligations to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it; or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not, in fact, make any promise on the subject, but the law which always intends justice implies one."

Higgins v. City of San Diego, 131 Cal. 294, 45 Pac. 824, 63 Pac. 470 (city liable on a quantum valebat); George F. Blake Mfg. Co. v. Sanitary Dist. of Chicago, 77 Ill. App. 287; City of Chicago v. McKechney, 91 Ill. App. 442; Helms v. State, 19 Ind. App. 360, 48 N. E. 264 (town liable for benefits actually received).

Brown v. City of Atchison, 39 Kan. 37. "Where a contract is entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it, * * * but the contract is not immoral, inequitable or unjust, and

said in a preceding section discussing the nature and powers of a public corporation, there is always a broad distinction to be made between the irregular or informal exercise of a power granted and the doing of an act entirely beyond or in excess of the legal powers of the corporation. The application of the doctrine of estoppel may depend upon this distinction; the courts holding the corporation estopped in the former case while denying the application of the doctrine where the act is ultra vires in the proper and technical sense.[744] This distinction is the basis of many decisions although it may not appear as a reason. Other cases hold the corporation liable where it has received the benefits of the transaction because of that equitable rule that though they, the courts, will not lend their aid to further promote or enforce an ultra vires transaction, yet they will not permit the

the contract is performed in whole or in part by and on the part of one of the parties and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received, for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit."

Nicholasville Water Co. v. Board of Councilmen of Nicholasville (Ky.) 38 S. W. 430; Municipal Sec. Co. v. Baker County, 39 Or. 396; Jewell Nursery Co. v. State, 5 S. D. 623, 59 N. W. 1025; London & New York Land Co. v. City of Jellico, 103 Tenn. 320; Brand v. City of San Antonio (Tex. Civ. App.) 37 S. W. 340; Earle v. Wallingford, 44 Vt. 367; Monroe Water-works Co. v. City of Monroe, 110 Wis. 11, 85 N. W. 685. See, also, authorities cited in note 711, § 247, supra.

[744] Rogers v. City of Burlington, 70 U. S. (3 Wall.) 654; Lake County v. Graham, 130 U. S. 674; Town of Searcy v. Yarnell, 47 Ark. 269; Treadway v. Schnauber, 1 Dak. 236; Maher v. City of Chicago, 38 Ill. 266; McPherson v. Foster, 43 Iowa, 48; Ryce v. City of Osage, 88 Iowa, 558; Wormstead v. City of Lynn, 184 Mass. 425; Black v. Common Council of Detroit, 119 Mich. 571; State v. Murphy, 134 Mo. 548, 34 L. R. A. 369; Schumm v. Seymore, 24 N. J. Eq. (9 C. E. Green) 143; Opening of Albany St., 6 Abb. Pr. (N. Y.) 273; Moore v. City of New York, 73 N. Y. 238; Union Bank of Richmond v. Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487; City of Cleveland v. State Bank, 16 Ohio St. 236; Mathewson v. Tripp, 14 R. I. 587; McTwiggan v. Hunter, 19 R. I. 265, 29 L. R. A. 526.

party who has obtained a benefit or advantage thereby to interpose ultra vires as a defense. In other words, they will attempt to do substantial justice even though in so doing they may indirectly enforce an ultra vires act and this is true whether the particular court is one maintaining the strict rule of ultra vires or otherwise.

§ 260. Contracts; their formal execution.

A public corporation necessarily acts through its official representatives; they, in conducting the affairs and business of the corporation, expend moneys raised by public taxation and deal with property and interests not their own. Every possible safeguard, therefore, is thrown around its property and interests likely to be affected or wasted by a misuse or abuse of powers vested in public officials. Nowhere is this intent of the law more apparent than in the establishment and maintenance of rules controlling and regulating the manner in which public corporations, through the formal execution of contracts, may be bound. As already stated the authority of public officials is special, not general; they have the right to exercise only such powers and perform such duties as are expressly given and the principal is only held under such conditions and circumstances. A public corporation is not bound by acts coming within the apparent scope of the agent's power and authority. In this respect the rule differs widely from that applying to an agent of a private corporation or individual.[745] We may, therefore, find in charter or

[745] The Floyd Acceptances, 74 U. S. (7 Wall.) 666; Peirce v. United States, 1 Ct. Cl. 270. "By the law of agency at the common law, there is this difference between individuals and the government; the former are liable to the extent of the power they have apparently given to their agents while the government is liable only to the extent of the power it has actually given its officers."

Story, Ag. § 307a. "In respect to the acts and declarations and representations of public agents, it would seem that the same rule does not prevail which ordinarily governs in relation to mere private agents. As to the latter, the principals are in many cases bound, where they have not authorized the declarations and representations to be made. But in cases of public agents, the government or other public authority is not bound, unless it manifestly appears that the agent is acting within the scope of his authority, or he is held out as having authority to do the act, or is employed, in his capacity as a public agent, to make the declaration

statutory provisions, minute details as to the manner and formalities attending the making and execution of a contract. The pro-

or representation for the government. Indeed, this rule seems indispensable in order to guard the public against losses and injuries arising from the fraud or mistake, or rashness and indiscretion of their agents. And there is no hardship in requiring from private persons dealing with public officers the duty of inquiry as to their real or apparent power and authority to bind the government." Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167, affirming 77 Ill. App. 287. Green v. Beeson, 31 Ind. 7. Grants of power to officials construed strictly. Rissing v. City of Ft. Wayne, 137 Ind. 427.

Clark v. City of Des Moines, 19 Iowa, 199. "The general principle of law is well known and definitely settled that the agents, officers or even city council of a municipal corporation cannot bind the corporation when they transcend their lawful and legitimate powers.

"This doctrine rests upon this reasonable ground: The body corporate is constituted of all the inhabitants within the corporate limits. The inhabitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporators. Their duties and their powers are prescribed by statute. Every one therefore, may know the nature of these duties and the extent of these powers. These considerations as well as the dangerous nature of the opposite doctrine, demonstrate the reasonableness and necessity of the rule, that the corporation is bound only when its agents, by whom from the very necessities of its being it must act if it acts at all, keep within the limits of their authority. Not only so, but such a corporation may successfully interpose the plea of ultra vires; that is, set up as a defense its own want of power under its charter or constituent statute to enter into a given contract or to do a given act in violation or excess of its corporate power and authority. The cases asserting these principles are numerous and uniform; some of the more important and striking ones need only be cited. City of Albany v. Cunliff, 2 N. Y. (2 Comst.) 165, reversing 2 Barb. (N. Y.) 190; Cuyler v. Village of Rochester, 12 Wend. (N. Y.) 165; Hodges v. City of Buffalo (4th of July appropriation), 2 Denio (N. Y.) 110; Halstead v. City of New York, 3 N. Y. (3 Comst.) 430; Martin v. City of Brooklyn, 1 Hill (N. Y.) 545; Boom v. City of Utica, 2 Barb. (N. Y.) 104; Cornell v. Town of Guilford, 1 Denio (N. Y.) 510; Boyland v. City of New York, 3 N. Y. Super. Ct. (1 Sandf.) 27; Dill v. Inhabitants of Wareham, 48 Mass. (7 Metc.) 438; Vincent v. Inhabitants of Nantucket, 66 Mass. (12 Cush.) 103; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; Parsons v. Inhabitants of Goshen, 28 Mass. (11 Pick.) 396; Hood v. City of Lynn, 83 Mass. (1 Allen) 103; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Mitchell v. City of Rockland, 41 Me. 363, 66 Am. Dec. 252; Anthony v. Inhabitants of Adams, 42 Mass. (1 Metc.) 284; Western College of Homeopathic Medicine v. City of Cleveland, 12 Ohio St. 375; Tippecanoe County Com'rs v. Cox,

visions are held mandatory, not directory merely.[746] Charter or statutory provisions may require the execution or approval of contracts on behalf of public corporations by certain designated officials[747] with countersignatures,[748] and those executed by oth-

6 Ind. 403; Inhabitants of Congressional Tp. No. 11 v. Weir, 9 Ind. 224; Smead v. Indianapolis, P. & C. R. Co., 11 Ind. 104; Brady v. City of New York, 20 N. Y. 312; Appleby v. City of New York, 15 How. Pr. (N. Y.) 428; Estep v. Keokuk County, 18 Iowa, 199, and cases cited by Cole, J.; Clark v. Polk County, 19 Iowa, 248."

McGillivray v. District Tp. of Barton, 96 Iowa, 629; Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608; City of New Orleans v. Tulane Educational Fund's Adm'rs, 46 La. Ann. 861; City of Baltimore v. Eschbach, 18 Md. 282. "Although a private agent acting in violation of specific instructions, yet within the scope of a general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise. The city commissioner upon whose determination to grade and pave the contract was made was the public agent of a municipal corporation, clothed with duties and powers specially defined and limited by ordinances bearing the character and force of public laws, ignorance of which can be presumed in favor of no one dealing with him on matters thus conditionally within his official discretion. For this reason, the law makes a distinction between the effect of the acts of an officer of a corporation and those of an agent for a principal in common cases. In the latter the extent of authority is necessarily known only to the principal and the agent, while in the former, it is a matter of record in the books of the corporation or of public law."

Vose v. Deane, 7 Mass. 280; City of St. Louis v. Gorman, 29 Mo. 593; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495. "Even where a general discretionary power is conferred upon a public officer, his authority is not to be deemed an unlimited one. It is restricted to the evident purposes of the authority and to what is known as a sound and legal discretion excluding all arbitrary capricious inquisitorial and operative acts." See, also, United States v. Kirby, 74 U. S. (7 Wall.) 486; United States v. Doherty, 27 Fed. 730; Rose v. Stuyvesant, 8 Johns. (N. Y.) 333; and In re Holbrook, 99 N. Y. 539.

[746] Zottman v. City & County of San Francisco, 20 Cal. 96; Los Angeles Gas Co. v. Toberman, 61 Cal. 199; White v. City of New Orleans, 15 La. Ann. 667. But one contracting with a municipal corporation should not suffer by an accidental omission from the specifications of a contract on the part of the corporation. City of Baltimore v. Eschbach, 18 Md. 276; Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; Beyer v. Town of Crandon, 98 Wis. 306; City of Austin v. McCall (Tex. Civ. App.) 67 S. W. 192. An inseparable contract bad in part cannot be enforced.

[747] City of Superior v. Norton, 63 Fed. 357; City of Chicago v. Peck,

ers, or not in the manner required by law, will be invalid.[749] The law does not countenance dishonesty or a willful avoidance of an obligation entered into in good faith and following substantially the conditions required,[750] but it does require a strict observance of those provisions intended to protect public property from private plunder.[751] Such charter or statutory provisions may require as preliminary to the execution of a contract requiring the exependiture of moneys, the certification of the cost or necessity of a proposed work of public improvement;[752] a resolution or ordinance of the council or legislative body authorizing the execution of the contract with its attendant expenditures;[753] the appropriation by the council or the possession

196 Ill. 260; State v. Helms, 136 Ind. 122. A contract informally executed will bind the township, not the trustee personally. City of Baltimore v. City of New Orleans, 45 La. Ann. 526; McKissick v. Mt. Pleasant Tp., 48 Mo. App. 416; Morley v. Weakley, 86 Mo. 451; Wayne County Sup'rs v. Wayne Circ. Judge, 111 Mich. 33; City of Philadelphia v. Gorgas, 180 Pa. 296; Lee v. City of Racine, 64 Wis. 231.

[748] City of Superior v. Norton (C. C. A.) 63 Fed. 357; State v. Ramsey County Dist. Ct., 32 Minn. 181. A delay in countersigning until after the performance of the work under the contract held an informal irregularity.

[749] Bowditch v. Superintendent of Streets of Boston, 168 Mass. 239. The indorsement of the word "approved" upon a letter regarding the letting of a contract for a sewer construction held not the "written authority" of the mayor required by law.

[750] City of Goldsboro v. Moffett, 49 Fed. 213; Reeves v. Grottendick, 131 Ind. 107; Town of Gosport v. Pritchard, 156 Ind. 400; City of Indianola v. Jones, 29 Iowa, 282; Fehler v. Gosnell, 99 Ky. 380; Attorney-General v. City of Detroit, 55 Mich. 181; State v. Ramsey County Dist. Ct., 32 Minn. 181; Eyermann v. Provenchere, 15 Mo. App. 256; City of New York v. Kent, 5 N. Y. Supp. 567; Moore v. City of New York, 73 N. Y. 238; Swift v. City of New York, 83 N. Y. 528; Portland Lumbering & Mfg. Co. v. City of East Portland, 18 Or. 21, 6 L. R. A. 290.

[751] Westbrook v. Middlecoff, 99 Ill. App. 327.

[752] Smith v. City of New York, 5 Hun (N. Y.) 237; Continental Const. Co. v. City of Altoona (C. C. A.) 92 Fed. 822; Butler v. City of Detroit, 43 Mich. 552; City of Harrisburg v. Shepler, 190 Pa. 374.

[753] Carskaddon v. City of South Bend, 141 Ind. 596; Town of Gosport v. Pritchard, 156 Ind. 400. Where the power to contract is discretionary not legislative, the passage of an ordinance is immaterial. Seibrecht v. City of New Orleans, 12 La. Ann. 496; Booth v. City of Shreveport, 29 La. Ann. 581. Inaction of the council regarded as equivalent to consent. Goddard v. City of Lowell, 179

of moneys for the purpose required;[754] the letting of the contract only upon public advertisement for a designated time,[755] or other provision concerning the time of its execution;[756] the making of the contract in duplicate;[757] a petition by a required number of residents or property owners who are to be affected by the proposed contract,[758] or the approval of the contract by the electors.[759] Where a resolution or ordinance is necessary to the existence of the authority to contract, charter or statutory provisions which may require its special record are not unreasonable.[760] The object of all such requirements is the protection of the public corporation. Under certain conditions, the violation of charter or statutory provisions in regard to the time, the manner, or the mode of the making of a contract, may be waived by it, and then the other party to the contract cannot urge such disregard or violation of law for the purpose of defeating the contract.[761]

Mass. 496. If the ordinance, the basis of a contract, is illegal, it destroys the authority for the contract and none exists.

State v. Noyes, 25 Nev. 31, 56 Pac. 946. A public corporation cannot make a contract by tentative purchases made during the pendency of injunction proceedings relating to the subject-matter.

[754] City of Indianapolis v. Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; City of Defiance v. Council of Defiance, 23 Ohio Circ. R. 96; Assessors of Philadelphia v. Philadelphia Com'rs, 3 Brewst. (Pa.) 333; City of Harrisburg v. Shepler, 190 Pa. 374, 42 Atl. 893.

[755] Woodruff v. Berry, 40 Ark. 251; McEwen v. Gilker, 38 Ind. 233; Kretsch v. Helm, 45 Ind. 438; People v. Croton Aqueduct Board, 26 Barb. (N. Y.) 240; Mitchell v. City of Milwaukee, 18 Wis. 92.

[756] Burke v. Turney, 54 Cal. 486; People v. Village of Yonkers, 39 Barb. (N. Y.) 266. Construing a provision concerning the opening of contractors' proposals. Cowen v. Village of West Troy, 43 Barb. (N. Y.) 48; Miller v. Pearce, 2 Cin. R. (Ohio) 44; Hall v. City of Chippewa Falls, 47 Wis. 267.

[757] Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769. Such a requirement held, however, ineffectual to render a contract void otherwise good.

[758] Seward v. Town of Liberty, 142 Ind. 551, 42 N. E. 39; Smith v. City of Syracuse, 17 App. Div. 63, 44 N. Y. Supp. 852; Larned v. City of Syracuse, 17 App. Div. 19, 44 N. Y. Supp. 857.

[759] Merrill R. & Lighting Co. v. City of Merrill, 80 Wis. 358.

[760] Com. v. Marshall, 69 Pa. 328. The failure to record, however, was here held a technical defect only which the legislature might remedy.

[761] In re Worcester County (C. C. A.) 102 Fed. 808.

§ 261. Presumption of legality.

As the law presumes in the absence of circumstances showing or proving the contrary that the authority to contract exists, it also presumes that all contracts are valid, not void upon their face and apparently formally executed as required by law.[762] A contract, having a legal character different from that of a negotiable instrument and affording at all times a reasonable opportunity for investigation and contest in the case of equities existing between the parties, acts or instruments of a questionable legal character, are regarded not as acts or instruments of a higher character but as contracts and they will be construed and enforced accordingly.[763]

[762] City of Lincoln v. Sun Vapor Street-Light Co. (C. C. A.) 59 Fed. 756. "It was within the scope of the general powers of the city to make a contract for lighting its streets. If the contract was void because the city failed to make the necessary appropriation for it, it was so because the city itself failed to exercise its power in a lawful manner; and this was an affirmative defense. The contract, signed by the proper officers of the city, and sealed with the corporate seal, the motion passed by the city council approving and ratifying it, and the fact that the company had placed its lamps and posts in the city streets, lighted them, and received compensation therefor from the city, under the contract, for 14 months, without objection to its validity, are at least presumptive evidence that the contract was made in a lawful manner and the powers of the city properly exercised. A contract of a corporation formally executed by its proper officers by authority of its governing board, and not in itself necessarily beyond the scope of its powers, will, in the absence of proof to the contrary, be presumed to have been made by lawful authority. Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter. Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412; Bank of U. S. v. Dandridge, 12 Wheat. (U. S.) 64; Omaha Bridge Cases, 10 U. S. App. 98; Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 620."

Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 50 Pac. 1025; City of Baxter Springs v. Baxter Springs Light & Power Co., 64 Kan. 591, 68 Pac. 63; Henning v. Stengel, 23 Ky. L. R. 1793, 66 S. W. 41, 67 S. W. 64; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251, 5 So. 848; Bryson v. Johnson County, 100 Mo. 76, 13 S. W. 239.

[763] City & County of San Francisco v. Beideman, 17 Cal. 443. A provision made by a public corporation relative to its debts not regarded even as a contract. Louisiana & N. W. R. Co. v. Police Jury of Bienville Parish, 48 La. Ann. 331; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835.

§ 262. Mode of contracting; letting to the lowest bidder.

It is to the advantage of a public corporation equally with a person or a private corporation, that all services rendered or supplies furnished should be upon the most economical basis with due regard to their character and existing conditions or circumstances. In this respect, at least, competition may have a most beneficial effect and it is therefore a favorite and customary requirement relative to contracts of all public corporations, by law, to provide that public notice shall be given by advertisement, or otherwise,[764] of services or supplies needed, inviting bids; the con-

[764] Donnelly v. Marks, 47 Cal. 187; California Imp. Co. v. Moran, 128 Cal. 373. The advertisement in order to render the proceedings valid should be printed in the newspaper designated by legal authority.

City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324; Dooley v. Town of Sullivan, 112 Ind. 454; Wiles v. Hoss, 114 Ind. 371; Nicholasville Water Co. v. Board of Councilmen of Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; Davenport v. Kleinschmidt, 6 Mont. 502; Taylor v. Common Council of Lambertville, 43 N. J. Eq. 107; Common Council of Trenton v. Shaw, 49 N. J. Law, 638; Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452; Tifft v. City of Buffalo, 7 N. Y. Supp. 633; Harlem Gaslight Co. v. City of New York, 33 N. Y. 309; Swift v. City of New York, 83 N. Y. 528. A contract for the removal of garbage is not within the provisions of § 91, c. 335, Laws of 1873, Charter of New York City, which requires for expenditures of more than $1,000 the letting of a contract, after advertisement, to the lowest bidder.

Mutual Life Ins. Co. v. City of New York, 144 N. Y. 494; Public Ledger Co. v. City of Memphis, 93 Tenn. 77; People v. Gleason, 121 N. Y. 631. The court in this case held in passing upon a charter provision requiring such contracts similar to that suggested in the text "This provision was inserted in the charter undoubtedly to prevent favoritism, corruption, extravagance and improvidence in the procurement of work and supplies for the city and it should be so administered and construed as fairly and reasonably to accomplish this purpose. If contracts for work and supplies can be arbitrarily let, subject to no inquiry or impeachment, to the highest instead of the lowest bidder under such a provision as is found in this charter and substantially in the charters of all the other cities of the state, then the provision can always be nullified and will serve no useful purpose." See, also, Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348; City Imp. Co. v. Broderick, 125 Cal. 139; Dement v. Rokker, 126 Ill. 174; City of Baltimore v. Keyser, 72 Md. 106; Whitney v. Common Council of Hudson, 69 Mich. 189; City of Springfield v. Weaver, 137 Mo. 650; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 L. R. A. 279; Dickinson v. City of Poughkeepsie, 75 N. Y.

tract for the securing of which to be let to the lowest or the lowest responsible bidder as the statute may provide.[765] The authority for such procedure is usually found in some explicit provision of statutory or charter authority.[766] These requirements as a rule are considered not directory in their nature but mandatory[767] and a failure to comply with them will render any

65; Lyddy v. Long Island City, 104 N. Y. 218; Frame v. Felix, 167 Pa. 47, 27 L. R. A. 802.

McQuillin, Mun. Ord. § 553. "On principle it would seem that as the primary duty of the public officers is to secure the most advantageous contract possible for accomplishing the work under their direction, any regulation which prevents the attainment of this end is invalid. A law demanding competition in the letting of public work is intended unquestionably to secure unrestricted competition among bidders and hence, where the effect of an ordinance is to prevent or restrict competition and thus increase the cost of the work it violates manifestly such law and is void as are all proceedings had thereunder. It may be further observed that, according to the judicial view so far declared, all such ordinances are void on the constitutional ground of discrimination."

[765] Fitzgerald v. Walker, 55 Ark. 148; City Imp. Co. v. Broderick, 125 Cal. 139, 57 Pac. 776; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324. A contract made for a supply of electric light with the only electric light company in the city not held void because not secured after advertisement for bids as required by the city ordinance.

State v. Barlow, 48 Mo. 17; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; City of Marshall v. Rainey, 78 Mo. App. 416; Moynahan v. Birkett, 81 Hun, 395, 31 N. Y. Supp. 293; Lilienthal v. City of Yonkers, 6 App. Div. 138, 39 N. Y. Supp. 1037. It is not necessary that the question which is the most favorable bid should be immediately considered after the submission of proposals.

People v. Coler, 35 App. Div. 401, 54 N. Y. Supp. 785. The opening of bids by the secretary instead of the officer designated by law to perform such duty renders the proceedings void.

Baum v. Sweeny, 5 Wash. 712. A contract should be awarded to the lowest qualified bidder though but one bid made.

[766] Electric Light & Power Co. v. City of San Bernardino, 100 Cal. 348; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co., 9 Neb. 339. The words "work" or "improvement" as used in the statute do not apply to a supply of gaslight. Jones v. City of Seattle, 19 Wash. 669. See, also, the cases cited generally under this section.

[767] Worthington v. City of Boston, 152 U. S. 695. A city is bound by a contract made by its water board without first advertising for proposals by bidders as required by an ordinance of the city where it was made by special authority to the city council and mayor.

Zottman v. City & County of San Francisco, 20 Cal. 96; City Imp.

contract otherwise good, void and therefore incapable of enforcement.[768] Public officials cannot in this respect willfully disregard the plain terms of the law. But irregularities or informalities in the submission of bids will not generally invalidate them where there has been a substantial compliance with the provisions of the law or ordinance authorizing such action.[769]

§ 263. Acceptance of bids.

That legal authority for the contract exists after the public advertisement or invitation for proposals suggested in the preceding section, it may be necessary for the officials in charge to take official action upon the proposals submitted and to make a public record of such action.[770] It is usually held that, without the exe-

Co. v. Broderick, 125 Cal. 139; Whitney v. Common Council of Hudson, 69 Mich. 189; St. Louis Quarry & Const. Co. v. Von Versen, 81 Mo. App. 519; People v. Buffalo County Com'rs, 4 Neb. 150; McDermott v. Street & Water Com'rs, 56 N. J. Law, 273; McDonald v. City of New York, 68 N. Y. 23; Harley v. Mapes Reeves Const. Co., 33 Misc. 626, 68 N. Y. Supp. 191; Parr v. Village of Greenbush, 72 N. Y. 463; McCloud v. City of Columbus, 54 Ohio St. 439; City of Lancaster v. Miller, 58 Ohio St. 558; Addis v. City of Pittsburgh, 85 Pa. 379; Home Bldg. & Conveyance Co. v. City of Roanoke, 91 Va. 52, 20 S. E. 895. Such a charter requirement, however, does not prevent a city from constructing works of public improvement under direction of its own engineers and officers.

[768] Burchfield v. City of New Orleans, 42 La. Ann. 235; City of Baltimore v. Eschbach, 18 Md. 276; State v. Coad, 23 Mont. 131, 57 Pac. 1092; In re Rosenbaum, 53 Hun, 478, 6 N. Y. Supp. 184; Addis v. City of Pittsburgh, 85 Pa. 379; Breath v. City of Galveston, 92 Tex. 454, 49 S. W. 575. See, also, 5 Am. St. Rep. 442, and cases cited in preceding note.

[769] City of Baltimore v. Keyser, 72 Md. 106, 19 Atl. 706. An award held illegal where one of the bids properly filed was not considered. In re Clamp, 33 Misc. 250, 68 N. Y. Supp. 345.

[770] Pacific Bridge Co. v. Clackamas County, 45 Fed. 217; Safety Insulated Wire & Cable Co. v. City of Baltimore, 66 Fed. 140. The revocation of an acceptance will not invalidate a contract.

Main v. City of Ft. Smith, 49 Ark. 480, 5 S. W. 801. The acceptance may be indirectly made through the appointment of a superintendent on part of the city to supervise the work.

Edwards v. Berlin, 123 Cal. 544. The provisions of a statute requiring the record of official action should be followed.

Whitney v. Common Council of Hudson, 69 Mich. 189, 37 N. W. 184. In this case no bid was accepted. The council simply voted to give it to a certain person at a price much in excess of the reasonable value.

cution of a formal contract upon proof of the making of a bid and its formal acceptance made of record, an enforceable contract will exist between such public corporation and the one whose bid or proposal was accepted.[771]

§ 264. Rejection of bid.

Public officials, where authority is given may in the proposals or advertisements invite bids and reserve the full power to reject any or all submitted.[772] Where, however, the statute does not give them this discretionary power, this reservation in an advertisement calling for bids or proposals will be considered nugatory.[773]

The court said: "I cannot see how, under all the circumstances, it can be said that the common council were acting in good faith, in accordance with the charter and ordinances. * * * The law required them to let the contract to the lowest bidder, reserving the right to reject all bids. The law did not give them the right to award the contract to a person who had not bid and passing a resolution * * * did not raise contract relations with such third person. * * * The record does not show that there was any bidder whose bid was accepted; and as this was essential under the ordinance, as a basis for a valid assessment, such assessment was a nullity." Morley v. Weakley, 86 Mo. 451; Fuller v. City of Scranton (Pa.) 4 Atl. 467; Olympian-Tribune Pub. Co. v. Bryne, 28 Wash. 79, 68 Pac. 335.

[771] Safety Insulated Wire & Cable Co. v. City of Baltimore, 66 Fed. 140; Argenti v. City of San Francisco, 16 Cal. 255; Ross v. Stackhouse, 114 Ind. 200; City of Ft. Madison v. Moore, 109 Iowa, 476; Stanley v. Chosen Freeholders of Passaic County, 60 N. J. Law, 392. An accepted bidder cannot be deprived of his rights through a reasonable delay on his part in complying with the terms of the bid.

Terrell v. Strong, 14 Misc. 258, 35 N. Y. Supp. 1000; Lynch v. City of New York, 2 App. Div. 213, 37 N. Y. Supp. 798; In re Protestant Episcopal Public School, 58 Barb. (N. Y.) 161. But see the following cases to the contrary. People's Pass. R. Co. v. Memphis City R. Co., 77 U. S. (10 Wall.) 38; Dunham v. City of Boston, 94 Mass. (12 Allen) 375; Edge Moor Bridge Works v. Bristol County, 170 Mass. 528, 49 N. E. 918; Water Com'rs of Jersey City v. Brown, 32 N. J. Law, 504; State v. Noyes, 25 Nev. 31, 56 Pac. 946. So held where certain modifications were made to the original bid. Erving v. City of New York, 131 N. Y. 133.

[772] State v. City of New Orleans, 48 La. Ann. 643; Twiss v. City of Port Huron, 63 Mich. 528; State v. Rickards, 16 Mont. 145, 40 Pac. 210, 28 L. R. A. 298; Pennell v. City of New York, 17 App. Div. 455, 45 N. Y. Supp. 229; Barton v. City of Pittsburg, 4 Brewst. (Pa.) 373.

[773] But in Keogh v. City of Wil-

§ 265. Notice.

The purpose sought to be effected by the securing of bids under competition is the procurement of supplies or services as cheaply as possible. To effect this, it is necessary that the advertisement or invitation for submission of bids should be made in a public manner and for such a length of time that all desiring to bid intelligently and upon a reasonable basis may have seasonable opportunity to learn, in the first place, the needs of the corporation and the fact that bids are desired, and in the second place to acquaint themselves with the character and nature of the necessary services or supplies.[774] The time required by law may be, therefore, the essence of the proceeding, and bids let after the running of a proposal or an advertisement published for a time less than that required by law may be set aside and such contracts considered invalid and made without legal authority.[775] The notice may specify a time and a place

mington, 4 Del. Ch. 491, it is held that a bidder submitting a bid with such a provision in the proposal assents impliedly to the exercise of the reserved right. Walker v. People, 170 Ill. 410.

[774] Woodward v. Collett, 20 Ky. L. R. 1066, 48 S. W. 164; City of Augusta v. McKibben, 22 Ky. L. R. 1224, 60 S. W. 291; Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; Galbreath v. Newton, 45 Mo. App. 312.

[775] Brock v. Luning, 89 Cal. 316, 26 Pac. 972; Maxwell v. Stanislaus County Sup'rs, 53 Cal. 389; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; Belser v. Allman, 134 Cal. 399, 66 Pac. 492. Affixing of the time by the city clerk within which proposals should be made immaterial.

Harris v. Cook, 119 Cal. 454; Williams v. Bergin, 129 Cal. 461. In the absence of a record to the contrary, all prior proceedings will be presumed legal.

Benton County Com'rs v. Templeton, 51 Ind. 266; Case v. Fowler, 65 Ind. 29. An immaterial mistake in the date within which bids would be received, held immaterial where the notice was otherwise sufficient as to the time.

Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495. Where no evidence appears to the contrary, it will be presumed that notice was published the requisite number of days. The court said in part: "It is urged that the notice inviting bids for the work is not such as the law required. * * * It is admitted that this notice was published in two daily papers in Fort Dodge but whether for the requisite ten days or not does not certainly appear. There is no evidence that it was not so published; hence the presumption of the law is that it was and we must so hold." Following Jenney v. City of Des Moines, 103 Iowa, 347.

City of Baltimore v. Johnson, 62 Md. 225. The publication of a notice in one newspaper where the

where the manner in which, and the officials by whom, bids or proposals shall be opened. A trivial failure to comply with such provisions does not necessarily invalidate the proceedings at that time unless it appears that the purpose of the law to secure the most favorable bid and without collusion or bribery was defeated.[776]

ordinance requires three is insufficient. Tifft v. City of Buffalo, 7 N. Y. Supp. 633; In re Pennie, 108 N. Y. 364, 15 N. E. 611; Tifft v. City of Buffalo, 25 App. Div. 376, 49 N. Y. Supp. 489; Bradley v. Van Wyck, 65 App. Div. 293, 72 N. Y. Supp. 1034; In re Marsh, 83 N. Y. 431; Albany County Com'rs v. Chaplin, 5 Wyo. 74.

[776] Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108. "Section 5, c. 32, of the revised ordinances of the city provides that the 'advertisement for bids shall specify a time and place when and where such bids shall be opened, at which time and place such bids shall be opened by the board of public works in the presence of such persons as shall choose to attend.' The advertisement which was actually published reads as follows: 'Sealed proposals will be received at the office of the board of public works, Detroit, Michigan, until Tuesday, September 6, 1898, at 10 o'clock A. M. local time, for furnishing all labor, materials,' etc. The advertisement contains no statement that the bids will be opened at any time, or that an opportunity will be afforded to any person interested to inspect them. It is contended that this requirement of the ordinance is jurisdictional and that the proceedings based upon the advertisement which was actually published are null and void. Under the statute creating the board of public works, the details relating to the matters of public improvement rest with the board. The advertisement is subject only to the control of the board. The board is required to advertise for proposals and enter into a contract but the contract does not become valid or binding until approved by the council. The board must determine what the specifications must be. The council can approve or reject them but has nothing to do with making them. Before a contract can be entered into between the bidder and the board it must be approved by the council. The proofs show that the bids or proposals for this paving were opened in the office of the board of public works at 10 o'clock A. M., local time, on September 6, 1898, in public and in the presence of those who tendered bids; that being the time mentioned as the hour up to which bids would be received. The proofs also show that it had always been the custom of the board to open bids at the hour named. We think from this showing no one was deprived of any right and it would be a most technical rule to hold that the whole proceeding must fail, and the complainants escape payment for a valuable public improvement by which they are benefited. Whether there was a compliance with the ordinance or not, no one being harmed, the proceedings will not be set aside for that reason." People v. Coler, 35 App. Div. 401,

§ 266. Specifications of services or supplies required.

That the purpose sought through proceedings considered in the preceding and succeeding sections may be effected, it is necessary that prospective bidders shall have an opportunity to familiarize themselves with the character, quality and extent of the services, work or supplies required. To enable them to act intelligently in this respect, and to afford a uniform standard as a basis of award,[777] provisions will be found requiring specifications covering such points, either as a part of the public advertisement[778] or in detail, and on file in some office designated by law and referred to in the public advertisement or invitation for bids.[779] It is true in this respect as in others suggested

54 N. Y. Supp. 785; Roach v. City of Eugene, 23 Or. 376, 31 Pac. 825; Gilfillan v. Grier, 145 Pa. 317.

[777] Fones Hardware Co. v. Erb, 54 Ark. 645, 13 L. R. A. 353; Ertle v. Leary, 114 Cal. 238; Stansbury v. White, 121 Cal. 433, 53 Pac. 940; Dyer v. Erwin, 106 Ga. 845; Jenney v. City of Des Moines, 103 Iowa, 347; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; Packard v. Hayes, 94 Md. 233, 51 Atl. 32. A request for bids insufficient without specifications. Attorney-General v. City of Detroit, 26 Mich. 263; Detroit Free Press Co. v. State Auditors, 47 Mich. 135; Holmes v. Common Council of Detroit, 120 Mich. 226, 79 N. W. 200, 45 L. R. A. 121. The fact that specifications called for a patented article the sale of which was controlled by one dealer did not destroy the competitive character of the bidding.

People v. Buffalo County Com'rs, 4 Neb. 150; Moreland v. City of Passaic, 63 N. J. Law, 208, 42 Atl. 1058; Oakley v. Atlantic City, 63 N. J. Law, 127; Delafield v. Village of Westfield, 169 N. Y. 582, 62 N. E. 1095, affirming 41 App. Div. 24, 58 N. Y. Supp. 277; Smith v. Syracuse Imp. Co., 161 N. Y. 484, reversing 17 App. Div. 63, 44 N. Y. Supp. 852. Proposals for bids requiring a certain material furnished by one firm were void under a city charter requiring contracts to be let to the lowest bidder; the restriction as to material resulting in a destruction of competition.

Mazet v. City of Pittsburgh, 137 Pa. 548, 20 Atl. 693; Clayton v. Galveston County, 20 Tex. Civ. App. 591, 50 S. W. 737. Determining the effect of a fraudulent change in specifications for the submission of bids. Ricketson v. City of Milwaukee, 105 Wis. 591, 47 L. R. A. 685.

[778] Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274; Coggeshall v. City of Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; Windsor v. City of Des Moines, 101 Iowa, 343, 70 N. W. 214.

[779] Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397; City of Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Sexton v. City of Chicago, 107 Ill. 323; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; Dixon v. Greene County, 76 Miss. 794, 25 So. 665; Smith v. City of Syracuse, 17 App. Div. 63, 44 N. Y.

in preceding sections that a failure to comply with the provisions of the law, although they may seem trivial, will render null and void any contract based upon bids secured under such circumstances.[780] Where the law requires the advertisement or notice inviting proposals to state the extent, character and other particulars in connection with the work, supplies or services to be supplied, such specifications should be in detail.[781] The authori-

Supp. 852. The required specification should be filed a reasonable time before the time fixed for receiving bids to afford a substantial competition between bidders. Kneeland v. Furlong, 20 Wis. 460.

[780] Van Reipen v. Jersey City, 58 N. J. Law, 262; Voght v. City of Buffalo, 133 N. Y. 463; Reilly v. City of New York, 111 N. Y. 473, 18 N. E. 623; In re Merriam, 84 N. Y. 596. Where the law provides that the advertisement "shall state the nature and extent as near as possible of the works required," precise specifications are not needed so long as the advertisement complies with the provision above noted. In re Anderson, 109 N. Y. 554, 17 N. E. 209. A random "guess" under such a provision however, cannot be the basis of an award. People v. Board of Improvement, 43 N. Y. 227. The rule applies to where the specifications have been changed since the original proposal. McCloud v. City of Columbus, 54 Ohio St. 439, 44 N. E. 95.

[781] California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802. Conditions in specifications that tend to limit competitive bidding directly or indirectly are invalid.

Windsor v. City of Des Moines, 101 Iowa, 343, 70 N. W. 214; Polk v. McCartney, 104 Iowa, 567, 73 N. W. 1067. In this case the court say: "The following is Sec. 3, c. 14, acts 23d Gen. Assemb. 'Sec. 3. All such contracts shall be made by the council or the board of public works when such board shall exist, in the name of the city, and shall be made with the lowest bidder or bidders upon sealed proposals after public notice for not less than ten days in at least two newspapers of said city, which notice shall state as nearly as practicable the extent of the work, the kind of materials to be furnished, when the work shall be done and at what time the proposals shall be acted upon.' The only language in the notice that could be construed as an attempt at compliance with the prescribed notice is the following: 'Brick paving consisting of two courses of brick on sand foundation, with top filling as described on pages 9 and 10 of specifications.' In another part of the notice it appears that plans and specifications are on file in the office of the board of public works. The provisions of the law quoted are mandatory and their observance is a condition precedent to the right of the council to make contracts in pursuance of them. The notice is fatally defective. The requirements as to 'when the work shall be done' and 'what time the proposals shall be acted upon' are absolutely disregarded. There is not a reference to either in the notice, and, if the no-

dinarily as a matter of right on the part of public officials but is given them through the express terms of some existing law.[784]

veals, there were but two bidders upon the work; and of these, according to the allegation, the bid of the Canal Construction Company was in fact a bid for the excavation of the entire ditch, instead of an independent proposition upon each of the several sections as it is claimed the law requires. Here, then was the situation with which the auditor had to deal. If both bids were to be considered and treated as being for the entire work, then the Canal Construction Company bid involved the smaller aggregate expense and was 'lowest' within the ordinary meaning of that word. If both bids were to be considered and treated as being made upon each of the several sections independently, then each of the bidders was entitled to be awarded a part of the work. If, however, the bid of the Construction Company was, as alleged, a bid for the work as a whole, and therefore not entitled to consideration, then neither was entitled to the award, even though plaintiff's bid was in due form. A letting to the 'lowest' bidder implies the existence of competition, and if one of two bids be fatally informal, then the other, standing alone, is without competition and may rightfully be rejected, even though unobjectionable in form and substance."

Madison v. Harbor Board of Baltimore City, 76 Md. 395; Palmer v. Inhabitants of Haverhill, 98 Mass. 487; Elliot v. City of Minneapolis, 59 Minn. 111; Schefbauer v. Committee of Kearney Tp., 57 N. J. Law, 588; People v. King County Sup'rs, 42 Hun (N. Y.) 458; Walsh v. City of New York, 113 N. Y. 142; Com. v. Mitchell, 82 Pa. 343. An act requiring a municipal contract to be let "to the highest responsible bidder" imposes on the city authorities not only the ministerial duty to ascertain the lowest bid but the pecuniary responsibility of the bidder and his sureties and also confers a discretionary power on the public officers to grant the work to such a one as they considered would perform the contract best for the lowest amount.

American Pavement Co. v. Wagner, 139 Pa. 623. Public officials acting under such power are not personally liable to one who may be the lowest bidder but fails to be awarded the contract. See, also, as holding this last proposition the case of East River Gas Light Co. v. Donnelly, 93 N. Y. 557, where it is held that a common council acts judicially in determining which of several bodies is to be accepted and that the members thereof cannot be made liable in a civil action brought by a party who claimed that he was the lowest responsible bidder to recover damages because his bid was not accepted. The court applied the rule of the absolute immunity of judicial officers from responsibility in a civil or criminal prosecution for their action, however erroneous or even malicious.

Interstate Vitrified Brick Pav. Co. v. Philadelphia Mack Pav. Co., 164 Pa. 477. An act giving to public officials the right to award a contract to the "lowest responsible bidder" vests them with discretionary powers; the word "responsible" it

Otherwise the right to select the lowest responsible bidder might render nugatory the statute requiring competitive bids. Officials vested with the power, however, usually must award the contract to the person submitting the lowest bid in response to the invitation or proposal for the submission of bids.[785]

was held in this case included a determination not only of the financial condition of the bidder but his general capabilities including judgment and skill.

[784] Colorado Pav. Co. v. Murphy (C. C. A.) 78 Fed. 28; 37 L. R. A. 630. Such a provision not for the benefit of bidders but for the advantage and protection of taxpayers and property holders.

Riehl v. City of San Jose, 101 Cal. 442, 35 Pac. 1013; Girvin v. Simon, 116 Cal. 604; Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107. Under such authority, in case of failure of the lowest bidder to qualify, the contract may be let to the next highest bidder without readvertising.

People v. Buffalo County Com'rs, 4 Neb. 150; Schefbauer v. Committee of Kearney Tp., 57 N. J. Law, 588, 31 Atl. 454; People v. Willis, 6 App. Div. 231, 39 N. Y. Supp. 987; Gutta Percha Co. v. Stokely, 11 Phila. (Pa.) 219.

[785] Rice v. Trustees of Town of Haywards, 107 Cal. 398, 40 Pac. 551; Carter v. Kalloch, 56 Cal. 335; Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628; Dawson v. Woodhams, 11 Colo. App. 394, 53 Pac. 238; Dement v. Rokker, 126 Ill. 174. A "lowest bid" being such through the collusion of the one making the same with others who purposely refrain from bidding is not a "letting to the lowest bidder" within the meaning of the statutes or the constitution.

Vincent v. Ellis, 116 Iowa, 609, 88 N. W. 836. The determination of the lowest bidder includes the consideration of the character of the bid and the sureties offered and is a judicial and discretionary act.

State v. Shawnee County Com'rs, 57 Kan. 267, 45 Pac. 616; Neff v. Covington Stone & Sand Co., 21 Ky. L. R. 1454, 55 S. W. 697; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964; Talbot Pav. Co. v. City of Detroit, 109 Mich. 657, 67 N. W. 979. A "lowest bidder" whose bid has been rejected through the exercise of such a discretion has no right of action against a city for his prospective profits under the contract.

Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; State v. Douglas County Com'rs, 11 Neb. 484; Shaw v. City of Trenton, 49 N. J. Law, 339, 12 Atl. 902; Booth v. City of Bayonne, 56 N. J. Law, 268, 28 Atl. 381. Fraud cannot be predicated upon the fact that the lowest bid is larger than the estimated cost of the improvement made by the city officials. Kimball v. Hewitt, 2 N. Y. Supp. 697; In re Delaware & H. Canal Co., 8 N. Y. Supp. 352. Under such provision, city officials cannot permit a bidder to withdraw his bid even before they are opened.

People v. Kings County, 42 Hun. (N. Y.) 458. "It does not seem possible that the legislature intended to take from * * * the board of supervisors all discretion as to

§ 268. The same subject continued.

As stated in the preceding section, the law may give to public officials the power to reject arbitrarily all bids unless some one

the making of contracts for the people of the county. Suppose, from accident or design, it should happen that there was but one bid and that was for grossly exorbitant prices; could it be claimed that the board of supervisors must nevertheless award the contract? Such a construction would turn a statute intended for the protection of the public into an instrument of fraud and robbery."

Dickinson v. City of Poughkeepsie, 75 N. Y. 65; Davenport v. Walker, 57 App. Div. 221, 68 N. Y. Supp. 161; People v. Gleason, 121 N. Y. 631. "The claim is made on behalf of the relator that there is a conclusive presumption that the common council adjudicated that his bid was that of the lowest responsible bidder. If this claim be well founded, then provisions like that above quoted from the city charter are of little use, and they can always be effectually disregarded and violated. It is true that the common council, where there are several bidders, have jurisdiction to determine who is the lowest responsible bidder. But in order to give its action any legal effect, it must exercise its jurisdiction and make a determination based upon some facts. If it refuses to accept the lowest bid for work or supplies, there must be some facts tending to show that it is not that of a responsible bidder, or there must be, at least, some pretense to that effect. An arbitrary determination by such a body to accept the highest bid without any facts justifying it, cannot have the effect of a judicial determination, and must be denounced as a palpable violation of law."

State v. Yeatman, 22 Ohio St. 546; State v. Shelby County Com'rs, 36 Ohio St. 326. Under the Ohio law upon the failure of the lowest bidder to properly qualify, the county officials cannot be compelled by mandamus to award the contract to the next highest bidder.

State v. Marion County Com'rs, 39 Ohio St. 188; Shannon v. City of Portland, 38 Or. 382, 62 Pac. 50; Mazet v. City of Pittsburgh, 137 Pa. 548, 20 Atl. 693; Addis v. City of Pittsburgh, 85 Pa. 379; Frame v. Felix, 167 Pa. 47, 27 L. R. A. 802; Times Pub. Co. v. City of Everett, 9 Wash. 518; Goss v. State Capitol Commission, 11 Wash. 474, 39 Pac. 972; Cook v. City of Racine, 49 Wis. 243; Mueller v. Eau Claire County, 108 Wis. 304, 84 N. W. 430.

A combination of bidders for the purpose of maintaining prices will vitiate a contract let to one of their number. See McMullen v. Hoffman, 174 U. S. 639. "Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids. Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals but who in truth are secretly banded together for the purpose of obtaining contracts from public

of them is satisfactory, to select the lowest bidder or the lowest responsible bidder. The duties imposed upon officials when they

bodies such as municipal and other corporations at a higher figure than they otherwise would. Just how the fraud is to be successfully worked out by the combination, it is not necessary to show. It is enough to see what the natural tendency is. Public policy requires that officers of such corporations, acting in the interest of others, and not using the sharp eye of a practical man engaged in the conduct of his own business and not controlled by the powerful motive of self-interest, should, so far as possible and for the sake of the public whom they represent, be protected from the dangers arising out of a concealed combination and from fictitious bids. To hold contracts like the one involved in this case illegal is not to create any new rule of law for the purpose of affording the protection spoken of. It is but enforcing an old rule, and applying it to such facts as exist in this case because it naturally fits them. Its enforcement here is to but carry into effect the public policy upon which the rule itself is founded."

Dement v. Rokker, 126 Ill. 174; Jennings County Com'rs v. Verbarg, 63 Ind. 107; Woodward v. Collett, 20 Ky. L. R. 1066, 48 S. W. 164; People v. Stephens, 71 N. Y. 527; City of Wichita Falls v. Skeen, 18 Tex. Civ. App. 632; Ray v. Mackin, 100 Ill. 246. See, also, Spelling, Trusts & Monopolies, § 74. "It is often necessary, in the administration of Federal and State, as well as county and city, governments, to have constructed public works and improvements of various kinds and secure other unofficial services. It is just to all the citizens that they should have a fair and equal opportunity to secure contracts for the same, and expedient that the public, considered as an entirety, should have the benefit of competition in securing the performance of public work, furnishing supplies, at sale of public property, etc. No more effective method of attaining these ends can be devised than by opening such matters to competitive bids upon public notice. This being the case, it is self-evident that any secret combination, whatever its form, the effect of which is to abate honest rivalry or prevent fair competition, should be condemned as violative of public policy, and that no one should be allowed to predicate an enforceable right upon such an agreement." Citing Gibbs v. Smith, 115 Mass. 592; Hannah v. Fife, 27 Mich. 172; Boyle v. Adams, 50 Minn. 255, 52 N. W. 860, 17 L. R. A. 96; Atcheson v. Mallon, 43 N. Y. 147; Woodworth v. Bennett, 43 N. Y. 273; King v. Winants, 71 N. C. 469; James v. Fulcord, 5 Tex. 513; Allen v. Stephanus, 18 Tex. 658; Carrington v. Caller, 2 Stew. (Ala.) 175; Woodruff v. Berry, 40 Ark. 251; Hunter v. Pfeiffer, 108 Ind. 197. "Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued. The statute under which free turnpikes or gravel roads are constructed, requires contracts for their construction to be let to the lowest and best

are required by the provisions of the law to let the contract "to the lowest bidder" are ministerial or clerical in their character,[786] and ordinarily they can be compelled to perform them as in the case of the nonperformance of other duties of a similar nature upon their failure or neglect.[787] Where, however, the power is given them to arbitrarily reject all bids or award the contract to the lowest responsible bidder, the duties imposed are not simply ministerial but discretionary and deliberative.[788] The courts will not, therefore, interfere with or restrain the action of the public authorities from letting contracts to one who is not the lowest bidder unless it appears that they have acted corruptly or not in good faith.[789] As stated repeatedly in cases pass-

bidder, and that all bids shall be sealed when filed. If the courts should lend any countenance to such a contract of partnership as that disclosed in the complaint, in either aspect in which it is presented, the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other, and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder."

[786] Kelly v. City of Chicago, 62 Ill. 279; State v. Ohio Penitentiary, 5 Ohio St. 234.

[787] Crabtree v. Gibson, 78 Ga. 230, 3 S. E. 10. Where the work has been performed, however, by one who is not the lowest bidder, the sole remedy of a taxpayer is to prevent the contractor receiving more than the amount of the lowest bid.

[788] See, also, authorities cited in the next note. Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285; Gunning Gravel & Pav. Co. v. City of New Orleans, 45 La. Ann. 911, 13 So. 182; Oliver v. Gale, 182 Mass. 39, 65 N. E. 415. But public authorities have no power to make the contract with one who is not the lowest responsible bidder.

Attorney General v. City of Detroit, 26 Mich. 263; State v. McGrath, 91 Mo. 386, 3 S. W. 846; McGovern v. Board of Public Works of Trenton, 57 N. J. Law, 580, 31 Atl. 613. Such discretion must be exercised, however, in good faith. McDermott v. Street & Water Com'rs of Jersey City, 56 N. J. Law, 273; Terrell v. Strong, 14 Misc. 258, 35 N. Y. Supp. 1000; People v. Mooney, 4 App. Div. 557, 38 N. Y. Supp. 495; Gilmore v. City of Utica, 131 N. Y. 26; Reuting v. City of Titusville, 175 Pa. 512.

[789] Colorado Pav. Co. v. Murphy (C. C. A.) 78 Fed. 28, 37 L. R. A. 630; Riehl v. City of San Jose, 101 Cal. 442, 35 Pac. 1013; Stanley-Taylor Co. v. City & County of San Francisco Sup'rs, 135 Cal. 486, 67 Pac. 783; Kelly v. City of Chicago, 62 Ill. 279; People v. Kent, 160 Ill. 655; Madison v. Harbor Board of Baltimore City, 76 Md. 395, 25 Atl. 337; Connors v. Stone, 177 Mass. 424, 59 N. E. 71; Clapton v. Taylor, 49 Mo. App. 117; Anderson v. Public Schools of St. Louis, 122 Mo. 61, 26 L. R. A. 707; Chandler v.

ing upon this point, the duty imposed to award a contract to the lowest responsible bidder involves a determination of other ques-

Board of Education of Detroit, 104 Mich. 292, 62 N. W. 370; Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452; Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587; McGovern v. Board of Public Works of Trenton, 57 N. J. Law, 580; Wilson v. Inhabitants of Trenton, 60 N. J. Law, 394; Moran v. Village of White Plains, 58 Hun, 608, 12 N. Y. Supp. 61; People v. Gleason, 121 N. Y. 631, 25 N. E. 4; Terrell v. Strong, 14 Misc. 258, 35 N. Y. Supp. 1000. Fraud or lack of good faith is not established by award to one not the lowest bidder. Bradley v. Van Wyck, 65 App. Div. 293, 72 N. Y. Supp. 1034; State v. Hermann, 63 Ohio St. 440; Findley v. City of Pittsburgh, 82 Pa. 351; Douglas v. Com., 108 Pa. 559; Potts v. City of Philadelphia, 195 Pa. 619. The rule in the text applies to where but one bid was made.

In re McCain, 9 S. D. 57, 68 N. W. 163. "The right of Gossage to have his bid accepted must be sustained, if at all, upon the theory that he was the lowest responsible bidder and that it was the official duty of the board to award him the contracts. Assuming that he was the lowest responsible bidder, it was the duty of the board to award him the contracts did the court have authority to require the board to do so by mandamus? We believe the better doctrine is that the duties of officers intrusted with the letting of contracts to the lowest responsible bidder are not duties of a merely ministerial nature, but involve the exercise of such a degree of official discretion as to place them beyond the control of the courts by mandamus. It was not the duty of the board to accept the Gossage bid. Its duty consisted in carefully and honestly considering the terms of each bid, the needs of the county, the responsibility of each bidder; and upon the facts, as its members believed them to exist, the board was bound to act. The duty of determining what bids were the lowest, all things considered and who was or was not a responsible bidder, belonged to the board. It was a duty confided to its honest judgment and sound discretion. This discretion did not rest with the circuit court. It should have been slow to interfere with its exercise by the officers especially intrusted therewith. We very confidently reach the conclusion that the decision of the board, within the limits of the discretion conferred upon it, should not be controlled by the courts. The court might have required the board to proceed and consider the bids, but it did not have authority to command the board to award the contracts to any particular bidder."

Brown v. City of Houston (Tex. Civ. App.) 48 S. W. 760; State v. Board of Education of Fond du Lac, 24 Wis. 683. "Where proposals are made and bids put in in the usual manner in letting contracts for public work, the lowest bidder has no such fixed absolute right that he is entitled to a mandamus to compel the letting of the contract to him after his bid has been in fact, rejected, and the contract awarded

tions than financial; the business judgment and capacity, skill, responsibility and reputation of the various bidders and the quality of the materials proposed to be supplied are all to be taken into consideration.[790]

§ 269. Discretionary power of officials to award to lowest bidder or otherwise.

The law placing in the hands of certain public officials the power to contract for and on behalf of the public corporation they represent may provide as suggested in preceding sections for the awarding of contracts, only after public competition. In many cases, however, the power is vested in public officials in their discretion to either let contracts for the furnishing of supplies, rendition of services or the construction of public works after competitive bidding,[791] or to award such contracts directly to those who, in their judgment, will best perform them.[792] Where such discretion is granted, the duties performed

to another. The statutory provision requiring the contract in such cases to be let to the lowest bidder is designed for the benefit and protection of the public and not of the bidders."

[790] Kelly v. City of Chicago, 62 Ill. 279; People v. Kent, 160 Ill. 655; Johnson v. Sanitary Dist. of Chicago, 163 Ill. 285; Connolly v. Board of Chosen Freeholders of Hudson County, 57 N. J. Law, 286, 30 Atl. 548. But an opportunity should be given to all bidders to furnish information upon all points pertinent to a determination of the question of who is the lowest responsible bidder.

Ryan v. City of Paterson, 66 N. J. Law, 533, 49 Atl. 587; Wilson v. Inhabitants of Trenton, 60 N. J. Law, 394; State v. Hamilton County Com'rs, 20 Ohio St. 425; Reuting v. City of Titusville, 175 Pa. 512. The court said: "The Act of 23rd May, 1874, directing contracts to be awarded to the 'lowest responsible bidder,' has twice been before us for construction. In each it was held that the word 'responsible,' as used in the act, applies not to pecuniary ability only, but also to judgment and skill. The duties thereby imposed on the city authorities are not merely ministerial, limited to ascertaining whose bid is the lowest, and the pecuniary responsibility of the bidder and his sureties; the act calls for an exercise of duties and powers which are deliberate and discretionary."

[791] Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274. See § 268, supra.

[792] Worthington v. City of Boston, 152 U. S. 695; reversing 41 Fed. 23; Henry County Com'rs v. Gillies, 138 Ind. 667, 38 N. E. 40; Yarnold v. City of Lawrence, 15 Kan. 126; Elliot v. City of Minneapolis, 59 Minn. 111, 60 N. W. 1081; Detwiller v. City of New York, 46 How. Pr. (N.

by officials are of a discretionary character and so long as the legislative branch of the sovereign relies upon their integrity and business judgment, the courts will not interfere when they refuse to ask for public and competitive bidding.[793] Laws requiring the purchase of supplies or the awarding of contracts to be made upon public competition may apply not to all supplies, services or work but only to those the cost of which may be in excess of a certain sum[794] or which may be specifically named.[795] As to all other supplies, services or work, the law

Y.) 218; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; Gleason v. Dalton, 28 App. Div. 555, 51 N. Y. Supp. 337; Meyers v. City of New York, 58 App. Div. 534, 69 N. Y. Supp. 529; In re Emigrant Industrial Sav. Bank, 75 N. Y. 388; Beers v. Dalles City, 16 Or. 334, 18 Pac. 835.

[793] Cummins v. City of Seymour, 79 Ind. 491; Kingsley v. City of Brooklyn, 5 Abb. N. C. (N. Y.) 1.

[794] Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167; Long v. Boone County, 36 Iowa, 60; Packard v. Hayes, 94 Md. 233, 51 Atl. 32; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526; Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581; State v. Saline County Com'rs, 19 Neb. 253; State v. Cunningham, 37 Neb. 687; Tullock v. Webster County, 46 Neb. 211; Office Specialty Mfg. Co. v. Washoe County, 24 Nev. 359, 55 Pac. 222; Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452, 31 Atl. 625; Kean v. City of Elizabeth, 35 N. J. Law, 351; Phelps v. City of New York, 112 N. Y. 216, 19 N. E. 408; Walton v. City of New York, 26 App. Div. 76, 49 N. Y. Supp. 615; People v. Scannell, 69 App. Div. 400, 75 N. Y. Supp. 122; City of Waco v. Chamberlain (Tex. Civ. App.) 45 S. W. 191.

[795] Verdin v. City of St. Louis, 131 Mo. 26; Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 48 L. R. A. 285. Repairs to a street held a public work to be let by contract to the lowest responsible bidder pursuant to a St. Louis charter, art. 6, § 27.

City of Trenton v. Shaw, 49 N. J. Law, 638, 10 Atl. 273. A contract for the supply of rubber hose not included within a provision requiring "that all contracts for doing work furnishing materials for any improvement" shall be given to the lowest bidder.

Curley v. Chosen Freeholders of Hudson County, 66 N. J. Law, 401, 49 Atl. 471. The law requiring the advertisement of a contract for the lowest bidder applies only to original construction of public highways, not to work and materials necessary for their regular repair. State v. Kern, 51 N. J. Law, 259; City of Camden v. Ward, 67 N. J. Law, 558, 52 Atl. 392; Farmers' Loan & Trust Co. v. City of New York, 17 N. Y. Super. Ct. (4 Bosw.) 80; In re Leeds, 53 N. Y. 400; Greene v. City of New York, 60 N. Y. 303; People v. Van Nort, 65

will not apply and public officials having charge of such affairs can, in their discretion, ask for public and competitive bids or directly award contracts.[796]

§ 270. Change of contract.

Where contracts are required to be let after competitive bidding, changes cannot be made in them or in the specifications after the publication of the advertisement calling for bids. To permit such a course would, undoubtedly, defeat the purpose of the law requiring competition.[797] If it is found necessary

Barb. (N. Y.) 331. Such a law does not apply to estimates for patented articles or modes of work.

Walsh v. City of Columbus, 36 Ohio St. 169; Silsby Mfg. Co. v. City of Allentown, 153 Pa. 319. There is no necessity for competitive bidding when the article to be supplied is a patented one, the sale of which is controlled by one firm.

Com. v. Mercer, 165 Pa. 1. The law does not apply to extra work in transcribing official books, etc., such services can be rendered by clerks at a fixed salary instead of being let to the lowest bidder. Spangler v. Gallagher, 182 Pa. 277. A soldier's monument is not a public building within the statutes requiring the erection of county buildings to be let to the lowest bidder. Kilvington v. City of Superior, 83 Wis. 222, 18 L. R. A. 45.

[796] McGowan v. Ford, 107 Cal. 177, 40 Pac. 231. The law does not apply to a contract for repairs, alterations or improvements in the court house and grounds. City of Chicago v. McKechney, 91 Ill. App. 442; Williams v. Henry County Com'rs, 27 Ind. App. 207, 60 N. E. 1099; Stone v. Dispatch Pub. Co., 21 Ky. L. R. 1473, 55 S. W. 725. The rule applied to printing the proceedings of the General Assembly from day to day for use of its members. Reid v. Trowbridge, 78 Miss. 542, 29 So. 167; Mason v. Cranbury Tp., 68 N. J. Law, 149, 52 Atl. 568; Oakley v. Atlantic City, 63 N. J. Law, 127; Kingsley v. City of Brooklyn, 5 Abb. N. C. (N. Y.) 1; Westmoreland County's Appeal, 164 Pa. 355.

[797] Manly Bldg. Co. v. Newton, 114 Ga. 245, 40 S. E. 274; Osburn v. City of Lyons, 104 Iowa, 160, 73 N. W. 650. "The first objection to the validity of the tax urged is that the requirements of the law with respect to letting contracts for such improvements were not fulfilled. * * * The portion of the notice thus called in question is as follows: '* * * Sealed bids or proposals are hereby invited by the undersigned city clerk of Lyons City, in said County, to be filed with him at his office in said city on or before the 5th day of July, A. D., 1893, at 7:30 o'clock P. M. for grading, curbing, guttering and paving improvement districts numbers two and three, in said city according to the resolution and ordinance of said city, heretofore adopted ordering the same, and the specifications of the city engineer of said city on

after the publication of the proposal to change the character or the quality of the materials desired or the extent of the work, the proceedings then pending should be abandoned and a new proposal advertised for public bids based upon the changed conditions.[798]

§ 271. Parties to the proceedings.

Bidders are under no obligation to give the municipality the benefit of personal information or knowledge,[799] and, on the

file in the office of the said city clerk, which, together with his estimate of approximate quantities, are hereby included in this notice and made a part hereof.' The statute also required the notice to state when the work should be done but the notice in question did not refer to that subject. It is true that the paving resolution referred to in the notice, fixed November 1, 1893, as the time for completing the work, but about four months after the notice was published and the bids were received and six months before either of them was accepted, the council changed the time for completing the work to the 1st day of April, 1894, as already stated. The bid of the Lyons Construction Company was not accepted until the 1st day of May, 1894. At that time the company was not under any obligation on account of the original bid, to do the work for the reason its bid was based on the proposition that the work should be completed on the date first fixed, and the bid of its competitor was founded upon the same proposition. No bid had been asked nor made to do the work during a period of time which would expire on the second date fixed, and the contract as finally made, was entered into without notice and without the competition for which the statute provides."

Wickwire v. City of Elkhart, 144 Ind. 305, 43 N. E. 216; Campau v. City of Detroit, 106 Mich. 414, 64 N. W. 336; Rens v. City of Grand Rapids, 73 Mich. 237; Nash v. City of St. Paul, 11 Minn. 174 (Gil. 110); People v. Board of Imp. of Union St., 43 N. Y. 227; People v. Van Nort, 65 Barb. (N. Y.) 331; Dickinson v. City of Poughkeepsie, 75 N. Y. 65.

[798] City of Chicago v. McKechney, 91 Ill. App. 442. New bids are not required where the change does not involve any material departure from the original plans and specifications. State v. Birkhauser, 37 Neb. 521. The material for paving may be selected under Consol. St. 1891, § 2373, after bids have been submitted. See, also, as holding that plans and specifications need not be filed before advertising for bids under special charter provisions, Reno Water, Land & Light Co. v. Osburn, 25 Nev. 53, 56 Pac. 945; Highland County Com'rs v. Rhoades, 26 Ohio St. 411. A lowest bidder cannot be compelled to sign a contract differing in material respects from that called for by the advertisement asking for bids.

[799] McMullen v. Hoffman, 75 Fed.

other hand, the municipality is not required to impart information to bidders which may have been acquired personally by public officials representing such corporation.[800] The right does not exist to arbitrarily reject bids of certain bidders who, at the time of the submission of their bids, may not be in a position to perform the work or furnish the supplies required. Public officials have no right to pass adversely upon their power to perform a contract before the proper time or before it has been made.[801] A mistake in a bid if notice is promptly given and the bid withdrawn will relieve the bidder.[802]

§ 272. Conditions imposed.

To prevent fraud or collusion and to secure bids from those who are financially responsible and will perform the contract

547. It is said in the opinion "nor is it a ground of complaint that the parties had the advice of capable engineers and were able to know beforehand that the work could be done for $416,000 and leave a profit of at least $80,000. They were under no moral obligation to lower their bid because of the information they had procured nor in any manner to give the city the benefit of the knowledge they had acquired at their own expense, even if the means of such knowledge was not within the city's reach."

[800] Cleaveland v. Richardson, 132 U. S. 318; Sanitary Dist. of Chicago v. Ricker, 91 Fed. 833. "'Caveat emptor' is a just maxim and equally the contractor must stand guard for his own interests when making his agreements."

[801] State v. Milligan, 3 Wash. St. 144; Berry v. City of Tacoma, 12 Wash. 3, 40 Pac. 414. "The testimony shows that it was the determination of the council not to take into consideration or to investigate the qualifications of any of the bidders other than the owners of newspapers; and if, as we think, the law is that the council should exercise its discretion in investigating the qualifications of bidders and they arbitrarily dismissed from such investigation or consideration a certain class of bidders, then, certainly, as to that class, the council has refused to exercise its discretion. * * * This we think was error."

[802] Moffett, Hodgkins & Clarke Co. v. City of Rochester, 178 U. S. 373; reversing (C. C. A.) 91 Fed. 28. The court said in the same case in 82 Feb. 255: "If the defendants are correct in their contention there is absolutely no redress for a bidder for public work no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. * * * If through an error of his clerk he has agreed to do work worth $1,000,000 for $10 he must be held to the strict letter of his contract while equity stands by with folded hands and sees him driven into bankruptcy."

should it be awarded them, in the public advertisement calling for bids, conditions are valid that bidders must furnish a bond with good and sufficient securities for the proper performance of the work upon the awarding of the contract,[803] or that a certain deposit must accompany their bid to be forfeited in case the award is made to them and they refuse to execute a contract based upon such award.[804] A condition is also valid requiring the giving of a bond with good and sufficient securities by the contractor conditioned upon keeping the work in good repair for the period specified,[805] or requiring proof of satisfactory use of the material offered.[806]

[803] Arkansas Democrat Co. v. Press Printing Co., 57 Ark. 322, 21 S. W. 586. On account of defect in title, statute not enforced in this particular case.

Larned v. Maloney, 19 Ind. App. 199, 49 N. E. 278; City of St. Paul v. Butler, 30 Minn. 459. The rule is also true in regard to a statutory provision requiring a bond from the contractor "that he shall pay all just claims for all labor performed or material furnished for or on account of said contract as aforesaid as they shall become due."

Mackey v. Columbus Tp., 71 Mich. 227, 38 N. W. 899; May v. City of Detroit, 2 Mich. N. P. 235; Carey v. City of East Saginaw, 79 Mich. 73, 44 N. W. 168. Where, however, the charter provides "for good and sufficient security as required by said board," the failure to furnish such will be immaterial.

Gibson v. Owens, 115 Mo. 258; Barrett v. Ocean City, 62 N. J. Law, 588, 41 Atl. 946; Smith v. City of New York, 10 N. Y. (6 Seld.) 504; Walsh v. City of New York, 113 N. Y. 143; State v. Board of Education of Delaware County, 42 Ohio St. 374; Philadelphia & R. R. Co. v. Waterman, 54 Pa. 337; Mutchler v. City of Easton, 148 Pa. 441.

[804] Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N. E. 1085; Robinson v. Board of Education of Chicago, 98 Ill. App. 100; Robling v. Pike County Com'rs, 141 Ind. 522; Coggeshall v. City of Des Moines, 78 Iowa, 235; Flemming v. Jersey City (N. J. Law) 42 Atl. 845; Erving v. City of New York, 131 N. Y. 133; Selpho v. City of Brooklyn, 158 N. Y. 673, 52 N. E. 1126, affirming 5 App. Div. 529, 39 N. Y. Supp. 520; Kinsella v. City of Auburn, 54 Hun (N. Y.) 634; Walsh v. City of New York, 55 N. Y. Super. Ct. (23 J. & S.) 535; Mutchler v. City of Easton, 148 Pa. 441; Cotter v. Casteel (Tex. Civ. App.) 37 S. W. 791. Where, however, the conditions required in the contract are more onerous than noted in the advertisement calling for bids, the deposit will not be forfeited upon a failure of the successful bidder to execute the contract.

[805] Forsyth County v. Gwinnett County, 108 Ga. 510, 33 S. E. 892. A statutory provision requiring a bond is mandatory, and in no way can it be treated simply as a matter of form and directory.

[806] Berghoffen v. City of New York, 31 Misc. 205, 64 N. Y. Supp. 1082. The court said: "It does not

§ 273. Contracts; how made; in writing.

The statutory authority for the making of a contract by a public corporation may require that all contracts to be valid and binding upon the corporation must be in writing[807] or the provision may apply to such contracts as call for the expenditure of public moneys in excess of a certain sum. These provisions are usually considered valid, and contracts not made in accordance with them cannot be enforced although[808] in many instances

seem to me that the provision requiring a bidder who has not done work in this city to show some locality where pavement of such material as he proposes to use has been laid can be said to be unfair, unreasonable or unjust. The affidavits read on the part of the defendants show that as soon as the commissioner of highways came into office he called to his aid the engineers of his department and imposed upon them the responsibility of formulating rules which should safeguard the rights of the city in that respect, and as a result of the combined judgment of those engineers, the provisions which are now made the subject of attack in this action were adopted. * * * In the case at bar, * * * the restrictive provision which is complained of by the plaintiff is a provision which will enable the commissioner of highways to ascertain whether the bidder is competent from experience in other localities to perform his contract; in other words it is a provision which would be general in character, and be uniform throughout all the boroughs in the city, and yet which would, as far as possible, protect the interests of the city in regard to asphalt paving. * * * Under these circumstances, I do not think that it can be fairly argued that the action of the commissioner of highways was illegal or fraudulent."

[807] Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043; Schwiesau v. Mahon, 110 Cal. 543; Frick v. City of Los Angeles, 115 Cal. 512; Milburn v. Glynn County Com'rs, 112 Ga. 160, 37 S. E. 178; Aurora Water Co. v. City of Aurora, 129 Mo. 540, 31 S. W. 946. The right to supply a city with water being granted by ordinance, its passage and acceptance in writing by a person is a sufficient compliance with the statutory provision that all contracts should be in writing. Maupin v. Franklin County, 67 Mo. 327.

[808] Rice v. Plymouth County, 43 Iowa, 136; Starkey v. City of Minneapolis, 19 Minn. 203 (Gil. 166); Basshor v. City of St. Paul, 26 Minn. 110. "City ordinance No. 18 prohibits the controller from auditing or approving any claims for purchases made for the fire department, unless such purchases were made upon the written order of the committee on fire department, a copy of which order shall be transmitted to the controller with the account for the purchases. The effect of all this is—First, that no one except the common council or some one acting under its direction, (as, for instance, the committee of fire-department) has any authority to purchase

when supplies are furnished under a contract afterwards held invalid because of this reason, the party furnishing such supplies or materials can recover the same or for the same in the proper proceedings.[809] The early rule which existed independent of statutory or charter provisions was to the effect that public corporations being artificial persons could only act under seal and in writing even where the act or instrument was a simple contract. This rule has been modified to such an extent that the seal is scarcely ever required to give validity to corporate acts.[810]

fire-apparatus; second, that the committee on fire-department can make such purchases only by a written order; and third, that a purchase made otherwise than by the council, or some one acting under its direction, (as for instance, the committee on fire-department) or one made by such committee otherwise than by written order, is unauthorized, and does not bind the city. Such purchase is not only simply unauthorized, as made without authority, but it is void because made in direct contravention of the city charter and ordinance, and, therefore, prohibited to be made."

Bridges v. Clay County Sup'rs, 58 Miss. 817; Crutchfield v. City of Warrensburg, 30 Mo. App. 456; Inhabitants of Schell City v. L. M. Rumsey Mfg. Co., 39 Mo. App. 264; Savage v. City of Springfield, 83 Mo. App. 323 (Such a contract cannot be ratified); Woolfolk v. Randolph County, 83 Mo. 501; Bryson v. Johnson County, 100 Mo. 76; Aurora Water Co. v. City of Aurora, 129 Mo. 540. "The passage of an ordinance granting a person the right to supply water to the city, its approval by the voters and its sufficient acceptance by such person in writing, is sufficient compliance with Rev. St. § 3157, requiring contracts with municipal corporations to be in writing."

Jersey City Water Com'rs v. Brown, 32 N. J. Law, 504; Condon v. Jersey City, 43 N. J. Law, 452; Chapman v. City of Brooklyn, 40 N. Y. 372; Argus Co. v. City of Albany, 55 N. Y. 495; Dougherty v. Borough of Norwood, 196 Pa. 92; Willoughby v. City of Florence, 51 S. C. 462; Arnott v. City of Spokane, 6 Wash. 442.

[809] Crump v. Colfax County Sup'rs, 52 Miss. 107; North River Elec. Light & Power Co. v. City of New York, 48 App. Div. 14, 62 N. Y. Supp. 726. A contract for the supply of electric light fully performed by the contractor can be enforced by him.

La France Fire Engine Co. v. City of Syracuse, 33 Misc. 516, 68 N. Y. Supp. 894. The article itself can be recovered by the seller from the city in the proper action. Nicholson v. Guardians of Bradfield Union, L. R. 1 Q. B. 620.

[810] Wade v. City of New Bern, 77 N. C. 460; Austin v. Guardians of Bethnal Green, L. R. 9 C. P. 91.

§ 274. How made; orally.

Where, however, there is no express provision requiring contracts or certain contracts to be made in writing, the usual rule applies that where the power to contract exists, such contract may be made orally as well as in writing, subject, of course, to the rules of law based upon the statute of frauds or those relating to the general law of contracts.[811]

§ 275. By whom made.

In preceding sections, the invalidity of a contract made by a public corporation the result of want of authority or legal power has been discussed, but granting this, the further principle is suggested that a public corporation being an artificial person can only act through its agents specially authorized. The principles creating and regulating the relations existing between principal and agent differ in their application to officers or agents of a public corporation as distinguished from such representatives either of private corporations or natural persons. A public corporation being merely a governmental agent and organized for the pecuniary advantage of its members or officials is restricted and limited in the exercise of its powers in every way. The legal principle cannot be too often repeated that a public

[811] Brush Elec. Light & Power Co. v. City Council of Montgomery, 114 Ala. 433, 21 So. 960; Bluthenthal v. Town of Headland, 132 Ala. 249, 31 So. 87. The violation of a law prohibiting the sale of liquors upon credit will prevent a recovery although they have been used by the city, to whom sold. Construing Acts 1898-99, p. 108, § 9.

Montgomery County v. Barber, 45 Ala. 237; City of Selma v. Mullen, 46 Ala. 411; Halbut v. Forrest City, 34 Ark. 246; Maher v. City of Chicago, 38 Ill. 266; Town of New Athens v. Thomas, 82 Ill. 259; City of Logansport v. Dykeman, 116 Ind. 15; City of Indianola v. Jones, 29 Iowa, 282; Duncombe v. City of Ft. Dodge, 38 Iowa, 281; De Board v. Town of Bowling Green, 45 Ky. (6 B. Mon.) 229; Frankfort Bridge Co. v. City of Frankfort, 57 Ky. (18 B. Mon.) 41; Booth v. City of Shreveport, 29 La. Ann. 581; Carey v. City of East Saginaw, 79 Mich. 73, 44 N. W. 168; Tucker v. City of Virginia, 4 Nev. 20; Argus Co. v. City of Albany, 55 N. Y. 495. See this case as defining what constitutes a note or memorandum in writing within the meaning of the statute of frauds.

Wade v. City of New Bern, 77 N. C. 460. An ordinance, resolution or vote accepting a proposal if signed by the parties, is not sufficient to take it out of the statute of frauds. Dunlap v. Erie Water Com'rs, 151 Pa. 477.

corporation is not bound by acts of its agents coming within the apparent scope of their power and authority. Their authority to act must be explicit and direct that the corporation be bound.[812] There are found therefore many contracts made or attempted to be made by public officials held invalid which, if executed on behalf of a private corporation or a natural person, would be enforced. The power of public officials to bind a corporation in the making of a contract or of the corporation itself to contract, is closely scrutinized, and unless the same clearly appears, its existence will not be presumed.[813]

A public corporation is an organization of a greater or less degree of complexity; each of the different branches or departments having for its purpose the exercise, control and management of certain governmental powers or duties. As exercising such powers on behalf of the corporation will be found certain designated officials who, by law, are given the right to perform certain prescribed duties. Contracts made by officials concerning matters which do not come within the scope of duties thus specified or for which authority does not exist cannot be enforced. This doctrine is most emphatically applied in connection with those acts involving the expenditure of public moneys.[814]

[812] See authorities cited in § 260. Milford School Town v. Zeigler, 1 Ind. App. 138; Whitney v. City of New Haven, 58 Conn. 450; Seibrecht v. City of New Orleans, 12 La. Ann. 496; Damon v. Inhabitants of Granby, 19 Mass. (2 Pick.) 345. A committee duly authorized to superintend the construction of a public building have the implied power to make all necessary contracts in connection with its erection.

Hunneman v. Inhabitants of Grafton, 51 Mass. (10 Metc.) 454; Mahon v. Luzerne County, 197 Pa. 1.

[813] Johnson v. Common Council of Indianapolis, 16 Ind. 227; Plummer v. Kennedy, 72 Mich. 295, 40 N. W. 433; Owen v. Hill, 67 Mich. 43; Adams v. Dignowity, 8 Tex. Civ. App. 201, 28 S. W. 373. The authority of a committee appointed by a city council to sell some of the city's property will be presumed.

[814] Intendant & Town Council of Livingston v. Pippin, 31 Ala. 542. Where discretionary authority, however, exists, no objection to the mode of accomplishing the result can be availed of as a defense to an action on the contract. Neosho County Com'rs v. Stoddart, 13 Kan. 207; City of Baltimore v. Reynolds, 20 Md. 1; Butler v. City of Charlestown, 73 Mass. (7 Gray) 12; White v. City of New Orleans, 15 La. Ann. 667; Cuming County Com'rs v. Tate, 10 Neb. 193; Dey v. Jersey City, 19 N. J. Eq. (4 C. E. Green) 412; City of Philadelphia v. Philadelphia & R. R. Co., 88 Pa. 314.

authority to execute contracts otherwise legal and which will be binding upon the public corporation; with respect to duties incapable of delegation this, however, cannot be done.[820]

§ 277. Contracts made by departments.

The power to contract with reference to a particular matter may be granted by authority of law to special departments having charge of a specific branch of government. Their right to bind a corporation is then limited to those matters over which they are thus given control. Contracts made by them affecting expenditures of other departments of government or questions over which they have no control or a questionable one are not

[820] Hill v. City of Indianapolis, 92 Fed. 467. A contract of a board of public works, made without authority, can be subsequently ratified by the city council. The ratification in such case will be considered equivalent to authority originally given.

Town of Mt. Vernon v. Patton, 94 Ill. 65; State v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041; Worthington v. City of Covington, 82 Ky. 265; Keller v. Wilson, 90 Ky. 350; Brackett v. City of Boston, 157 Mass. 177.

Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116. Unless such delegation of authority has been made, the implied power to modify a contract is not possessed by the city controller. City of Burlington v. Dennison, 42 N. J. Law, 165; Board of Finance v. Jersey City Com'rs, 55 N. J. Law, 230.

Hackett v. Rockingham County, 52 N. H. 617. A delegation of authority, it was held here, did not authorize the expenditure of money. In re Roberts, 25 Hun (N. Y.) 371; Francis v. City of Troy, 74 N. Y. 338. The delegation of authority may be found in the city charter. Dickerson v. Peters, 71 Pa. 53; Reuting v. City of Titusville, 175 Pa. 512; A. H. Andrews & Co. v. Curtis, 2 Tex. Civ. App. 678; Beal v. City of Roanoke, 90 Va. 77, 17 S. E. 738. Where the authority to contract is delegated to several subcommittees or persons, the contract to be valid must be concurrently made by all.

[821] Ballard Pavement Co. v. Mandel, 2 McArthur (D. C.) 351; Boston Elec. Co. v. City of Cambridge, 163 Mass. 64, 39 N. E. 787; Chittenden v. City of Lansing, 120 Mich. 539, 79 N. W. 797. "Under the charter the city council determines whether it will build a public building. The board then procures plans and specifications and reports them with an estimate of cost, to the council. Bids are advertised for but before a contract can be made it must be authorized by the council. In this case the council authorized a contract to be made binding it to pay $108,000 for the construction of a building according to certain plans and specifications. The board of public works cannot bind the city by an agreement to increase the contract price. We are not cited to any case upholding such power. If this arrangement binds the city, then there is no limit to the power

valide or binding. This principle applies to boards of public work 46 N. Y. education,[822] so called, police,[823] water, aqueduct,[824] or

of the board to make changes in material and construction at the public expense. We feel that this is a hard case and that there is a moral obligation on the part of the city to pay for this extra which the public would be slow to forgive a private person for disregarding but we have not the power to give relief."

[822] Leonard v. Long Island City, 65 Hun, 621, 20 N. Y. Supp. 26; Purcell v. Long Island City, 91 Hun, 271, 36 N. Y. Supp. 290; Heughes v. Board of Education of Rochester, 37 App. Div. 180, 55 N. Y. Supp. 799.

[823] Tucker v. Common Council of Grand Rapids, 104 Mich. 621, 62 N. W. 1013. "It is not claimed that any statute authorizes sheriffs or prosecuting officers to make contracts which shall bind counties for the board of persons who may be thought important witnesses in pending cases. Such officers may sometimes assume the responsibility of incurring expenditures in attempts to convict felons which the board of supervisors may in their discretion allow but the courts cannot compel it unless the claim is for services which the statute authorizes and provides for. * * * The statute authorizes payment to a sheriff for extraordinary services at the discretion of the board and this discretion is not reviewable though action may be compelled by mandamus where the right and amount is fixed by statute. * * * Is the matter different because the contract was made by the board of police commissioners? This board is a statutory one. Not only must it be said on general principles that it can have no powers to contract unless prescribed by law but the charter of Grand Rapids provides that: 'Said board shall not be authorized to incur any indebtedness, nor enter into any contract * * * unless specially authorized so to do by a majority vote of all the members elect to the common council of said city.' * * * The absolute prohibition of unauthorized contracts must control. The council may properly allow claims for unusual or unexpected services where such claims are meritorious but we cannot compel it in this instance."

[824] Mann v. Town of Rochester, 29 Ind. App. 12, 63 N. E. 874; Morton v. Power, 33 Minn. 521. In this case section five of the act under discussion provides that "all contracts and engagements, acts and doings of the said board within the scope of their duty or authority shall be obligatory upon and be in law as binding as if done by the common council of said city." Speaking of this the court said: "In our judgment, these provisions of the act referred to clearly invest the board of water commissioners with authority to make contracts with reference to the waterworks in its own name as the representative of the city. * * * The contracts which the board is thus authorized to make, though made in the name of the board, are made by it as the representative and agent of the city, and therefore, they are, in substance and effect, made with as well as for the city."

United New Jersey R. & Canal Co. v. National Docks & N. J. J. C. R. Co., 57 N. J. Law, 523, 31 Atl. 981; O'Brien v. City of New York, 15 N.

street commissioners[825] or special boards,[826] and also to such various organizations or departments composed of more than one official and having in charge the affairs of a township, town,[827] city,[828]

Y. Supp. 520; O'Brien v. City of New York, 65 Hun, 112, 19 N. Y. Supp. 793; People v. Van Nort, 64 Barb. (N. Y.) 205; Fleming v. Village of Suspension Bridge, 92 N. Y. 368; Nicoll v. Sands, 131 N. Y. 19; Village of Ft. Edward v. Fish, 156 N. Y. 363; Dunlap v. Erie Water Com'rs, 151 Pa. 477.

[825] Dyer v. Hudson, 65 Cal. 374; City of Hartford v. Hartford Elec. Light Co., 65 Conn. 324. The board of street commissioners under the city charter have power to contract with the light company for the supply of electricity, the contract extending over a period of five years. People v. Town, 1 App. Div. 127, 37 N. Y. Supp. 864. The employment of counsel by a board of street commissioners held unauthorized.

People v. Waring, 5 App. Div. 311, 39 N. Y. Supp. 193, distinguishing Lynch v. City of New York, 2 App. Div. 213, 37 N. Y. Supp. 798. The court in part say: "The sole question is whether the contract which is to be made by the commissioner must be approved in its entirety by the board of estimate and apportionment so that they have substantially a veto upon the power of the commissioner to execute the contract after the proposals have been issued, the bids made and the successful bidder named in his bid accepted. * * * The act of the board of estimate and apportionment in approving a form of contract before the proposals were made and the bid accepted was not one which was within its duty, nor did it bind either the commissioner in framing the proposals or the board in its final action upon the perfected contract. The street cleaning commissioner was still at liberty in putting out his proposals to include within them such terms and conditions as he saw fit; and although he may have been willing to adopt, so far as it should go, the form of contract which had theretofore been approved by the board of estimate and apportionment for purposes of convenience, still it was not an act which the law required, or even authorized, the board of estimate and apportionment to do in such a way as to bind it when the final contract came up to be presented to it for approval; and that it did so cannot be regarded as of importance here."

[826] Lower Kings River Reclamation Dist. v. McCullah, 124 Cal. 175; New York, N. H. & H. R. Co. v. Wheeler, 72 Conn. 481; Sampson v. City of Boston, 161 Mass. 288, 37 N. E. 177; State v. McCardy, 62 Minn. 509, 64 N. W. 1133; City of Cleveland v. State Bank, 16 Ohio St. 236; City of Findlay v. Pendleton, 62 Ohio St. 80.

[827] Town of Rocky Hill v. Hollister, 59 Conn. 434; Davenport v. Inhabitants of Hallowell, 10 Me. (1 Fairf.) 317; Inhabitants of Industry v. Inhabitants of Starks, 65 Me. 167; Farr v. Inhabitants of Ware, 173 Mass. 403, 53 N. E. 898; Murdough v. Inhabitants of Revere, 165 Mass. 109; Jenney v. Mussey Tp., 121 Mich. 229, 80 N. W. 2; White v. Town of Ellisburgh, 18 App. Div. 514, 45 N. Y. Supp. 1122; Mills v.

Village of East Syracuse, 20 Misc. 651, 46 N. Y. Supp. 1080; Paine v. Caldwell, 65 N. C. 488; Cook v. Deerfield Tp., 64 Pa. 445. Road supervisors are the authorized agents of a township for the general repair of the roads.

Van Antwerp v. Dell Rapids Tp., 5 S. D. 447, 59 N. W. 209, affirming 3 S. D. 305, 53 N. W. 82, and citing Salem Mill Dam Corp. v. Ropes, 23 Mass. (6 Pick.) 23; Inhabitants of Fourth School Dist. v. Wood, 13 Mass. 193; Loker v. Inhabitants of Brookline, 30 Mass. (13 Pick.) 343; Hooper v. Emery, 14 Me. 375; Cheeney v. Inhabitants of Brookfield, 60 Mo. 53; Carlton v. Bath, 22 N. H. (2 Fost.) 559; Van Sicklen v. Town of Burlington, 27 Vt. 70. The court say: "Towns being corporations possessing only limited powers, it seems to have been the policy of all the courts to give to those powers a strict construction. As we have seen, no duty is imposed upon the town, or its board of supervisors to survey the highways therein. The contention of counsel that this court cannot say, from the record in this case, that the survey may not have been for some purpose recognized by the statute is untenable, as neither of the surveys provided for by the statute is for highways but for proposed townships and cart roads; and the complaint seems to have been drawn and the case tried, argued and submitted, upon the theory that the survey contracted for was a re-survey of all the highways of the township, including the state and county roads. We are of the opinion, therefore, that this is the only theory upon which the case can now be considered, from the record in this case. Taking the view that neither the electors of the town nor the township board of supervisors possessed the power to employ the plaintiff to make the surveys for which he seeks by this action to recover payment, we must hold the contract alleged, unauthorized and void."

[828] Kraft v. Board of Education of Weehawken Tp., 67 N. J. Law, 512, 51 Atl. 483; Coward v. City of Bayonne, 67 N. J. Law, 470, 51 Atl. 490. Where the authority exists a contract will not be set aside unless the evidence clearly shows fraud or an abuse of discretionary powers. The court say: "The board of education of Bayonne is not required by the charter of that city, or by any general law of the state, to advertise for proposals for doing any of the work which they are authorized to do. The only provision is in section ninety-one of the charter and although the board did actually advertise for proposals, they were not required to award the contract to the lowest bidder and the award of the contract to a higher or the highest bidder or to some one who did not bid at all, would not in the absence of bad faith and corruption, be regarded as such an abuse of that discretion conferred upon them by law as to justify interference by this court. * * * And after the bids had been received there was nothing to prevent the board from so modifying the specifications that a better contract might be made for the city. The board had the right to purchase for use in the building, any article or apparatus of a specific make, even though it was patented or the product of an exclusive manufacture. Nor do we think that a statement in the advertisement that only union labor should be employed, such a

county,[829] and variously designated throughout the United States as "Village," or "Town trustees," "Township supervisors," "Se-

condition not being contained in the contract, would vitiate the contract. The evidence fails to disclose that the board of education had any motive in awarding the contract, other than that of making the best bargain possible for the city. We think that they exercised the discretion conferred upon them by law with good faith and honesty."

Oakley v. Atlantic City, 63 N. J. Law, 127. A municipal body may award a contract independently of the proposals it has invited if it has regard to the public good.

[829] Times Pub. Co. v. Alameda County, 64 Cal. 469; Wood v. Bangs, 1 Dak. 179. Injunction will not lie to restrain the issue of warrants in payment for work done in constructing county buildings where the contract of construction was in excess of the authority of the County Commissioners.

Wheeler v. Wayne County, 31 Ill. App. 299, affirmed 132 Ill. 599; Gillett v. Logan County Sup'rs, 67 Ill. 256; Kitchell v. Union County Com'rs, 123 Ind. 540, 24 N. E. 366; Burnett v. Abbott, 51 Ind. 254. County commissioners have no power to enter into contracts for boring oil wells.

Conner v. Franklin County Sup'rs, 57 Ind. 15; Harrison County Com'rs v. Byrne, 67 Ind. 21; Grant County Com'rs v. Bradford, 72 Ind. 455. A contract is ultra vires made by a County board for the purpose of aiding in the arrest, prosecution or conviction of a person charged with crime.

Clinton County Com'rs v. Hill, 122 Ind. 215; Perry County Com'rs v. Gardner, 155 Ind. 165. A contract by the county commissioners for an investigation of the treasurer's books is valid.

Fouke v. Jackson County, 84 Iowa, 616, 51 N. W. 71; Leavenworth County Com'rs v. Keller, 6 Kan. 510; Mitchell v. Leavenworth County Com'rs., 18 Kan. 188. The authority of the county commissioners extends to the hiring of guards for the county jail.

Dixon v. Greene County, 76 Miss. 794, 25 So. 665. A delegation of authority to modify a contract cannot be made by the county board of supervisors.

George v. Cleveland, 53 Neb. 716; Keith County v. Ogalalla Power & Irr. Co., 64 Neb. 35, 89 N. W. 375; Clarke v. Lyon County, 7 Nev. 75. A partial allowance by county commissioners of a claim presented to them does not of itself amount to a ratification of the contract. Orleans County Sup'rs v. Bowen, 4 Lans. (N. Y.) 24. The power to contract usually includes the power to compromise.

Chosen Freeholders of Hudson County v. Layton, 28 N. J. Law (4 Dutch.) 244; Schenck v. City of New York, 67 N. Y. 44. The implied authority exists in a board of supervisors to purchase articles necessary to properly equip and furnish a county jail.

People v. Livingston County Sup'rs, 68 N. Y. 114. An invalid contract because not duly approved by the county authorities may be subsequently ratified by the legislature.

Cleveland Cotton Mills v. Cleveland County Com'rs, 108 N. C. 678; Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406; Broomall's Appeal,

lectmen," "County commissioners," "Commissioners of highways," "Board of supervisors," or other designated names. It is also true that such authority when exercised must be in the manner, at the time and in the place, prescribed by law.[830]

75 Pa. 173; Polly v. Hopkins, 74 Tex. 145, 11 S. W. 1084; Russell v. Cage, 66 Tex. 428. Authority for the performance of discretionary acts cannot be delegated.

Smith v. Barron County Sup'rs, 44 Wis. 686. "The contract set out is incomplete, uncertain and executory." "If then, the board of supervisors authorized the making of the contract set out in the complaint (and we must assume they did for the purposes of this demurrer) they acted without authority, and, as we think, in violation of law and their action in this respect was ultra vires and void and conferred no authority whatever upon the county treasurer to enter into this contract. It follows as a clear legal consequence from this position, that the county treasurer received of the plaintiff the two hundred dollars paid or advanced upon this illegal contract, not as a public officer, or in his official character as county treasurer acting within the scope of his authority so as to bind the county and make this money so received a part of the funds of the county in his hands as such treasurer, but as an individual and private person; and he alone is liable (if he is liable) to refund it upon the failure of the consideration or for the want of it." Putney Bros. Co. v. Milwaukee County, 108 Wis. 554, 84 N. W. 822.

That County Commissioners or Supervisors generally have the power to employ counsel on behalf of the county in litigation affecting it, see the following cases: Hopkins v. Clayton County, 32 Iowa, 15; Thacher v. Jefferson County Sup'rs, 18 Kan. 182; Garrard County Ct. v. McKee, 74 Ky. (11 Bush) 234; Talbott v. Parish of Iberville, 24 La. Ann. 135; Ellis v. Washoe County, 7 Nev. 291; People v. Delaware County Sup'rs, 45 N. Y. 196; State v. Franklin County Com'rs, 21 Ohio St. 648.

[830] Babcock v. Goodrich, 47 Cal. 488. A contract signed by the chairman of the board of supervisors and entered into by the board on behalf of the county is binding.

Arapahoe County Com'rs v. Clapp, 9 Colo. App. 161, 48 Pac. 157. A mere resolution of county commissioners without specifying a definite length of time does not create a contract of employment.

Matthews v. Cook County Com'rs, 87 Ill. 590. Action taken by county commissioners not in accordance with established rules of proceeding, not binding on the county.

Potts v. Henderson, 2 Ind. 327. Contract should be made by the county at a regular session. Cass County Com'rs v. Ross, 46 Ind. 404; McCabe v. Fountain County Com'rs, 46 Ind. 380. There must be a concurrent act of a majority of the county commissioners at a legal session to constitute a valid contract.

Curtis v. City of Portland, 59 Me. 483. A contract should be signed by a majority of a committee having in charge street improvements. Fullam v. Inhabitants of West Brookfield, 91 Mass. (9 Allen) 1;

§ 278. Made by public officials.

The principle stated in the preceding sections that the authority of an agent or official of a public corporation is special, limited and restricted in its character, applies in the making of contracts to individual officers of such corporations having charge of some designated branch of public service, whether such officers represent political organizations dignified by the name of "City"[831] or those designated as a "Township," or "Town,"[832] "County,"[833] "Highway,"[834] "School district,"[835] or other subordinate political public quasi corporation.[836]

Jefferson County Sup'rs v. Arrighi, 54 Miss. 668; Merrick County Com'rs v. Batty, 10 Neb. 176. Contracts by the county commissioners should be made at the county seat.

McDonald v. City of New York, 68 N. Y. 23, 23 Am. Rep. 144; Parr v. Village of Greenbush, 72 N. Y. 463. A contract stating that it was made by the president and trustees of the "corporation," sufficient in its terms to bind the village. Dunlap v. Erie Water Com'rs, 151 Pa. 477. Where, however, the statute does not designate the manner or the place of making contracts by such a board, those made by them as a board although not at their office are valid.

[831] Buckman v. Ferguson, 108 Cal. 33, 40 Pac. 1057; Ede v. Cogswell, 79 Cal. 278; Town of Madison v. Newsome, 39 Fla. 149; Michigan City v. Leeds, 24 Ind. App. 271, 55 N. E. 799; Robinson v. City of St. Louis, 28 Mo. 488; Campbell v. City of St. Louis, 71 Mo. 106; Randall v. Van Vechten, 19 Johns. (N. Y.) 60, 10 Am. Dec. 193; Horgan v. City of New York, 21 App. Div. 405, 47 N. Y. Supp. 580; Barnes v. City of Philadelphia, 3 Phila. (Pa.) 409; Providence v. Miller, 11 R. I. 272; Willoughby v. City of Florence, 51 S. C. 462, 29 S. E. 242; Indiana Road Mach. Co. v. City of Sulphur Springs (Tex. Civ. App.) 63 S. W. 908; Bardsley v. Sternberg, 17 Wash. 243.

[832] Boyd v. Black School Tp., 123 Ind. 1, 23 N. E. 862; State v. Fountain County Com'rs, 147 Ind. 235, 46 N. E. 525. A township is not liable for the hire of a conveyance used by a township trustee in the performance of his official duties.

Jackson Tp. v. Home Ins. Co., 54 Ind. 184; Strafford v. Welch, 59 N. H. 46; De Forest v. Walters, 78 Hun, 611, 28 N. Y. Supp. 831; Paine v. Caldwell, 65 N. C. 488; Somerset Tp. v. Parson, 105 Pa. 360; Hunkins v. Town of Johnson, 45 Vt. 131.

[833] Price v. Chosen Freeholders of Passaic County, 96 Fed. 174; Dickerson Hardware Co. v. Pulaski County, 55 Ark. 437; Frandzen v. San Diego County, 101 Cal. 317, 35 Pac. 897; Babcock v. Goodrich, 47 Cal. 488; Barnard v. Sangamon County, 91 Ill. App. 98; Brown v. Bartholomew County Com'rs, 5 Ind. App. 75, 31 N. E. 811. The rule applied to a contract for the publication of the county's annual financial report.

Carroll County Com'rs v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; Hamilton County Com'rs v. Webb, 47 Kan. 104; People v.

§ 279. The ratification of an illegal contract.

A contract may, because of some irregularity or informality in the manner or time of its execution, be illegal because defective and, therefore, incapable of enforcement. Such a contract, the authorities hold, may be ratified either by an acceptance of the benefits of the contract by the public corporation,[837] by the sub-

Cortland County Sup'rs, 58 Barb. (N. Y.) 139; People v. Cayuga County Sup'rs, 22 Misc. 616, 50 N. Y. Supp. 16; Fornoff v. Nash, 23 Ohio St. 335; Olympian-Tribune Pub. Co. v. Byrne, 28 Wash. 79, 68 Pac. 335; Hoffman v. Chippewa County, 77 Wis. 214, 45 N. W. 1083, 8 L. R. A. 781. "The answer shows that the plaintiffs filed with the county clerk an offer, in writing, to print the delinquent list in their paper for three cents for each description, and tendered a bond for the faithful performance of the work. On the good faith of this offer or proposition the clerk doubtless entered into the contract which he made with them. * * * For reasons satisfactory to the legislature, it saw fit to prescribe the amount of compensation (thirty cents a description) which the printer should receive for the service. Whether it was thought that this compensation would secure better service, or greater faithfulness in the execution of the work, we cannot tell. It is sufficient to say that the law is so enacted and the courts must conform to it."

[834] Crabtree v. Gibson, 78 Ga. 230; Bean v. Inhabitants of Hyde Park, 143 Mass. 245; McDonald v. City of New York, 1 Hun (N. Y.) 719; Huggans v. Riley, 51 Hun (N. Y.) 501; Reilly v. City of Albany, 112 N. Y. 30; Davis v. Wayne County Ct., 38 W. Va. 104.

[835] Honey Creek School Tp. v. Barnes, 119 Ind. 213; Roseboom v Jefferson School Tp., 122 Ind. 377; Briggs v. Borden, 71 Mich. 87.

[836] Sanitary Dist. of Chicago v. Ricker (C. C. A.) 91 Fed. 833, reversing 89 Fed. 251. The principle applied to the chief engineer of the Sanitary District of Chicago.

[837] Frick v. Town of Brinkley, 61 Ark. 397; Argenti v. City of San Francisco, 16 Cal. 255; Sacramento County v. Southern Pac. Co., 127 Cal. 217; Town of Rocky Hill v. Hollister, 59 Conn. 434; McGuire v. Rapid City, 6 Dak. 346; National Tube-Works Co. v. City of Chamberlain, 5 Dak. 54; City of Conyers v. Kirk, 78 Ga. 480; Jackson County v. Hall, 53 Ill. 440; Frederick v. People, 83 Ill. App. 89; City of Chicago v. McKechney, 91 Ill. App. 442; City of Chicago v. Norton Mill. Co., 196 Ill. 580; Carroll County Com'rs v. O'Connor, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; City of Logansport v. Dykeman, 116 Ind. 15; Hard v. City of Decorah, 43 Iowa, 313; Cooper v. City of Cedar Rapids, 112 Iowa, 367, 83 N. W. 1050; Mound City v. Snoddy, 53 Kan. 126, 35 Pac. 1112; Pigrau v. Guillotte, 14 La. Ann. 297; Brown v. Inhabitants of Winterport, 79 Me. 305, 9 Atl. 844; Fisher v. Inhabitants of School Dist. No. 17, 58 Mass. (4 Cush.) 494; Inhabitants of Melrose v. Hiland, 163 Mass. 303, 39 N. E. 1031; Roberts v. City of Cambridge, 164 Mass. 176, 41 N. E. 230; Aurora Water Co. v.

sequent performance of those acts and conditions required by law in the execution of a legal contract,[838] or by acquiescence

City of Aurora, 129 Mo. 540; Lancaster v. Armstrong, 56 Mo. 298; Devers v. Howard, 88 Mo. App. 253; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Lyman v. City of Lincoln, 38 Neb. 694; New Jersey Car-Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 649; Keyser v. School Dist. No. 8, 35 N. H. 477; Backman v. Town of Charlestown, 42 N. H. 125; City of New York v. Sonneborn, 113 N. Y. 423; City of Buffalo v. Bettinger, 76 N. Y. 393; Kent v. Village of North Tarrytown, 50 App. Div. 502, 64 N. Y. Supp. 178; Beers v. Dallas City, 16 Or. 334; Allegheny City v. McClurkan, 14 Pa. 81; Sicilian Asphalt Pav. Co. v. City of Williamsport, 186 Pa. 256, 40 Atl. 471; City of Dallas v. Martyn, 29 Tex. Civ. App. 201, 68 S. W. 710.

Norton v. City of Roslyn, 10 Wash. 44. The acceptance of work by a municipality results in a waiver of its right to declare the contract forfeited under which the work was done. Kneeland v. Gilman, 24 Wis. 39. But in Turney v. Town of Bridgeport, 55 Conn. 412, it is held that the use and possession of a school house is not such a ratification of unauthorized expenditures made in its erection as will create a liability on the part of the town.

[838] Daviess County v. Dickinson, 117 U. S. 657; Town of Bloomfield v. Charter Oak Bank, 121 U. S. 121; City of Findlay v. Pertz (C. C. A.) 66 Fed. 427, 29 L. R. A. 188; Hill v. City of Indianapolis, 92 Fed. 467; Zottman v. City & County of San Francisco, 20 Cal. 96; Pimental v. City of San Francisco, 21 Cal. 351; Town of Durango v. Pennington, 8 Colo. 257; City of Indianapolis v. Wann, 144 Ind. 175, 31 L. R. A. 743. A contract void because of an insufficient appropriation cannot be ratified by subsequent action. See however, the case of Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, to the contrary.

McPherson v. Foster, 43 Iowa, 48; Newman v. City of Emporia, 32 Kan. 456; Hanson v. Inhabitants of Dexter, 36 Me. 516; Crutchfield v. City of Warrensburg, 30 Mo. App. 345.

Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775. "The cases bearing upon the question of the power of municipal corporations to ratify their unauthorized contracts are confusing, and apparently irreconcilable. It would subserve no useful purpose to examine them at length in this connection, or to attempt a statement of the grounds upon which they rest. It is sufficient that there is one principle which seems to run through them all, namely; if a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed ultra vires, and can be ratified only upon the conditions essential to a valid agreement in the first instance. But where the formalities prescribed, or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode. McCracken v. City of San Francisco, 16 Cal. 591; San Diego Water Co. v. City of San Diego, 59 Cal. 517; Town of Durango v. Pennington, 8 Colo. 257; Newman v. City of Emporia, 32 Kan. 456; Tullock v. Webster County, 46

in existing conditions, or by operation of the doctrine of estoppel through silence or conduct other than that already suggested.[839] There is authority for the doctrine that a public corporation can be bound by action not expressly authorized in its charter. If it permit its officials or agents to execute contracts or act in its name and for its benefit, good faith and honesty require that it prevent the doing of these acts or that it should not deceive the

Neb. 211; Agawam Nat. Bank v. Inhabitants of South Hadley, 128 Mass. 503; McBrian v. City of Grand Rapids, 56 Mich. 103; Cory v. Chosen Freeholders of Somerset County, 44 N. J. Law, 445; and Keeney v. Jersey City, 47 N. J. Law, 449."

Lincoln Land Co. v. Village of Grant, 57 Neb. 70, 77 N. W. 349. It is not necessary to a recovery where there has been an acceptance of the benefits to show a ratification. There will be a liability on the part of the public corporation based upon a quantum meruit. Squire v. Cartwright, 67 Hun (N. Y.) 218; Smith v. City of Newburgh, 77 N. Y. 130; Nelson v. City of New York, 131 N. Y. 4; Penn v. City of Laredo (Tex. Civ. App.) 26 S. W. 636; Arnott v. City of Spokane, 6 Wash. 442; Dullanty v. Town of Vaughn, 77 Wis. 38.

[839] Randolph County v. Post, 93 U. S. 502; City of Findley v. Pertz, 66 Fed. 427, 29 L. R. A. 188; Town of Searcy v. Yarnell, 47 Ark. 269; People v. Swift, 31 Cal. 26; City of Shawneetown v. Baker, 85 Ill. 563; Wilhelm v. Cedar County, 50 Iowa, 254; King v. Mahaska County, 75 Iowa, 329; Sleeper v. Bullen, 6 Kan. 300; Mound City v. Snoddy, 53 Kan. 126; City of New Orleans v. Southern Bank, 31 La. Ann. 560; Sceery v. City of Springfield, 112 Mass. 512; Roberts v. City of Cambridge, 164 Mass. 176; Davis v. City of Jackson, 61 Mich. 530; Spitzer v. Village of Blanchard, 82 Mich. 234. But no implied liability will arise by reason of a resolution of acceptance of commodities furnished passed at a special meeting of the village council not legally called.

Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; Cory v. Chosen Freeholders of Somerset County, 44 N. J. Law, 445; Peterson v. City of New York, 17 N. Y. 449; Moore v. City of New York, 73 N. Y. 238; Albany City Nat. Bank v. City of Albany, 92 N. Y. 363; Silsby Mfg. Co. v. City of Allentown, 153 Pa. 319; Mathewson v. Tripp, 14 R. I. 587; Pope Mfg. Co. v. Granger, 21 R. I. 298; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495. A failure on the part of a municipality to disaffirm within a reasonable time an unauthorized contract made by a subordinate committee will not constitute a ratification.

Brennan v. City of Weatherford, 53 Tex. 330. Where a municipality by its own acts is estopped to deny its corporate existence in a collateral proceeding, the same doctrine operates to prevent the same claim from being made by members of that community.

Barton v. Town of Pittsford, 44 Vt. 371. A settlement of an unauthorized account is not a ratification of an unauthorized purchase. Judevine v. Town of Hardwick, 49 Vt. 180; Koch v. City of Milwaukee, 89 Wis. 220.

public and allow them to trust in the unauthorized acts of its agents. This rule is especially applicable where the acts or contracts are such as come within the usual exercise of the powers and duties of a public corporation.[840] The general rule obtains, however, that a public corporation cannot be estopped by the unauthorized acts of its officers or agents.[841]

§ 280. Ratification of a contract ultra vires.

The principles stated in the preceding section do not apply to an ultra vires contract. If there is no legal authority for the contract, that authority cannot be created through the application of any doctrine or principle of estoppel, acceptance or ratification. The contract cannot be enforced.[842] The courts rec-

[840] Rogers v. City of Burlington, 70 U. S. (3 Wall.) 654; The Maggie P., 25 Fed. 202; Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495; Maher v. City of Chicago, 38 Ill. 266; Grant v. City of Davenport, 18 Iowa, 179; Sleeper v. Bullen, 6 Kan. 300; Schumm v. Seymour, 24 N. J. Eq. (9 C. E. Green) 143; Brady v. City of New York, 20 N. Y. 312; Allegheny City v. McClurkan, 14 Pa. 81. "It is not universally true that a corporation cannot bind the corporators beyond what is expressly authorized in the charter. There is power to contract, undoubtedly, and if a series of contracts have been made openly and palpably within the knowledge of the corporators, the public have a right to presume that they are within the scope of the authority granted." City of Denison v. Foster (Tex. Civ. App.) 28 S. W. 1052.

[841] City of Galesburg v. Galesburg Water Co., 34 Fed. 675; Rissing v. City of Ft. Wayne, 137 Ind. 427; McGillivray v. Barton Dist. Tp., 96 Iowa, 629; City of New Orleans v. Tulane Educational Fund's Adm'rs, 46 La. Ann. 861; Lincoln v. Inhabitants of Stockton, 75 Me. 141; City of St. Louis v. Gorman, 29 Mo. 593; Huron Waterworks Co. v. City of Huron, 7 S. D. 9, 30 L. R. A. 848; City of Nashville v. Hagan, 68 Tenn. (9 Baxt.) 495.

[842] See authorities cited in §§ 249-258, 259; Town of Newport v. Batesville & B. R. Co., 58 Ark. 270; Berka v. Woodward, 125 Cal. 119, 57 Pac. 777, 45 L. R. A. 420; City of Indianapolis v. Wann, 144 Ind. 175, 42 N. E. 901, 31 L. R. A. 743; Sioux City v. Weare, 59 Iowa, 95; City of Leavenworth v. Rankin, 2 Kan. 357; Root v. City of Topeka, 63 Kan. 129, 65 Pac. 233; City of Baltimore v. Reynolds, 20 Md. 1; Packard v. Hayes, 94 Md. 233, 51 Atl. 32; Sceery v. City of Springfield, 112 Mass. 512; Hilton v. Common Council of Grand Rapids, 112 Mich. 500; Jefferson County Sup'rs v. Arrighi, 54 Miss. 668; McKissick v. Mt. Pleasant Tp., 48 Mo. App. 416; Maupin v. Franklin County, 67 Mo. 327; Tullock v. Webster County, 46 Neb. 211; Berlin Iron Bridge Co. v. Wilkes County Com'rs, 111 N. C. 317; McTwiggan v. Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526; Huron Water-

ognize and enforce the clear distinction between an irregular or informal exercise of a granted or implied power and the total lack or absence of power.[843]

§ 281. Legislative ratification of ultra vires contracts.

If the legislature possess the power to authorize the execution of certain contracts by a public corporation, it can authorize such a corporation to ratify a contract previously executed by it without such authority;[844] the ratification is then equal

works Co. v. City of Huron, 7 S. D. 9, 62 N. W. 975; Arnott v. City of Spokane, 6 Wash. 442; Agawam Nat. Bank v. Inhabitants of South Hadley, 128 Mass. 503.

[843] Lake County v. Graham, 130 U. S. 674; Scott's Ex'rs v. City of Shreveport, 20 Fed. 714; Branham v. City of San Jose, 24 Cal. 585; Higgins v. City of San Diego, 118 Cal. 524; Treadway v. Schnauber, 1 Dak. 236; Stephens v. People, 89 Ill. 337; Ryce v. City of Osage, 88 Iowa, 558; Lincoln v. Inhabitants of Stockton, 75 Me. 141; Black v. Common Council of Detroit, 119 Mich. 571; McDonald v. City of New York, 68 N. Y. 23; Union Bank of Richmond v. Oxford Com'rs, 119 N. C. 214, 34 L. R. A. 487; Borough of Milford v. Milford Water Co., 124 Pa. 610, 3 L. R. A. 122; Ellis v. City of Cleburne (Tex. Civ. App.) 35 S. W. 495; Clark v. City of Janesville, 13 Wis. 415. See, also, cases cited in preceding note and those generally cited under preceding section.

[844] City of Bridgeport v. Housatonuc R. Co., 15 Conn. 475; Windsor v. City of Des Moines, 110 Iowa, 175, 81 N. W. 476; Id., 101 Iowa, 343, 70 N. W. 214; Inhabitants of Bridgewater v. Inhabitants of Plymouth, 97 Mass. 382; Chesapeake & P. Tel. Co. v. City of Baltimore, 89 Md. 689, 43 Atl. 784, 44 Atl. 1033; Kunkle v. Town of Franklin, 13 Minn. 127 (Gil. 119), and cases cited.

State of Wisconsin v. Torinus, 26 Minn. 1. "In making the sale of his principal's property on time and taking a note for the purchase money, the agent, Harriman, exceeded his delegated authority and for that reason alone his act was an invalid one. It was competent, however, for the state as principal to make it good by a legislative enactment, adopting it as its own for it could have authorized it in the first instance and whatever it can do or direct to be done originally, it can subsequently, and when done, lawfully ratify and adopt, with the same effect as though it had been properly done under a previous authority."

Winchester v. Inhabitants of Corinna, 55 Me. 11; City of New York v. Tenth Nat. Bank, 48 Hun, 620, 1 N. Y. Supp. 840; Wrought-Iron Bridge Co. v. Town of Attica, 49 Hun, 513, 2 N. Y. Supp. 359; Brown v. City of New York, 63 N. Y. 239; Trustees of Cuyahoga Falls Real Estate Ass'n v. McCaughy, 2 Ohio St. 152; Mill Creek Val. St. R. Co. v. Village of Carthage, 18 Ohio Circ. R. 216; Jewell Nursery Co. v. State, 4 S. D. 213, 56 N. W. 113. But see Jewell Nursery Co. v. State, 8 S. D. 531, 67 N. W. 629.

in legal force to the granting of original authority, and relating back to the inception of the transaction validates all acts in connection therewith.[845]

§ 282. Ratification of illegal contracts.

The statement has been made in a preceding section that an illegal contract may be ratified by a subsequent performance of those acts or conditions requisite to the making of a legal contract. This must be done in the manner and by the body authorized by law to perform such acts. The assent of the legislature[846] to the contract may be originally necessary, or consent of the people at an election[847] duly held for such purpose, or the affirmative action by a local legislative body,[848] or by a subor-

Nichols v. State, 11 Tex. Civ. App. 327, 32 S. W. 452. The rule, however, in this case was not applied to extras furnished by the contractor in connection with the authorized construction of a state building, Mills v. Gleason, 11 Wis. 470; Blount v. City of Janesville, 31 Wis. 648; City of Jackson v. Bowman, 39 Miss. 671. See, also, cases cited under § 282.

[845] Daviess County v. Dickinson, 117 U. S. 657; Hill v. City of Indianapolis, 92 Fed. 467; Town of Durango v. Pennington, 8 Colo. 257; Squire v. Preston, 82 Hun (N. Y.) 88.

[846] Santa Ana Water Co. v. Town of San Buenaventura, 65 Fed. 323. But a fraud inherent in such a contract and undisclosed at the time of action by the legislature will not be ratified.

Reed v. Inhabitants of Lancaster, 152 Mass. 500; City of Jackson v. Bowman, 39 Miss. 671. Facts considered and not held a sufficient ratification.

State v. Miller, 66 Mo. 328; Atlantic City Waterworks Co. v. Read, 50 N J. Law, 665. An ultra vires contract cannot be ratified by a subsequent act of the legislature. See, also, as holding the same Board of Finance of Jersey City v. Jersey City, 57 N. J. Law, 452; Brown v. City of New York, 63 N. Y. 239. See, also, authorities cited under § 281.

[847] Crebs v. City of Lebanon, 98 Fed. 549; Inhabitants of Arlington v. Cutter, 114 Mass. 344; City of Lexington v. Lafayette County Bank, 165 Mo. 671, 65 S. W. 943; Squire v. Cartwright, 67 Hun, 218, 22 N. Y. Supp. 899; Squire v. Preston, 82 Hun, 88, 31 N. Y. Supp. 174; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328, 46 L. R. A. 513; City of Portland v. Bituminous Pav. Co., 33 Or. 307, 44 L. R. A. 527.

Williams v. Shoudy, 12 Wash. 362. Upon such a ratification a decree of court enjoining the payment of county warrants issued in excess of the authorized indebtedness becomes null and void. Richards v. Klickitat County, 13 Wash. 509.

[848] City of Shawneetown v. Baker, 85 Ill. 563; City of Chicago v. Galpin, 183 Ill. 399; Isenburg v. Selvage, 19 Ky. L. R. 1963, 44 S. W. 974; City of

dinate public officer to whom is delegated the performance of such designated duties.[849] A contract, therefore, where such original action is necessary, may be ratified by the proper subsequent performance of the requisite steps. This principle applies universally to the agencies suggested above. The ratification of an illegal or ultra vires contract, when this can be done, operates equally in the same manner relating back to the inception of the transaction and validating all subsequent acts.

§ 283. Modification of a contract.

Where the power is possessed by certain designated officers, the legislature of the state, or a local legislative body, to enter

Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; City of New Orleans v. Southern Bank, 31 La. Ann. 560; Naegely v. City of Saginaw, 101 Mich. 532.

City of Unionville v. Martin, 95 Mo. App. 28, 68 S. W. 605. The ratification must consist of the identical acts necessary in a grant of original authority.

Kroffe v. City of Springfield, 86 Mo. App. 530; Devers v. Howard, 88 Mo. App. 253. The ratification extends to the contract as an entirety. City of St. Louis v. Davidson, 102 Mo. 149, 22 Am. St. Rep. 764; State v. Cowgill & Hill Mill. Co., 156 Mo. 620; Gutta-Percha & Rubber Mfg. Co. v. Village of Ogalalla, 40 Neb. 775, 59 N. W. 513.

City of Omaha v. Croft, 60 Neb. 57. The question of ratification is one of fact for a jury to determine. City of Philadelphia v. Hays, 93 Pa. 72; City of Philadelphia v. Jewell, 140 Pa. 9. A forfeited contract may be reinstated and ratified by a subsequent ordinance. In re Borough of Millvale, 162 Pa. 374.

[849] People v. Swift, 31 Cal. 26; Smeltzer v. Miller, 125 Cal. 41, 57 Pac. 668; Taylor v. Mott, 123 Cal. 497; Paulding County v. Scoggins, 97 Ga. 253; Crawford County v. Walter, 89 Ill. App. 7; Sexton v. Cook County, 114 Ill. 174; Lynch v. Forbes, 161 Mass. 302, 37 N. E. 437; McCormick v. City of Boston, 120 Mass. 499; May v. City of Gloucester, 174 Mass. 583; State v. District Ct. of Hennepin County, 33 Minn. 235; New Jersey Car Spring & Rubber Co. v. Jersey City, 64 N. J. Law, 544, 46 Atl. 649; People v. Rensselaer County Sup'rs, 52 Hun, 446, 5 N. Y. Supp. 600; Trustees of Town of East Hampton v. Bowman, 60 Hun, 163, 14 N. Y. Supp. 668; North River Elec. Light & Power Co. v. City of New York, 48 App. Div. 14, 62 N. Y. Supp. 726; Port Jervis Water Works Co. v. Village of Port Jervis, 151 N. Y. 111; Pope Mfg. Co. v. Granger, 21 R. I. 298, 43 Atl. 590; City of Wichita Falls v. Skeen, 18 Tex. Civ. App. 632; Boydston v. Rockwall County, 86 Tex. 234; Town of Topsham v. Rogers, 42 Vt. 189; Barton v. Town of Pittsford, 44 Vt. 371; Goshorn's Ex'rs v. County Ct. of Kanawha, 42 W. Va. 735. Facts considered and not held a sufficient ratification.

into contract relations binding upon the public corporation they represent, the rule is true that with the consent of the other party to the contract, modifications or changes may be made and the contract as thus modified or changed will be the one determining and establishing the rights of parties. The making of these modifications or changes will be controlled by the general principles relating to the law of contracts.[850] The mere fact that one of the parties to a contract entered into by legal authority is a public corporation, a governmental agent of restricted and special powers does not enable it to willfully or dishonestly modify, change or avoid a contract without the consent of the other party though it may be onerous and burdensome or one resulting in a pecuniary loss to the corporation.[851] The contract obligation existing between a public corporation and other parties, if entered into with legal authority, cannot be impaired or avoided at the mere whim or pleasure of the public corporation. The law

[850] Smith v. Salt Lake City, 83 Fed. 784; Gafney v. City & County of San Francisco, 72 Cal. 146, 13 Pac. 467; Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025; Himmelmann v. Hoadley, 44 Cal. 276; Ede v. Knight, 93 Cal. 159; Buckman v. Landers, 111 Cal. 347; Anderson v. De Urioste, 96 Cal. 404; Edwards v. Berlin, 123 Cal. 544; Village of Morgan Park v. Gahan, 35 Ill. App. 646; Gibson County Com'rs v. Motherwell Iron & Steel Co., 123 Ind. 364, 24 N. E. 115; Terre Haute & L. R. Co. v. Nelson, 130 Ind. 258, 27 N. E. 486; Gibson County Com'rs v. Cincinnati Steam-Heating Co., 128 Ind. 240, 27 N. E. 612, 12 L. R. A. 502; Jenkins v. Stetler, 118 Ind. 275; Moore v. Held, 73 Iowa, 538, 35 N. W. 623; Campau v. City of Detroit, 106 Mich. 414; Reno Water, Land & Light Co. v. Osburn, 25 Nev. 53, 56 Pac. 945; Dillon v. City of Syracuse, 55 Hun, 612, 9 N. Y. Supp. 98; Murphy v. City of Albina, 22 Or. 106; Filbert v. City of Philadelphia, 181 Pa. 530; Nolan County v. Simpson, 74 Tex. 218.

Markey v. City of Milwaukee, 76 Wis. 349, 45 N. W. 28. "It is also urged as a reason for sustaining the demurrer that it appears from the complaint 'that the plaintiff continued his work under the contract after the alleged modification of the same by the board of public works,' and he must therefore be presumed to have accepted the modified contract and waived the right to insist upon its performance as originally made. * * * If there was a waiver on the part of the plaintiff it must be made to appear in some way and will not be presumed from the mere fact that he continued his work under his original contract after the unauthorized action of the board of public works in modifying and changing the same."

[851] City of Sacramento v. Kirk, 7 Cal. 419; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Markey v. City of Milwaukee, 76 Wis. 349, 45 N. W. 28.

does not countenance dishonesty and if a contract has been fairly made in the absence of fraud or misconduct on the part of public officers, it will be enforced to the same extent as if made by natural persons or private corporations. The public corporation is liable in damages for a breach of its conditions or terms.[852] This rule applies to all acts of the public corporation without respect to the source of authority, irrespective of constitutional provisions, against the impairment of the obligations of a contract; the courts acting upon well established principles will not permit private interests to suffer wrong simply because a public corporation may be one of the parties interested.

§ 284. Avoidance or rescission of contract.

The right of a public corporation to rescind a contract is controlled by general rules of law.[853] There is a tendency of mu-

[852] Town of Milford v. Powner, 126 Ind. 528; Hull v. Independent School Dist., 82 Iowa, 686, 46 N. W. 1053, 48 N. W. 82, 10 L. R. A. 273; Cobb v. School Dist. No. 1, 63 Vt. 647, 21 Atl. 957; City of Newport v. Phillips, 19 Ky. L. R. 352, 40 S. W. 378.

[853] Farmers' Loan & Trust Co. v. City of Galesburg, 133 U. S. 156. A contract subject to a continuing compliance with the terms of an ordinance authorizing it is subject to the city's right of rescission for a failure to comply with stipulations concerning the quality and quantity of water to be supplied. The court in part say: "The principal contention on the part of the appellants is that on the acceptance of the ordinance by Shelton, a right in the franchise vested in him, which could not be defeated even though he afterwards failed to comply with its terms, that the failure of the water company to furnish water in the quantity and of the quality called for by the ordinance was only a breach of a condition subsequent, and that a court of equity will not lend its aid to divest an estate for such a breach. But it seems to us that in respect to a contract of the character of the present one the ability of the water company to continue to furnish water according to the terms of the ordinance was a condition precedent to the continuing right of Shelton and his assigns to use the streets of the city and to furnish water for a period of thirty years; and that when, after a reasonable time, Shelton and his assigns, had failed to comply with the condition as to the quantity and quality of the water, the city had the right to treat the contract as terminated and to invoke the aid of a court of equity to enforce its rescission. A suit for a specific performance of the contract, or a suit to recover damages for its nonperformance, would be a wholly inadequate remedy in a case like the present. The danger to the health and lives of the inhabitants of the city

nicipal corporations to regard a contract especially those relating to so-called public utilities, binding upon them only so long as it operates in their favor. If it proves what is termed "a bad bargain," it is to be avoided irrespective of the rights of others. The fact that the complaining party is a public corporation being sufficient reason, so it is urged, for it to disregard at its pleasure all contract obligations whenever or under whatever circumstances incurred. This claim is not based upon sound principles and is, therefore, by the great weight of authority, not sustained by the courts.[854] An authorized contract between

from impure water and the continued exposure of the property in the city to destruction by fire from an inadequate supply of water, were public questions peculiarly under the care of the municipality; and it was entitled and bound to act with the highest regard for the public interests and at the same time, as it did, with due consideration for the rights of the other parties to the contract."

City of Galesburg v. Galesburg Water Co., 34 Fed. 675; Crebs v. City of Lebanon, 98 Fed. 549. A contract with a water company ratified by the electors of a municipality accepted and performed by the company and the city for a number of years cannot be subsequently avoided on the ground of irregularities occurring at the election ratifying it.

City of Greenville v. Greenville Waterworks Co., 125 Ala. 625, 27 So. 764; City of Sacramento v. Kirk, 7 Cal. 419; Warren v. Chandos, 115 Cal. 382; Gibson v. O'Brien, 9 Ky. L. R. 639, 6 S. W. 28. Construing the right of abutting owners on a contract for street improvements. City of New Orleans v. Great Southern Telep. & Tel. Co., 40 La. Ann. 41; Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 485; Childers v. Holmes, 95 Mo. App. 154, 68 S. W. 1046. The failure to complete street grading within the time limit of a contract with the city is ground for its forfeiture. Neill v. Gates, 152 Mo. 585; Powers v. City of Yonkers, 114 N. Y. 145; Fire-Extinguisher Mfg. Co. v. City of Clarksville (Tenn. Ch. App.) 52 S. W. 442.

[854] In Warner v. City of New Orleans, 167 U. S. 467, 477, the court said: "That one who purchases property, contracting to pay for it out of a special fund and issues warrants therefor payable out of that fund—a fund yet partially to be created and created by the performance by him of a statutory duty—cannot deliberately abandon that duty, take active steps to prevent the further creation of the fund, and then there being nothing in the fund, plead in defence to a liability on the warrants drawn on that fund, that it had prior to the purchase paid off obligations theretofore created against the fund."

City of New Orleans v. Warner, 175 U. S. 120; Fitzgerald v. Walker, 55 Ark. 148; City & County of San Francisco v. Beideman, 17 Cal. 443. But provision made by the public corporation for the payment of its debts is not considered a contract and may be altered at its pleasure.

City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 31 N. E.

a public corporation and other parties if made in good faith, without fraud, should be enforced.[855] The question of advantage in the contract to either one party or the other is not to be considered. Courts should not make contracts but enforce them. The rescission, if the right for such exists, cannot be irregularly done. Verbal instructions or assertions when the contract is in writing do not affect its validity. The sufficiency of a notice of rescis-

573, 16 L. R. A. 485; City of Indianapolis v. Bly, 49 Ind. 373; City of Newport v. Phillips, 19 Ky. L. R. 352, 40 S. W. 378. The revocation by a city for failure to comply with the provisions of a contract for police and fire protection has prima facie presumption that it was made for good cause. State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; United States Water Works Co. v. Borough of Du Bois, 176 Pa. 439. The following cases question the principle given in the text. Rittenhouse v. City of Baltimore, 25 Md. 336; Kemper v. King, 11 Mo. App. 116.

[855] Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817. This case goes further than the principle in the text and holds that not only should the contract between the parties be enforced but that the municipality itself is prohibited, within the life of the contract, from erecting works of its own which would enter into competition with those of the other party to the contract.

Tippecanoe County Com'rs v. Everett, 51 Ind. 543; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 16 L. R. A. 485; Cason v. City of Lebanon, 153 Ind. 567. An illegal arrangement not a part of a contract but made in connection with it is no ground for its rescission. Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa, 229; Schwartz v. Flatboats, 14 La. Ann. 243; Kaiser v. City of New Orleans, 17 La. Ann. 178.

State v. Heath, 20 La. Ann. 172, 96 Am. Dec. 390. "This court can only 'view the city as any other contracting party,' and it will not sanction the revocation of contracts made by her because she may find them onerous or incongruous." Gurley v. City of New Orleans, 41 La. Ann. 75. The nature of the relation existing between the parties, however, may be questionable whether contract or otherwise. Nelson v. Inhabitants of Milford, 24 Mass. (7 Pick.) 18; Allen v. Inhabitants of Taunton, 36 Mass. (19 Pick.) 486; Dausch v. Crane, 109 Mo. 323, 19 S. W. 61; Nebraska City v. Nebraska City Hydraulic Gas Light & Coke Co., 9 Neb. 339; Jewett v. Town of Alton, 7 N. H. 257; Ottendorfer v. Fortunato, 56 N. Y. Super. Ct. (24 J. & S.) 495, 4 N. Y. Supp. 629; Cody v. City of New York, 71 App. Div. 54, 75 N. Y. Supp. 648; Baird v. City of New York, 96 N. Y. 567.

Goodale v. Fennell, 27 Ohio St. 426. The attempt to rescind a legal contract is subject to the restraining power of the constitutional provision protecting the obligation of a contract. Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; City of Galveston v. Morton, 58 Tex. 409; Auerbach v. Salt Lake County, 23 Utah, 103, 63 Pac. 907; Earle v. Town of Wallingford, 44 Vt. 367.

sion must be determined by an inspection of the contract in each individual case.[856]

§ 285. Contracts; their construction.

In the construction of contracts, the fact that a public corporation is one of the parties does not change, except in a few instances, the application of ordinary legal rules.[857] Some exceptions to this rule are based upon the reason that in all matters affecting public interests, a public corporation being a governmental or public agency, questions of doubt especially in grants are construed most strongly in favor of the corporation and against the other party to the contract.[858] There are also cases going to the extent that the rule of construction applying to contracts that the court in construing a doubtful provision will follow the interpretation placed upon it by the parties will not apply.[859]

[856] City of Greenville v. Greenville Water-Works Co., 125 Ala. 625, 27 So. 764; City of Indianapolis v. Bly, 39 Ind. 373; Neill v. Gates, 152 Mo. 585. The attempted rescission may be void because of a delegation of legislative powers.

[857] Richie v. Frazer, 50 Ark. 393, 8 S. W. 143; Worthington v. City of Covington, 82 Ky. 265; City of Baltimore v. Eschbach, 18 Md. 276; McBrian v. City of Grand Rapids, 56 Mich. 95; City of Grand Rapids v. Grand Rapids Hydraulic Co., 66 Mich. 606; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; City of Harrisburg v. Shepler, 190 Pa. 374. The fact that a contract does not show upon its face that it is based upon an appropriation of money is immaterial and does not invalidate it. Milliken v. Callahan County, 69 Tex. 205, 6 S. W. 681. The rule applied that preliminary negotiations are merged in a written contract subsequently made and evidence of which cannot be introduced to alter or change its terms. Gano v. Palo Pinto County, 71 Tex. 99, 8 S. W. 634.

[858] McPherson v. San Joaquin County (Cal.) 56 Pac. 802.

[859] National Water-Works Co. v. School Dist. No. 7, 48 Fed. 523. "Regarding this verbal agreement, it may be said that the construction given to a doubtful provision by the parties to a contract, and affecting their interest only, often influences courts in their judgment, upon the reasonable presumption that the parties to a judgment are in a condition to best know what was meant or intended by it and, moreover, likely to guard their interest. The force of such reasoning is broken when we come to apply it to municipal corporations. They must of necessity have their affairs conducted by persons selected according to law, who often have but a general public interest in the matters intrusted to them, are frequently changed, and not always the best calculated to

Courts are called upon to construe many contracts executed by the parties at some time in the past more or less remote and, usually, under more favorable circumstances at that time to the public corporation. An increase in population or other change of conditions makes the contract, which at the time of its execution was a burdensome one upon the other party, of great advantage to it. The public corporation desires to take advantage of the fact that if this contract were executed under present conditions a better bargain might be made and therefore seeks to avoid it for the reason that it is a public corporation, a public agent and, therefore, it should be permitted to make all of its contracts at the greatest possible advantage to itself even if in order to do this it must deliberately avoid legal contracts made under other conditions or circumstances less favorable. The rule adopted by the courts in such cases for determining their reasonableness or validity is whether at the time the contract was made it was legal and reasonable; subsequent developments or newly arising conditions should not be permitted to influence or determine the question.[860] The contracts requiring the most

construe contracts made by their predecessors. This is illustrated to some extent in the case before the court, in which school directors of one board contracted to pay, and the same or another set of directors afterwards refused payment. A court asked to construe the provisions of a contract under such or similar circumstances may well hold itself free to do so without being influenced by the views entertained or even acted on by the corporators, especially in a case involving public interests, as the present one does." Chicago, B. & Q. R. Co. v. City of Chicago, 134 Ill. 323; Adrian Water Works v. City of Adrian, 64 Mich. 584; St. Louis Gaslight Co. v. City of St. Louis, 46 Mo. 121.

[860] Santa Ana Water Co. v. Town of San Buenaventura, 56 Fed. 339; Los Angeles City Water Co. v. City of Los Angeles, 88 Fed. 720. "It is insisted by defendants that the case at bar is distinguishable from that of Santa Ana Water Co. v. Town of San Buenaventura, supra, * * * because Griffin and his associates procured their contract with the intention of forming a corporation to carry out the same, and that soon thereafter, pursuant to said intention, the Los Angeles City Water Company, one of the complainants herein, was organized by them. Now I do not think that the power of the city to enter into the contract or the validity of the contract can be affected by the fact that the assignors of the water company, at the time they procured the contract, intended to assign it to a corporation thereafter to be formed. Suppose that, after the making of the contract, Griffin, Beaudry and Lazard had changed their purposes and concluded to carry out the contract as

frequent construction by the courts are those which relate to or secure a supply of water[861] or light [862] for municipal or public

individuals and had actually done so; could it be contended that the contract, if to-day held by them, would be invalid because when they procured it they purposed its assignment to a contemplated corporation? No one, I think, would so contend." Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; City & County of San Francisco v. Spring Valley Water Works, 48 Cal. 493.

[861] Little Falls Elec. & Water Co. v. City of Little Falls, 102 Fed. 663; Menominee Water Co. v. City of Menominee, 124 Mich. 386, 83 N. W. 127; Alpena City Water Co. v. City of Alpena, 130 Mich. 518, 90 N. W. 323; Ludington Water-Supply Co. v. City of Ludington, 119 Mich. 480; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 5 L. R. A. 546; Port Jervis Water Works Co. v. Village of Port Jervis, 151 N. Y. 111.

[862] Pittsburgh Gas Co. v. City of Pittsburgh, 101 U. S. 219. Construing Internal Revenue Act 1864, § 94, relative to the levying of a tax on illuminating gas to be paid by the manufacturer. Hamilton Gas Light & Coke Co. v. City of Hamilton, 146 U. S. 258, affirming 37 Fed. 832, and construing the provisions of a contract for supplying gas for private and public consumption during the period of five years. Southwest Missouri Light Co. v. City of Joplin, 113 Fed. 817; Decatur Gaslight & Coke Co. v. City of Decatur, 120 Ill. 67, affirming 24 Ill. App. 544 and construing the terms "at rates as favorable" as used in a contract with a gas company relative to the price to be charged for gas supplied.

City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 16 L. R. A. 485, construing ordinance granting to plaintiff's assignors the privilege of laying gas mains for supplying illuminating gas during a period of twenty-five years. Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa, 229, construing the term "public lamp posts" as used in a contract for lighting streets.

Capital City Gaslight Co. v. City of Des Moines, 93 Iowa, 547, construing provisions of a city ordinance binding the city to use for ten years gas furnished by the plaintiff for lighting public buildings and street lamps with the privilege whenever the city council should deem it expedient or economical to light the public buildings or a portion of the business section of the city with electric lights, of discontinuing any or all of the gas lamps; also construing the words "business section" as meaning that part of the city chiefly devoted to business purposes and in which stores, factories, offices and shops predominated in contradistinction to those parts chiefly used for resident purposes or which were vacant and unoccupied. The court also lays down the rule that "If a construction can be placed upon the contract which will give all parts of it force and effect, and at the same time is in accord with the well settled rules of construction, it must obtain, rather than one which would render a part of the contract inoperative. Again it is proper to look to the acts of the parties at a time when there was no litigation, to ascertain what view they had held as to their obligations under the contract."

City of Winfield v. Winfield Gas

uses; the paving,[863] repairing,[864] sprinkling,[865] or improvement[866] of streets and public highways; the construction,[867] and mainte-

Co., 37 Kan. 24. Full force and effect must be given to the entire contract. Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157. Where neither the charter nor the statutes require a public corporation to pay in cash for a lighting plant, a contract for the construction of one without such funds on hand is valid.

St. Paul Gaslight Co. v. City of St. Paul, 78 Minn. 39, 80 N. W. 774, 877; City of St. Louis v. Laclede Gas Light Co., 155 Mo. 1; Virginia City Gas Co. v. Virginia City, 3 Nev. 320; Bronx Gas & Elec. Co. v. City of New York, 17 Misc. 433, 41 N. Y. Supp. 358; State v. Ironton Gas Co., 37 Ohio St. 45; Saltsburg Gas Co. v. Borough of Saltsburg, 138 Pa. 250, construing the term "for all street lamps" in a contract in which a gas company agreed to furnish natural gas to a village free of charge for such lamps. Parkersburg Gas Co. v. City of Parkersburg, 30 W. Va. 435. A contract with a gas company giving the exclusive right to furnish gas for public use does not prevent the city from making a contract for the use of electric light.

[863] Murdock v. District of Columbia, 22 Ct. Cl. 464; Hitchcock v. City of Galveston, 2 Woods, 272, Fed. Cas. No. 6,532. A written consent of property owners abutting on an asphalt pavement held a part of the contract between the city and the contractor for such paving. The failure to obtain such consent considered a breach of the contract sufficient to prevent a recovery for work done under it.

McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808. A provision that work shall be commenced "within fourteen days" from the date of the contract for street paving held sufficient under statutes of 1885, p. 151 fixing the time of the commencement of work at not more than fifteen days from the date of the contract. Kelso v. Cole, 121 Cal. 121, 53 Pac. 353. Construing general street law, § 12½ as amended by statutes of 1889, p. 169; Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; N. P. Perine Contracting & Pav. Co. v. Quackenbush, 104 Cal. 684, construing statutes of 1889, p. 162, providing for the laying of pavement by property owners if they so elect.

Himmelmann v. Satterlee, 50 Cal. 68. A resolution to macadamize and curb a street does not give authority to order work on adjoining sidewalks. Martindale v. Palmer, 52 Ind. 411. A contract based upon an ordinance calling for "Nicholson or wooden block pavement" can be enforced as substantially following the ordinance.

Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; Risdon v. Shank, 37 Iowa, 82; State v. New Orleans & N. E. R. Co., 42 La. Ann. 11, 7 So. 84; Grant v. City of Detroit, 119 Mich. 43, 77 N. W. 307. A contract called for paving a street "forty feet wide, less car tracks, fifteen feet." There was a small space between the flanges on the outside rails not included in the forty feet. The court held this space to be included in the contract and that it was error for the trial court to leave the construction of the contract to a jury.

Cole v. Skrainka, 105 Mo. 303; Dunn v. McNelly, 75 Mo. App. 217; State v. Webster, 20 Mont. 219; City of Camden v. Ward, 67 N. J. Law, 558, 52 Atl. 392. Construing that provision of a paving contract for the completion of the work by the street commissioner if the contractor fail to do this.

City of Schenectady v. Union College, 66 Hun, 179, 21 N. Y. Supp. 147; Kelly v. City of New York, 16 App. Div. 296, 44 N. Y. Supp. 628; People v. Maher, 56 Hun (N. Y.) 81.

[864] McDonald v. Mezes, 107 Cal. 492; Latham v. Village of Wilmette, 168 Ill. 153; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; State v. Common Council of Michigan City, 138 Ind. 455; Osburn v. City of Lyons, 104 Iowa, 160; Kansas City v. Hanson, 60 Kan. 833. A guarantee that a contractor would make all repairs necessary within the time fixed resulting from any imperfection of the work or material is a guarantee only of the quality of the workmanship and material used in paving and not a general obligation to make street repairs irrespective of the cause.

Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107; Barber Asphalt Co. v. Ullman, 137 Mo. 543, 38 S. W. 458; Robertson v. City of Omaha, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534. A provision in a paving contract by which the contractor agrees to make "all repairs which may result from any imperfection in said work or material becoming necessary within the time (ten years)" does not include ordinary repairs.

City of Schenectady v. Union College, 66 Hun, 179, 21 N. Y. Supp. 147; O'Keefe v. City of New York, 73 App. Div. 312, 76 N. Y. Supp. 796. A street improvement contract binding the contractor to maintain the work in repair for a certain period held proper and valid.

City of Philadelphia v. Jewell's Estate (Pa.) 20 Atl. 281. In the absence of a contract providing the time for the completion of the paving, general ordinances control. Southern Pav. Co. v. City of Chattanooga (Tenn. Ch. App.) 48 S. W. 92; Boyd v. City of Milwaukee, 92 Wis. 456. A provision in a paving contract requiring the contractor to keep the pavement in good repair for five years, except repairs due to cutting through the pavement for laying pipes, etc., renders an assessment therefor against the property owners invalid, the charter of the city requiring the expenses of repairing streets to be paid from the ward fund.

[865] Rosetta Gravel Pav. & Imp. Co. v. City of New Orleans, 50 La. Ann. 1173, 24 So. 237.

[866] Drew v. Smith, 38 Cal. 325. Construing a contract for the grading of streets where the statutes declare that eight hours labor shall constitute a day's work in all cases where the same is performed by the authority of any municipal government.

Palmer v. Burnham (Cal.) 47 Pac. 599. Construing statutes of 1885, p. 151, § 6, regarding the time of commencement and completion of all works of public improvement. Board of Public Works of Denver v. Hayden, 13 Colo. App. 36, 56 Pac. 201. The term "street" in a charter when not specified includes the whole area from the line of lots on one side to the line of lots on the other including sidewalk areas.

City of Chicago v. People, 56 Ill. 327; City of New Albany v. Conger, 18 Ind. 230, 47 N. E. 852. Construing § 3625, Rev. St. 1894 apportion-

ing the cost of street improvements and holding municipalities liable for public grounds and street and alley crossings.

Ryan v. City of Dubuque, 112 Iowa, 284, 83 N. W. 1073; City of Leavenworth v. Rankin, 2 Kan. 357; Rossvalley v. City of New Orleans, 19 La. Ann. 7; Rens v. City of Grand Rapids, 73 Mich. 237. Construing the provisions of a contract providing for the payment of "extras." Allen v. Rogers, 20 Mo. App. 290. Construing the provision of a contract for public work calling for the performance of "extra work." Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107. A single contract may cover work authorized by ordinances passed at different times. Saxton Nat. Bank v. Haywood, 62 Mo. App. 550. Street railway tracks not included within a contract for the macadamizing, curbing and guttering of a certain street. McQuiddy v. Brannoch, 70 Mo. App. 535. Construing a contract provision fixing the time for completion of work.

Palladino v. City of New York, 56 Hun, 565, 10 N. Y. Supp. 66. Special provisions and stipulations in a contract for the improvement and grading of a street control the general language of the contract specifications.

Ferdinand v. City of New York, 56 Hun, 623, 13 N. Y. Supp. 226. Construing and determining that provision of a contract providing for its reletting in case of abandonment of the work by the contractor.

Barry v. City of New York, 38 App. Div. 632, 56 N. Y. Supp. 1049. No recovery can be had for filling beneath the surface of the street as shown by lines in a plan made a part of the contract and representing the surface of the ground.

Phelan v. City of New York, 119 N. Y. 86; Dean v. City of New York, 167 N. Y. 13, reversing 45 App. Div. 605, 61 N. Y. Supp. 374. The work under the contract limited to that shown by the plan accompanying the contract irrespective of ordinance conditions authorizing it. McManus v. City of Philadelphia, 195 Pa. 304.

Naughton v. City of Sioux Falls, 3 S. D. 90, 52 N. W. 324, holds that when a contract provides for the doing of specific work and the furnishing of materials but is silent as to the payment of the expense, the person doing the work can collect his pay in the regular manner. McEwen v. City of Nashville (Tenn. Ch. App.) 36 S. W. 968; City of Waco v. Chamberlain (Tex. Civ. App.) 45 S. W. 191; Town of Elma v. Carney, 9 Wash. 466; Morse v. Gilman, 18 Wis. 373.

[867] People's Pass. R. Co. v. Memphis R. Co., 77 U. S. (10 Wall.) 38; City of Goldsboro v. Moffett, 49 Fed. 213. A failure to commence work considered a breach of the contract resulting in the forfeiture of a bond given "for the faithful performance of their contract."

Smith v. Salt Lake City, 83 Fed. 784. Construing a contract for the construction of an aqueduct and presuming the making of the preliminary survey and location of the line. Salt Lake City v. Smith, 104 Fed. 457. A contract for the construction of a conduit construed with reference to the character of extra work payment for which might be recovered.

County of Pike v. Hosford, 11 Ill. 170. The unpaid balance due on a contract for the construction of a bridge bears interest from the date of the payment and refusal to pay.

City of Chicago v. Weir, 165 Ill.

nance,[868] of works of public improvement; the construction,[869] repairing,[870] and maintenance[871] of sewers, and the construction of sidewalks.[872]

582. Construing the provisions of a contract with a city to dig a water tunnel and shafts, relative to the payment at a fixed price "of rock excavation" "earth tunneling" and where the "tunnel is partly in earth and partly in rock." City of Chicago v. Duffy, 179 Ill. 447. Construing specifications of a contract for the construction of a water tunnel fixing the price where "the tunnel was partly in earth and partly in rock."

Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676; Fox v. Bay City, 122 Mich. 499, 81 N. W. 352; McQuiddy v. Brannock, 70 Mo. App. 535; City of Camden v. Ward, 67 N. J. Law, 558, 52 Atl. 392; Slattery v. City of New York, 31 App. Div. 127, 52 N. Y. Supp. 546; Jones v. Savage, 24 Misc. 158, 53 N. Y. Supp. 308. Construction of a public building. Delafield v. Village of Westfield, 169 N. Y. 582, 62 N. E. 1095; Mairs v. City of New York, 52 App. Div. 343, 65 N. Y. Supp. 160. Construing a contract provision that all losses resulting from the nature of the work or imperfections of construction should be sustained by the contractor.

O'Brien v. City of New York, 139 N. Y. 543. Construing the provision of a contract for the construction of an aqueduct relative to filling with masonry at the expense of the contractor the excess of the tunnel area. Hasbrouck v. City of Milwaukee, 17 Wis. 266.

[868] Bork v. City of Buffalo, 37 N. Y. State Rep. 332.

[869] Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337; McBean v. City of San Bernardino, 96 Cal. 183; White v. Harris, 103 Cal. 528; Campau v. City of Detroit, 106 Mich. 414, 64 N. W. 336. A substantial change cannot be made in plans fixing the course and location of a sewer except as authorized by the council ordering in the first instance the construction of the sewer.

Gartner v. City of Detroit, 131 Mich. 21, 90 N. W. 690; Whittemore v. Sills, 76 Mo. App. 248. A delay in the construction of a sewer occasioned by an injunction is within the provisions of a contract providing generally for delays.

City of New York v. Reilly, 59 Hun, 501, 13 N. Y. Supp. 521. In the absence of a formal notice to commence work upon a sewer by the proper official, there can be no forfeiture of the contract for a failure to complete it within a specified time, although the contractor had voluntarily proceeded with the work.

Smith v. City of New York, 82 Hun, 570, 31 N. Y. Supp. 783. A sewer is "in progress" within the meaning of laws of 1873, c. 335, when the excavation was begun by a force of fifty-four men and a number of teams.

Jones v. City of New York, 170 N. Y. 580, 63 N. E. 1118, affirming Jones v. City of New York, 60 App. Div. 622, 70 N. Y. Supp. 296; Marshall v. City of San Antonio (Tex. Civ. App.) 63 S. W. 138; State v. Liebes, 19 Wash. 589; Markey v. City of Milwaukee, 76 Wis. 349, 45 N. W. 28. The municipal authorities have no right to arbitrarily shorten a sewer against the con-

§ 286. Arbitration clauses.

The policy of the law is the avoidance of litigation and courts, therefore, generally sustain clauses in contracts providing for the submission of disputes to arbitrators to be selected in the manner provided by the contract.[873] The rule applied in the con-

tractor's protest when all conditions of the contract have been complied with. Burnham v. City of Milwaukee, 100 Wis. 55, 75 N. W. 1014. All oral agreements between the city authorities and the contractor are merged in the subsequent written contract.

Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681. A contract for sewer construction calling for the expenditure of a sum of money a portion of which is in excess of the constitutional limit of indebtedness is valid to the extent of the constitutional limit and invalid as to the excess; the contract being divisible.

[870] Seifert v. City of Brooklyn, 15 Abb. N. C. (N. Y.) 97; Van Rensselaer v. City of Albany, 15 Abb. N. C. (N. Y.) 457.

[871] Van Vorst v. Jersey City, 27 N. J. Law (3 Dutch.) 493.

[872] Schwiesau v. Mahon, 110 Cal. 543; Gray v. Richardson, 124 Cal. 460. A contract provided that the contractor should construct certain concrete sidewalks in accordance with the specifications annexed to, and made a part of, the contract. When the contract was offered in evidence there were no specifications annexed and it was not shown that there had been any prepared; one witness testified that shortly after the contract was executed and filed in the office of the superintendent of streets, he examined it, and no specifications were annexed. The court held that this would sustain a finding that no contract was ever made.

[873] Brady v. City of Brooklyn, 1 Barb. (N. Y.) 584; Jones v. City of New York, 60 App. Div. 161, 70 N. Y. Supp. 46. The decision of such an arbitrator in the absence of fraud or mistake is conclusive on the parties. Marshall v. City of San Antonio (Tex. Civ. App.) 63 S. W. 138; Burnham v. City of Milwaukee, 100 Wis. 55, 75 N. W. 1014.

Salt Lake City v. Smith, 104 Fed. 457. "The stipulations in such contracts that all questions, differences or controversies which may arise between the corporation and the contractor under or in reference to the agreement and the specifications, or the performance or nonperformance of the work to which they relate, shall be referred to the engineer, and his decision thereof shall be final and conclusive upon both parties, does not give the engineer jurisdiction to determine that work which is not done under the contract or specifications, and which is not governed by them, was performed under the agreement and is controlled by it, and his decision to that effect is not conclusive upon the parties. Neither an engineer nor a judge who has no jurisdiction of a question can confer jurisdiction of it upon himself by erroneously deciding that he has it."

struction of railroad grading contracts quite universally holds in connection with contracts of public corporations involving the construction of public works.[874]

§ 287. Corporate contracts; their performance.

(a) In general. A contract may be illegal in part, if it is separable, and such is usually the case, in those for the construction of public works or the supply of municipal commodities, that portion which is legal can be enforced by the contractor and its performance to that extent insisted upon.[875] A contract legal as determined by the principles laid down in the preceding sections can be enforced as an entirety if performed in the manner, time and under the conditions required by its terms.[876]

(b) Manner of performance. Such contracts usually provide that the work done or materials or commodities furnished shall follow specifications or be performed to the satisfaction of some designated official,[877] or that the work shall be done in a good and workmanlike manner.[878] To afford a contractor a claim for the payment for work done or materials furnished by him under such provisions, the decision in good faith that the conditions have been complied with by such official is necessary,[879]

[874] Murphy v. City of Yonkers, 45 App. Div. 621, 60 N. Y. Supp. 940. An engineer thus elected has no authority, however, to pass upon questions other than those provided by the contract to be determined by him. Smith v. City of Philadelphia, 13 Phila. (Pa.) 177; Forristal v. City of Milwaukee, 57 Wis. 628; Burnham v. City of Milwaukee, 100 Wis. 55, 75 N. W. 1014; Dwyer v. Board of Education, 27 App. Div. 87, 50 N. Y. Supp. 123; Lawrence v. City of New York, 29 App. Div. 298, 51 N. Y. Supp. 416.

[875] Chapman v. Douglas County, 107 U. S. 348; Gamewell Fire-Alarm Tel. Co. v. City of Laporte, 42 C. C. A. 405, 102 Fed. 417; Stebbins v. Perry County, 167 Ill. 567; Stockdale v. School Dist. No. 2, 47 Mich. 226; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100; Thomson v. Town of Elton, 109 Wis. 589. Also 59 Am. St. Rep. 886.

[876] Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; Newport Wharf & Lumber Co. v. Drew, 125 Cal. 585, 58 Pac. 187; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Cody v. City of New York, 71 App. Div. 54, 75 N. Y. Supp. 648; Brady v. City of New York, 132 N. Y. 415.

[877] Silsby Mfg. Co. v. Town of Chico, 24 Fed. 893; Gearty v. City of New York, 171 N. Y. 61, 63 N. E. 804. But power conferred upon officials must be exercised with fairness and in good faith, not in an arbitrary manner.

[878] Murphy v. City of Yonkers, 45 App. Div. 621, 60 N. Y. Supp. 940.

[879] Markey v. City of Milwaukee,

and a decision under such circumstances will estop both parties from raising the question of a noncompliance with the contract.

(c) Time of performance. A substantial compliance with provisions fixing the time for the commencement or completion of public work, unless time is made the essence of the contract, is all that is necessary to give a contractor the right of compensation for work done by him.[880]

(d) Other conditions. Another provision often found in such contracts is one requiring the contractor to guarantee the quality of his work, both as to materials and workmanship.[881] The guar-

76 Wis. 349, 45 N. W. 28; Jones v. Town of Marlborough, 70 Conn. 583, 40 Atl. 460.

[880] Pitcairn v. Philip Hiss Co., 113 Fed. 493; City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547. The rule also held to apply, in this case, to the performance of the work. See also as holding the same, Middlesborough Town & Land Co. v. Knoll, 21 Ky. L. R. 1399, 55 S. W. 205; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995; McCartan v. Inhabitants of Trenton, 57 N. J. Eq. 571.

[881] Jones v. Town of Marlborough, 70 Conn. 583, 40 Atl. 460. A contractor cannot recover on a quantum meruit for repairs not made according to provided stipulations. In this case the person doing the work was not to be paid until the work was inspected and accepted as satisfactory. It was not satisfactory and was not accepted. The trial court nevertheless allowed a recovery on a quantum meruit. In reversing this the appellate court said: "The trial court applied in his favor the doctrine that in certain cases there may be a recovery for the value of labor and materials furnished under a special contract, not strictly performed where the defendant has availed himself of, and been benefited by them and the plaintiff was not in willful default. This is not allowed in every instance where the part performance has been beneficial. It must also be shown that the benefit has been appropriated under circumstances sufficient to raise an implied promise to pay for the reasonable value of what has been received, notwithstanding the breach of contract. Towns do not own their roads nor use them. The public use them and towns are benefited by their repair only so far as they may be thus relieved of a statutory responsibility for their proper maintenance. It may be that a promise to pay the value of permanent improvements, such as a stone pavement or a new bridge, furnished under a contract, though not in full accordance with it, would, under some circumstances, if they were retained as part of a highway, be implied by law; but in the case of ordinary repairs, made by one receiving an annual salary, the payment of which is made dependent on the favorable report of an inspector, no such obligation can arise. The town was not exonerated from liability under the statute unless its roads were in fact kept in good condition and as respects those to whom it entrusted the fulfillment of this duty in its

antee being made efficient either through the giving of a bond by the contractor for a specified time to maintain in good condition the work or to make all repairs necessary on account of imperfections in the work or materials,[882] or the retention of a certain percentage of the contract price for the purpose of accumulating a fund from which such repairs can be made, the work completed, or the work redone if defective, by the public corporation.[883] These provisions are generally held valid despite the objection that the cost of the improvement or the public work

behalf, it had the right to contract for making the certificate of inspection the sole criterion of what that condition was."

[882] Meriwether v. Lowndes County, 89 Ala. 362, 7 So. 198. A contract provision to keep a bridge in good repair and safe condition for continuous use during a period of five years held to apply where the bridge constructed was washed away by a flood within that time.

Osburn v. City of Lyons, 104 Iowa, 160, 73 N. W. 650. Such a condition does not make the contractor liable for repairs made necessary by excavations in the streets.

City of Louisville v. Selvage, 21 Ky. L. R. 349, 51 S. W. 447; State v. City of New Orleans, 51 La. Ann. 699; State v. New Orleans & C. R. Co., 52 La. Ann. 1570. An obligation to keep a street in good repair may involve the use of "new material." Such material may be used in making the ordinary repairs required by the conditions of the contract. Warren-Scharf Asphalt Pav. Co. v. City of St. Paul, 69 Minn. 453, 72 N. W. 711; Robertson v. City of Omaha, 55 Neb. 718, 44 L. R. A. 434; Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 44 L. R. A. 540, 40 Atl. 575.

[883] J. M. Griffith Co. v. City of Los Angeles (Cal.) 54 Pac. 383; King v. Mahaska County, 75 Iowa, 329, 39 N. W. 636; Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 40 Atl. 575. "Property owners are not chargeable with the price of such improvements (paving) but only with an equivalent for the special benefits they derive therefrom. Such an equivalent cannot exceed the reasonable value of the improvement and hence the municipality itself, not the assessable property owners, must bear the excess of price beyond fair cost. If, therefore, the commissioners who levy an assessment for this improvement charge upon the property owners anything beyond the fair cost of laying a good pavement, their assessment will to that extent be illegal. The same evidence which would now show that the nominal price for paving includes compensation for the guaranty and for repaving will be then available for the same purpose, and if produced, will result in reducing the assessment to such sum as would have secured a proper pavement without the added stipulations." O'Brien v. City of New York, 15 N. Y. Supp. 520; Jones v. Savage, 24 Misc. 158, 53 N. Y. Supp. 308; People v. Third Nat. Bank of Syracuse, 159 N. Y. 382.

may sometimes be arbitrarily or unnecessarily increased in violation of some charter or statutory obligation or rule.[884]

(e) Performance by the public corporation as a party to the contract. The performance of the contract in accordance with its terms and conditions is as obligatory upon the public corporation as upon the other party or parties to it. The corporation cannot, when the contract has been fully performed by the other party, willfully refuse to perform its obligations especially where it has received and retains its benefits.[885]

§ 288. A contract; its performance; acceptance of work.

Contracts for the construction of public works usually require that the work shall be constructed under the supervision and to the satisfaction of some designated official or official body, and further, that upon the final completion of the whole, the completed work shall be inspected and formally accepted in the manner provided either by the charter of the corporation or the terms of the contract.[886] In the absence of fraud, such action

[884] Brown v. Jenks, 98 Cal. 12; City of Portland v. Bituminous Pav. Co., 33 Or. 307, 44 L. R. A. 527. See, however, as holding to the contrary, the cases of Alameda Macadamizing Co. v. Pringle, 130 Cal. 226, 62 Pac. 394, 52 L. R. A. 264; and Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 40 Atl. 575, 44 L. R. A. 540.

[885] Town of Gosport v. Pritchard, 156 Ind. 400, 59 N. E. 1058. Where a town refuses payment claiming the contract void, action should be brought for the amount due upon the contract. City of Logansport v. Dykeman, 116 Ind. 15; Seward v. Town of Liberty, 142 Ind. 551; City of New Orleans v. Wardens of St. Louis Church, 11 La. Ann. 244; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175; Norton v. City of Roslyn, 10 Wash. 44. See, also, authorities cited § 279.

[886] Reid v. Clay, 134 Cal. 207, 66 Pac. 262. In this case the court had under consideration a statute (Gen. St. Cal. 1885, p. 151) which provided that the materials used in street improvements "shall comply with the specifications and be to the satisfaction of [the] superintendent of streets." A contract for street improvements provided that the contractor must do the work "in a good and workman-like manner, under the direction and to the satisfaction of the superintendent of streets, in compliance with the specifications hereunto attached and made part of this contract." The court held this provision a sufficient compliance with the statutory requirement.

Town of Colorado City v. Townsend, 9 Colo. App. 249; Gulick v. Connely, 42 Ind. 134. The acceptance by city authorities of work is only prima facie evidence that it has been done in substantial compliance with the terms of the con-

establishing the completion of work, and the fact that the contract in all its terms and conditions has been complied with, is conclusive and binding upon both parties.[887] Official action of this nature is especially conclusive and binding upon abutting property owners who raise no objection until the completion of the contract and the acceptance of the work.[888] A certificate of performance, approval or acceptance as it is usually termed is gen-

tract. Creston Waterworks Co. v. City of Creston, 101 Iowa, 687; Dumesnil v. Louisville Artificial Stone Co., 109 Ky. 1, 58 S. W. 371; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957.

[887] City of Omaha v. Hammond, 94 U. S. 98; Fitzgerald v. Walker, 55 Ark. 148; Ryan v. City of Dubuque, 106 Iowa, 312, 76 N. W. 703; Whitefield v. Hipple, 11 Ky. L. R. 386, 12 S. W. 150; Alpena City Water Co. v. City of Alpena, 130 Mich. 518, 90 N. W. 323. The rule applied to a contract for the supply of water, and full payment by the city from time to time for water furnished under the contract held to constitute an estoppel.

Schliess v. City of Grand Rapids, 131 Mich. 52, 90 N. W. 700; O'Dea v. City of Winona, 41 Minn. 424; McCormick v. City of St. Louis, 166 Mo. 315, 65 S. W. 1038; O'Brien v. City of New York, 15 N. Y. Supp. 520; Smith v. City of New York, 12 App. Div. 391, 42 N. Y. Supp. 522; People v. Coler, 26 Misc. 509, 57 N. Y. Supp. 461; People v. Coler, 58 App. Div. 131, 68 N. Y. Supp. 448; Brady v. City of New York, 132 N. Y. 415.

Peck v. State, 137 N. Y. 372. Where, however, there is no authority vested in certain officials to make such certificate and accept work, their action in this respect will not be binding. Malone v. City of Philadelphia, 12 Phila. (Pa.) 270.

[888] McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453. The court here say: "The contract submitted many things to the discretion and judgment of the engineer, and, if the contract was not as definite and certain as the law requires, the appellees ought to have made that question before the work was completed. Principle and authority forbid that property owners should be allowed to stand by inactive and passive until after the work has been done and then come in and take from a contractor the value of his work and materials without compensation. For such persons the law has no very tender regard. They ought to move promptly and not wait until the contractor has expended time and money under the directions and requirements of the board of commissioners and its engineer. As the contractor in this instance has obeyed the orders of the proper officers, has followed the construction placed upon the contract by them and has fully completed his work, the appellees are estopped from questioning his right to compensation upon the ground that the contract did not conform to the law." City of Evansville v. Pfisterer, 34 Ind. 36; City of Logansport v. Uhl, 99 Ind. 531; Stewart v. Wyandotte County Com'rs, 45 Kan. 708;

erally necessary that the contractor may recover from the public corporation the compensation to which he is entitled according to the terms of the contract.[889]

§ 289. Fraud as rendering a contract invalid.

The usual rule that the existence of fraud either in the execution or the performance of a contract will entitle the party seek-

Smith v. Hubbard, 85 Tenn. 306, 2 S. W. 569.

[889] City of Elizabeth v. Fitzgerald (C. C. A.) 114 Fed. 547. A contractor is not deprived, however, of the right to recover for work which has been done in substantial conformity with the conditions of the contract because the city officials arbitrarily and unreasonably refuse to accept and approve the work as required by law. The court here say: "The second question propounded to the jury correctly assumed that the contract provided for certification of the work by the city surveyor and for its approval and acceptance by the committee on streets and parks as well as by the street commissioner and the inspector, and also that such certification, approval and acceptance had been severally refused; so that the only question submitted was, were they unreasonably refused? We have already said that this question if legally pertinent, was properly referred to the jury, and we now add that in our opinion, it was a material and important question in the cause. As was said by the learned trial judge, the plaintiff could not, by unreasonable refusals to certify and approve his work 'be deprived of the fruits of his labor.' * * * Hence, it must be understood that by answering the second question affirmatively, the jury found that the officers of the city in refusing the certification and approval in question had acted, not upon honest belief that the work had not been done according to the contract, but whimsically and without cause; and surely such conduct, may, without exaggeration, be characterized as unreasonable. Had then the defendant's officers the right to arbitrarily refuse the certificates and approval called for by the contract? Both in reason and upon authority it is clear that they had not."

Jones v. Town of Marlborough, 70 Conn. 583, 40 Atl. 460; Campbell County v. Youtsey, 11 Ky. L. R. 529, 12 S. W. 305; Gosnell v. City of Louisville, 22 Ky. L. R. 365, 57 S. W. 476; Kansas City v. Walsh, 88 Mo. App. 271; Bowery Nat. Bank v. City of New York, 2 T. & C. (N. Y.) 523; Weston v. City of Syracuse, 158 N. Y. 274, 43 L. R. A. 678; Smith v. Hubbard, 85 Tenn. 306, 2 S. W. 569. The use by the public for five years of a bridge and the fact that jurors as provided by law appointed by the county court, examined and approved it, estop the municipality from setting up as a defense its lack of character as a public bridge. Smith v. Jefferson County, 16 Tex. Civ. App. 251, 41 S. W. 148. See, also, 14 Am. St. Rep. 422.

ing it to equitable relief or to a cancellation and rescission of the contract applies to the contracts of public corporations.[890]

§ 290. The right of the parties to maintain an action based upon a contract.

In the execution of every contract for the construction or maintenance of either a work of local or public improvement, the public corporation and the contractor are the direct parties. The moneys received by the contractor for his work, and the labor and materials furnished, are usually raised by the levy of taxes upon abutting property and in many instances his right to the recovery of compensation due him under the contract is limited to the sums collected from such taxes and the obligation due from the corporation to see that they are levied and collected by the proper authorities. Indirectly, there is also another party interested in the performance of the contract, namely, the abutting property owner, who may, but who usually does not, have any right to relief either in the event of an improper performance of such contract, its abandonment or a total failure to comply with its conditions.[891] The right of one party executing the contract to maintain an action for a failure on the part of the other to comply with its conditions is not denied.[892]

[890] Mason v. City of Des Moines, 108 Iowa, 658, following Carthan v. Lang, 69 Iowa, 384. In the former case the court held that irrespective of any intention to commit fraud, the mere fact that the contractor did not furnish enough cement to do the paving as it should be done would afford grounds for a cancellation of the contract. Thilemann v. City of New York, 66 App. Div. 455, 73 N. Y. Supp. 352; City of Tacoma v. Tacoma Light & Water Co., 16 Wash. 288.

[891] Loeber v. New Orleans & C. R. Co., 41 La. Ann. 1151, 5 So. 60. "In proper cases and proper averments the citizen or taxpayer may sue to enforce or restrain municipal action, but he cannot sue in affirmance of its contracts which contain no stipulation pour autrui." Handy v. City of New Orleans, 39 La. Ann. 107; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; Basselin v. Pate, 30 Misc. 368, 63 N. Y. Supp. 653.

[892] Prowers County Com'rs v. Bedell, 13 Colo. App. 261, 57 Pac. 187; State v. New Orleans & C. R. Co., 52 La. Ann. 1570; Hayden v. Inhabitants of Madison, 7 Me. (7 Greenl.) 76. A contract for the construction of a road may be rescinded by mutual agreement actual or implied, and in such case, for the work done under such contract before its rescission, recovery can be had on a quantum meruit.

Wentink v. Chosen Freeholders of Passaic County, 66 N. J. Law, 65, 48

§ 291. Delay in the performance of a contract.

The contract may require within a certain time after its formal execution the commencement of the work or there may be a time limit set for its completion.[893] In such a case the right of the parties may be affected by a delay either in the time fixed by the contract or by law for the commencement of the work or in its completion. An unexcused delay, or one not waived, may be considered a breach of the contract that entitles the party suffering injury to its forfeiture or to damages.[894] The prospective injury may be determined in advance and compensation agreed upon in the form of liquidated damages.[895] Such a pro-

Atl. 609. Where a contract has been set aside because of irregularity, the contractors may recover for work and materials furnished under the contract on a quantum meruit and proportional to the total contract price. People v. Denison, 19 Hun (N. Y.) 137; Reilly v. City of Albany, 40 Hun (N. Y.) 405; Jones v. City of New York, 60 App. Div. 622, 70 N. Y. Supp. 296; Thilemann v. City of New York, 66 App. Div. 455, 73 N. Y. Supp. 352.

[893] Rauer v. Lowe, 107 Cal. 229; Williams v. Bergin, 127 Cal. 578, reversing 57 Pac. 1072.

[894] McQuiddy v. Brannock, 70 Mo. App. 535. The provision fixing the time within which the work shall be performed is equivalent to an agreement that if not completed within that time, there is no performance and the contractor cannot recover on a quantum meruit.

Bietry v. City of New Orleans, 22 La. Ann. 149; People v. Brennan, 18 Abb. Pr. (N. Y.) 100. A forfeiture incurred by delay may be waived by the municipality. Jones v. City of New York, 171 N. Y. 628, 63 N. E. 1118, affirming 60 App. Div. 622, 70 N. Y. Supp. 296; Chandley v. Borough of Cambridge Springs, 203 Pa. 139, 52 Atl. 87. "At the time fixed for the commencement of the work, the borough had not succeeded in selling the bonds it had issued to provide the means of payment. The plaintiff began at once the building of an impounding well but delayed ordering the pipe and pumps because the bonds had not been sold. If this delay were the sole cause of the noncompletion in time, the responsibility would rest with him. He took the chance of prompt payment when he entered into the contract, and was not justified in delaying the work because the borough did not have the money in its treasury in advance of the time it was due him."

[895] Boyce v. United States Fidelity & Guaranty Co. (C. C. A.) 111 Fed. 138; City of Terre Haute v. Lake, 43 Ind. 480; Jones v. City of New York, 60 App. Div. 622, 70 N. Y. Supp. 296, affirmed 170 N. Y. 580, 63 N. E. 1118; Gearty v. City of New York, 62 App. Div. 72, 70 N. Y. Supp. 942; Cody v. City of New York, 71 App. Div. 54, 75 N. Y. Supp. 648. The failure to perform a prescribed portion of the contract within the required time does not warrant a forfeiture of the entire

vision, it has been held, is not inconsistent with others giving the corporation the power to declare the contract terminated because of delay, either in the progress of work, or the time of completion.[896] If, however, the delay has been waived or excused by authority equal in extent and power to that originally the source of authority for the execution of a contract although there may be resulting injury, yet such injury cannot be made the basis of an action for damages.[897] An extension of time should ordinarily be made in the same manner and under the same conditions as the original execution of the contract.[898] A parol agreement to extend the time for the perform-

contract. Nichols v. City of Superior, 109 Wis. 643, 85 N. W. 428.

[896] Boyce v. United States Fidelity & Guaranty Co. (C. C. A.) 111 Fed. 138. In this case there was the stipulation that if the contractor "shall fail to commence or proceed with the work to the satisfaction of the said trustees, it is agreed that said trustees may give or cause to be given notice or notices in writing to said contractor. * * * And in case said contractor shall, for ten (10) days after such notice, fail to commence or regularly proceed with the work to the satisfaction of said trustees, all rights of the said contractor under this contract shall therefrom terminate and it is agreed that said trustees may declare this contract, as to any and all rights of said contractor thereunder, forfeited, annulled and wholly cancelled, and take away, hold and complete said work by re-letting the unfinished part thereof or completing the same by day work, or otherwise as may be for the best interest of the said first party in the judgment of said trustees." The court said: "The parties expressly made the completion of the contract by the day named an integral part of the contract and it was clearly the purpose of the above stipulation to secure its full and complete performance in this respect as well as in others. It would have defeated this purpose if the city was required to lie by, while the other party was neglecting the work, until the day for completion had been reached. The public interests and convenience might be seriously delayed by tying up the hands of the city after it was demonstrated that the contractor either, would not, or could not, with his facilities finish his undertaking within the appointed time; and we are convinced that such considerations were the reason on which it was stipulated that the board of trustees should have power to determine whether the progress of the work gave reasonable ground for expecting the due fulfillment of the work."

[897] City of Philadelphia v. Hays, 93 Pa. 72; McKnight v. City of Pittsburgh, 91 Pa. 273.

[898] Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125. The extension necessarily need not be endorsed on the contract before the expiration of the time originally fixed for the contemplation of the work. "The rec-

ance of work cannot affect a written contract. A failure to comply with contract requirements for the construction of public improvements, or fixing the time for the completion of the work, may invalidate the contract, when all proceedings pending for the levy and collection of taxes upon abutting property for the payment of such improvement become invalid.[899] If a contractor fail to finish work within the required time, the city, however, may go on and complete it.[900] When this is done the assessments are not rendered invalid by such failure. If the delay in the work has been occasioned through acts of the corporation, not

ord shows that the work was completed within the time fixed for its completion by the superintendent of streets and the subsequent extensions thereof authorized by the board of supervisors. It does not appear at what time the superintendent indorsed these extensions upon the contract and the prima facie character of the documentary evidence introduced includes the 'regularity and correctness' of his acts. It was not requisite that he should indorse an extension upon the contract before the expiration of the time originally fixed therein." McVerry v. Boyd, 89 Cal. 304; Ede v. Knight, 93 Cal. 159.

[899] Murdock v. District of Columbia, 22 Ct. Cl. 464; Mappa v. City of Los Angeles, 61 Cal. 309; Village of Morgan Park v. Gahan, 136 Ill. 515, 26 N. E. 1085. An invalid assessment, however, affords no excuse to a contractor to abandon his contract where the improvement is to be paid with the proceeds of such assessment. In this case an appeal from a judgment of the lower court in favor of contractors whose bid had been accepted on a local improvement for a deposit they had made as required by the terms of the ordinance was affirmed, the court holding "that an advertisement by a village for bids for work on a local improvement to be paid for by special assessment, while it charges the bidder with notice of the ordinance providing for the improvement in question, does not affect them with notice of a subsequent ordinance providing the method in which the special assessment may be levied; and where an ordinance providing for a local improvement declares that it shall be paid for by special assessment the passage of a subsequent invalid ordinance providing that the assessment shall be paid in ten annual instalments is such an attempt to change the proposed contract as will justify the bidder in refusing to execute it."

Trustees of United Brethren in Christ Church v. Rausch, 122 Ind. 167; Lake Erie & W. R. R. Co. v. Walters, 13 Ind. App. 275, 41 N. E. 465. The rule will not apply, however, where the delay has been occasioned by causes entirely beyond the control of the contractor. Rose v. Trestrail, 62 Mo. App. 352; In re Anderson, 47 Hun (N. Y.) 203.

[900] School Town of Winamac v. Hess, 151 Ind. 229, 50 N. E. 81, and cases cited; Newton v. Devlin, 134 Mass. 490; Simermeyer v. City of New York, 16 App. Div. 445, 45 N. Y. Supp. 40.

only will it be liable for the work constructed although completed after the contract time,[901] but it will be liable to the contractor for any special damages which he may have suffered by reason of such delay.[902]

§ 292. The assignment of a contract.

As suggested in a preceding section, in all municipal contracts for the construction of public improvements, there are three parties interested, those executing the contract and abutting prop-

[901] Hellman v. Shoulters, 114 Cal. 136; City of Dunkirk v. Wallace, 19 Ind. App. 298, 45 N. E. 614; 49 N. E. 463; George G. Fetter Co. v. Courier-Journal Job Printing Co., 20 Ky. L. R. 614, 47 S. W. 241; State v. McCardy, 87 Minn. 88, 91 N. W. 263; Childers v. Holmes, 95 Mo. App. 154, 68 S. W. 1046; Hardiman v. City of New York, 21 App. Div. 614, 47 N. Y. Supp. 786; Johnson v. City of Mt. Vernon, 34 App. Div. 37, 53 N. Y. Supp. 1063; Dady v. City of New York, 57 Hun (N. Y.) 456; Jones v. City of New York, 170 N. Y. 580, 63 N. E. 1118, affirming 60 App. Div. 622, 70 N. Y. Supp. 296; Mairs v. City of New York, 52 App. Div. 343, 65 N. Y. Supp. 160; Jones v. City of New York, 60 App. Div. 622, 70 N. Y. Supp. 296 (A disputed cause of delay is a question of fact for a jury to determine); Episcopo v. City of New York, 35 Misc. 623, 72 N. Y. Supp. 140; Leeson v. City of New York, 65 App. Div. 105, 72 N. Y. Supp. 538; Thilemann v. City of New York, 66 App. Div. 455, 73 N. Y. Supp. 352; Cody v. City of New York, 71 App. Div. 54, 75 N. Y. Supp. 648; Montgomery v. City of New York, 151 N. Y. 249. The rejection of materials causing delay is no excuse for the non-completion of the work within the time fixed.

[902] Brady v. City of St. Joseph, 84 Mo. App. 399; Markey v. City of Milwaukee, 76 Wis. 349, 45 N. W. 28. "If the board refused to permit the plaintiff to perform that part of his work which is set up in the complaint as the basis of his action under this provision in the contract, that fact might be a defense to the action; but such defense must be raised by an answer and is not raised by a demurrer to the complaint. The allegation of the complaint is 'that the city by its duly-constituted officers, caused the plans and specifications for doing said work to be modified and changed, whereby the lateral sewers contracted to be constructed by the plaintiff were shortened to the extent of 176 feet, against the will and protest of the plaintiff. We find no provision in the contract which authorizes the city arbitrarily to modify or change the contract made with the plaintiff and if the city has modified or changed the contract for any cause which authorized it to do so, such fact must be set up as a defense to the action; but under the allegations of the complaint, it cannot be presumed that such alteration was authorized."

erty owners. Ordinarily, the public corporation is interested only in the performance of the work according to the terms and conditions of the contract; the individuality of the contractor is not considered, and, therefore, unless prohibited by law, the original party to the contract may with the consent of the authorities, assign all his rights in and to such contract. The assignee then stands in the place of and succeeds to all the rights of his assignor and assumes all his obligations whether arising under the provisions of the contract,[903] or depending upon the levy and collection of special assessments.[904]

The abutting property owner is but indirectly interested, and, therefore, has no right to prevent, if otherwise it can be legally done, the assignment of such a contract, and the mere fact that there has been a substitution of legal parties does not give him a right to resist the collection of special assessments levied for

[903] French v. Powell, 135 Cal. 636, 68 Pac. 92; Suburban Elec. Light Co. v. Town of Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443; Episcopo v. City of New York, 35 Misc. 623, 72 N. Y. Supp. 140; Ernst v. Kunkle, 5 Ohio St. 523; City of Philadelphia v. Lockhardt, 73 Pa. 211; Southern Pav. Co. v. City of Chattanooga (Tenn. Ch. App.) 48 S. W. 92; Marshall v. City of San Antonio (Tex. Civ. App.) 63 S. W. 138; Robertson v. King County, 20 Wash. 259, 55 Pac. 52. An assignment of a claim or contract to one prohibited by law from being interested in contract work to be done within the limits of a designated public corporation held void. Cook v. City of Menasha, 103 Wis. 6, 79 N. W. 26. The consent of the municipality is necessary to the legal assignment, following and quoting from Skobis v. Ferge, 102 Wis. 122, 78 N. W. 426.

Herman v. City of Oconto, 100 Wis. 391. The execution of a contract for the benefit of an undisclosed principal does not render it invalid if the party actually executing it complies with all the conditions.

[904] Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Foley v. Bullard, 99 Cal. 516; Diggins v. Hartshorne, 108 Cal. 154; Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723; Deffenbaugh v. Foster, 40 Ind. 382. Where the contract provides that the consent of the common council is necessary, such consent must be shown before the assignee can recover on the contract. City of Dunkirk v. Wallace, 19 Ind. App. 298, 49 N. E. 463; Sims v. Hines, 121 Ind. 534; McCubbin v. City of Atchison, 12 Kan. 166; City of St. Louis v. Clemens, 42 Mo. 70; Jones v. Savage, 24 Misc. 158, 53 N. Y. Supp. 308; Suburban Elec. Light Co. v. Town of Hempstead, 38 App. Div. 355, 56 N. Y. Supp. 443. The consent of the public corporation will be necessary to a legal assignment under Laws 1897, c. 444. Devlin v. City of New York, 63 N. Y. 8; City of Philadelphia v. Lockhardt, 73 Pa. 211; Brace v. City of Gloversville, 167 N. Y. 452.

the express purpose of paying the obligation of the contract, namely, the cost of the improvement.

§ 293. Rights of parties.

The public corporation as a party to a contract is interested in and has the right to enforce its performance in accordance with its terms and conditions.[905] A failure to carry out the contract or its imperfect performance by the contractor confers no rights ordinarily upon an abutting property owner, the taxes upon whose property provide for the cost of the improvement.[906]

[905] City of Milwaukee v. Shailer (C. C. A.) 84 Fed. 106. A city, however, cannot recover damages for a failure to execute a contract in accordance with its conditions when the uncompleted work as constructed by the city is essentially different from that provided by the contract. In this case the board of public works undertook to change the route as contracted for and finish it at the expense of the contractors. The court said: "The engineer of the city had reported the prescribed line to be impracticable but the resolution of the board was silent on that point and was too indefinite in respect to the course and ending of the detour ordered to be regarded as establishing a new line or as amounting to an irrevocable abandonment of the old line; but it necessarily resulted that, when the work was taken out of the hands of the contractors, and the board of public works undertook to complete the tunnel, it was bound to proceed on the line of the agreement and could not then change the line and have the right to charge the contractors with the extra expense of construction. By the contract, power was reserved to the board to change the plans and specifications, but with equal explicitness it was provided that the price of extra work caused by a change should be agreed upon by the board and by the contractors before the work should be commenced. Practically, therefore, no change involving extra work could be made except by mutual agreement, and it certainly was not in the power of the board to suspend work by the contractors, and then adopt new plans to be worked out at their expense. If the original line was practicable, the board had its choice to finish the tunnel on that line and to look to the contractors for the expense in excess of the contract price or to treat the contract as at an end and do with the work as it saw fit. If the line was impracticable, the contractors, on the discovery of the fact, were entitled to abandon the work and it was not in the power of the board to require of them, against their consent to construct a tunnel on different plans and specifications." Town of Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130.

[906] Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 S. W. 939, 48 L. R. A. 279; City of Philadelphia v. Jewell, 135 Pa.

A failure of public officials to properly perform some of their duties in connection with the execution or carrying out of the contract cannot affect the right of the contractor or his assignee to enforce its obligations.[907]

§ 294. Payment of contract obligations.

The obligation assumed by a public corporation under a contract may be general and payable from funds raised by general taxation or special and payable only from moneys raised by special assessments upon designated property. In the former case the contractor or his assignee can compel payment from the general funds at the disposal of the corporation;[908] if the obligation for the payment is based upon a special fund he is limited in his recovery to such fund.[909]

329, 19 Atl. 947. A property owner may, however, avail himself of statutory rights; in this case Act Pa. April 19, 1843 (P. L. 342). To the contrary see Lodor v. McGovern, 48 N. J. Eq. 275.

[907] McVerry v. Boyd, 89 Cal. 304; Diggins v. Hartshorne, 108 Cal. 154; Wells v. Wood, 114 Cal. 255. "The point that the superintendent of streets failed to record the entire contract at the proper time, even if conceded, is of no consequence affecting any right of the contractor." Bigelow v. Inhabitants of Perth Amboy, 25 N. J. Law (1 Dutch.) 297.

[908] First Nat. Bank of Du Quoin v. Keith, 183 Ill. 475; City of New Albany v. Sweeney, 13 Ind. 245; McCubbin v. City of Atchison, 12 Kan. 166; Tournier v. Municipality No. 1, 5 La. Ann. 298. A city is liable where it guarantees the payment of the contract price upon a failure of the abutting owners to pay their proportion of same, also held in Cronan v. Municipality No. 1, 5 La. Ann. 537; City of New Orleans v. Elliott, 10 La. Ann. 59; Patterson v. City of New Orleans, 20 La. Ann. 103; Warren-Scharf Asphalt Pav. Co. v. City of St. Paul, 69 Minn. 453; Woolsey v. Village of Rondout, 4 Abb. Dec. (N. Y.) 639; City of Belton v. Sterling (Tex. Civ. App.) 50 S. W. 1027.

[909] City of Pontiac v. Talbot Pav. Co. (C. C. A.) 96 Fed. 679, denying a rehearing in 94 Fed. 65, 48 L. R. A. 326; City of Alton v. Foster, 74 Ill. App. 511; Hoblit v. City of Bloomington, 87 Ill. App. 479. A contractor is not entitled to interest upon a fund collected from special assessments eventually to be paid him but temporarily withheld.

City of Huntington v. Force, 152 Ind. 368; Succession of Erwin, 16 La. Ann. 132. A contractor may proceed against the abutting property owner.

Moylan v. City of New Orleans, 32 La. Ann. 673; Wheeler v. City of Poplar Bluff, 149 Mo. 36; City of Cincinnati v. Cameron, 33 Ohio St. 336; Comstock v. Incorporated Village of Nelsonville, 61 Ohio St. 288, 56 N. E. 15; German-American Sav. Bank v. City of Spokane, 17 Wash. 315,

The payment of compensation depends first, upon the validity of the contract; if executed without proper authority or not in the manner required by law, and therefore invalid, the contractor in case of nonpayment cannot recover in an action based upon it.[910] In these instances to effect a substantial equity between

47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259. Mandamus will lie to enforce an assessment for the purpose of creating a fund for the payment of certain obligations. Hohl v. Town of Westford, 33 Wis. 324. Where funds accumulated for the purpose of paying for local improvements are improperly used for other purposes, the town will not be relieved from the liability on a contract for their construction. The court say: "The town drainage fund was created by c. 151, Laws of 1869. That act provides that certain drainage moneys shall be apportioned to the several towns and refers to the moneys so apportioned to any town as belonging to the town; it provides that the money shall go into the hands of the town treasurer and when paid into the town treasury, it shall be denominated the drainage fund of the town and if not needed for drainage purposes it may be applied to the support of schools. True the law places the fund under the control of the town board of supervisors and provides that the same shall be expended under their direction for the purposes specified in the act; but these provisions merely designate the agencies through which the town shall act in disposing of the fund and do not relieve it from its obligations as custodian and trustee thereof. * * * In contemplation of law there was at the time mentioned, more than sixty dollars of the drainage fund in the town treasury. The fact that the supervisors had used it, without legal authority for another purpose cannot relieve the town from liability. The plaintiff had the right to assume that there was money belonging to that fund in the treasury and to contract on the faith of it and if he did so, and has performed his contract, the wrongful act of the agents of the town in using the fund for an unauthorized purpose cannot destroy his contract and exonerate the town from liability on account thereof. So far as he is concerned, there was a sufficient drainage fund belonging to the town to pay him for his work and the town, as the trustee of that fund, is bound to apply the same to that purpose."

[910] Richardson v. Grant County, 27 Fed. 495. No recovery can be had on a quantum meruit. Gamewell Fire-Alarm Tel. Co. v. City of Laporte (C. C. A.) 102 Fed. 417, affirming 96 Fed. 664. Newman v. Sylvester, 42 Ind. 106. The rule applied where the improvement was made under a misapprehension of the facts, outside the city limits, both parties as to the facts having equal knowledge.

Fox v. City of New Orleans, 12 La. Ann. 154; Seibrecht v. City of New Orleans, 12 La. Ann. 496; Warren v. Inhabitants of Durham, 61 Me. 19; Newbery v. Fox, 37 Minn. 141. "The doctrine of ultra vires has, with good reason, been applied with greater strictness to municipal bodies than to private corporations,

parties, he is usually permitted to recover for the work done, materials furnished or services rendered upon a quantum meruit or valebant.[911] The payment of compensation again may depend

and, in general, a municipality is not estopped from denying the validity of a contract made by its officers when there has been no authority for making such a contract. A different rule of law would in effect vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent. In the case here presented it is not to be denied that the town council had no authority to make this contract; that the charter set forth the conditions which would authorize such a contract to be made; that those prescribed conditions had not been fulfilled, nor did the defendant believe that they had been. The most that appears in his favor is that without being misled or mistaken as to the fact, but being warned that the contract was void, he nevertheless judged that it was legally valid; and being also so advised by the members of the council, he took the risk of performing it. The contract, being thus unauthorized, was not effectual as a contract, and the defendant does not appear in a position entitling him to invoke the doctrine of estoppel to aid him in enforcing his claim as though the contract were obligatory upon the town."

State v. Rickards, 16 Mont. 145, 28 L. R. A. 298; State v. City of Helena, 24 Mont. 521, 63 Pac. 99, 55 L. R. A. 336; Tappan v. Long Branch Police S. & I. Commission, 59 N. J. Law, 371, 35 Atl. 1070. But a mere irregularity constitutes no defense in an action on a contract. Brady v. City of New York, 7 Abb. Pr. (N. Y.) 234; Nichols v. State, 11 Tex. Civ. App. 327, 32 S. W. 452; Berlin Iron Bridge Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408; Berwind v. Galveston & H. Inv. Co., 20 Tex. Civ. App. 426, 50 S. W. 413; Silliman v. Fredericksburg, O. & C. R. Co., 27 Grat. (Va.) 119; Bill v. Town of Woodbury, 54 Vt. 251, 87 Am. Dec. 423.

[911] Bill v. City of Denver, 29 Fed. 344. The rule applied to the payment of services rendered. Illinois Trust & Sav. Bank v. Arkansas City Water Co., 67 Fed. 196; La Corporation de Notre Dame de Bonsecours v. Bessette, Rap. Jud. Que. 9 B. R. 423; San Juan County Com'rs v. Tulley, 17 Colo. App. 113, 67 Pac. 346; Dawson Water-Works Co. v. Carver, 95 Ga. 565. The rule applied to the payment by the city for water already consumed, without a consideration of the validity of the contract.

City of Chicago v. Norton Mill. Co., 97 Ill. App. 651; Westbrook v. Middlecoff, 99 Ill. App. 327; Sanitary Dist. of Chicago v. George F. Blake Mfg. Co., 179 Ill. 167; State Board of Agriculture v. Citizens' St. R. Co., 47 Ind. 407; Schipper v. City of Aurora, 121 Ind. 154, 6 L. R. A. 318; Reichard v. Warren County, 31 Iowa, 381. But the acceptance and occupancy of a public building will

upon the performance of the contract according to its terms and conditions. If there is a failure to perform or an imperfect performance, advantage can be taken of these conditions by the public corporation and payment refused. It is then questionable if the contractor can recover.[912] The failure, however, on the part

not enable the contractor to recover on a quantum meruit for that portion of its cost in excess of the amount authorized by law.

Sleeper v. Bullen, 6 Kan. 300. The acceptance of the work and the levying of a tax, it is held here, estop the city from denying the validity of a contract. City of Concordia v. Hagaman, 1 Kan. App. 35, 41 Pac. 133; Nicholasville Water Co. v. Councilmen of Nicholasville, 18 Ky. L. R. 592, 36 S. W. 549; City of Louisville v. McNaughten, 19 Ky. L. R. 1695, 44 S. W. 380; City of Louisville v. Gosnell (Ky.) 61 S. W. 476; Wiley v. Inhabitants of Athol, 150 Mass. 426; City of Detroit v. Michigan Pav. Co., 36 Mich. 335. The rule is different where a valid contract has been abandoned by a contractor; he cannot recover for the labor and materials furnished by him upon the uncompleted work.

Sykes v. City of St. Cloud, 60 Minn. 442; Lyman v. City of Lincoln, 38 Neb. 794. "A contractor who furnishes labor and material to a city under a contract which reserves to the city the right of cancellation, is entitled, after a termination of such contract by the city, to recover from it the actual benefits the city has received from the contractor's partial performance; and this is found by ascertaining the reasonable worth to the city of such partial performance, appropriated or received by the city, at the time of such receipt or appropriation and deducting therefrom all payments made to the contractor and all actual damages the city has sustained by his defaults."

Schier v. City of Buffalo, 35 Hun (N. Y.) 564. A contractor may recover for services rendered where both parties acted in good faith though through an error one of the conditions required by law as necessary to the making of a legal contract did not exist.

North River Elec. Light & Power Co. v. City of New York, 48 App. Div. 14, 62 N. Y. Supp. 726. A contract for the supply of a necessary commodity, i. e., street lighting, is enforceable for a reasonable consideration though not executed in the manner required by charter provision, designed to insure economy and prevent favoritism and corruption.

Sheehan v. City of New York, 37 Misc. 432, 75 N. Y. Supp. 802; City of New York v. Sonneborn, 113 N. Y. 423; Allegheny City v. McClurkan, 14 Pa. 81; City of Sherman v. Connor, 88 Tex. 35, 29 S. W. 1053; Jewell Nursery Co. v. State, 8 S. D. 531, 67 N. W. 629; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100, holds that for obligations incurred in excess of the constitutional limit, although the corporation had had the benefit of the contract, it will not be liable even on a quantum meruit. Scott v. School Dist. No. 9 in Williamstown, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

[912] Trustees of Belleview v. Hohn,

of public officials to levy and collect special assessments or taxes may give the contractor performing work or supplying materials, the right to a recovery from general corporate funds.[913] This general liability may then include not only the original contract price but such damages as the contractor may have suffered by reason of the failure and neglect to levy and collect the taxes unless there is some express provision in the charter or the contract exempting the corporation.[914]

§ 295. Extras.

The furnishing of extra supplies or materials or the doing of work in excess of that called for by the contract leads to many differences. A contractor should not perform extra work or supply extra materials without a clear understanding of his rights for compensation. A public corporation is one of restricted and limited powers, especially in the expenditure of public moneys; the power to contract is not usually an implied one but must expressly be given and must be exercised in the manner designated.

82 Ky. 1; Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Mathewson v. City of Grand Rapids, 88 Mich. 558. A contractor failing to complete the work within the time required by the contract cannot recover when the delay was caused by the issuance of an injunction on behalf of the adjoining property owners because of an encroachment of the public work upon private property. The court held that the duty to ascertain the right of the city to construct the work in this particular place rested equally upon both parties to the contract. Maupin v. Franklin County, 67 Mo. 327; Moore v. City of New York, 73 N. Y. 238; Lillard v. Freestone County, 23 Tex. Civ. App. 363.

[913] City of Leavenworth v. Stille, 13 Kan. 539; Heller v. Garden City, 58 Kan. 263, 48 Pac. 841; Kearney v. City of Covington, 58 Ky. (1 Metc.) 339; Cole v. City of Shreveport, 41 La. Ann. 839, 6 So. 688; City of Lansing v. Van Gorder, 24 Mich. 456; Fisher v. City of St. Louis, 44 Mo. 482; Baldwin v. City of Oswego, 1 Abb. Dec. (N. Y.) 62; Beard v. City of Brooklyn, 31 Barb. (N. Y.) 142; Weston v. City of Syracuse, 158 N. Y. 274, 43 L. R. A. 678; Addyston Pipe & Steel Co. v. City of Corry, 197 Pa. 41; McEwan v. City of Spokane, 16 Wash. 212; Stephens v. City of Spokane, 14 Wash. 298; Bowman v. City of Colfax, 17 Wash. 344, 49 Pac. 551; Allen v. City of Janesville, 35 Wis. 403.

[914] Denny v. City of Spokane (C. C. A.) 79 Fed. 719; City of New Orleans v. Kerr, 50 La. Ann. 413. The rule applied to a pound master working under a contract with the city. Ash v. City of Independence, 79 Mo. App. 70; McCann v. City of Albany, 11 App. Div. 378, 42 N. Y. Supp. 94; Cumming v. City of Brooklyn, 11 Paige (N. Y.) 596.

The law adopts this policy to prevent the dishonest or improper use of public moneys. If a contractor were permitted upon his own volition or in an informal manner to perform services or furnish materials not called for by the original terms of his contract thus creating an obligation on the part of the corporation the very purpose and policy of the law would be defeated. At the same time the courts recognize the principle that a public corporation, equally with others, should deal justly and fairly. No rule of general application can be laid down. Each case involving the question of "extras," so called, must depend largely upon its own facts.[915] The extra work or materials necessary

[915] Fitzhugh v. Ashworth, 119 Cal. 393; West Chicago Park Com'rs v. Kincade, 64 Ill. App. 113; City of Chicago v. McKechney, 91 Ill. App. 442. The compensation allowed for extra work or materials of a different character from those provided in the contract should be based upon their value.

Palladino v. City of New York, 56 Hun, 565, 10 N. Y. Supp. 66; Abells v. City of Syracuse, 7 App. Div. 501, 40 N. Y. Supp. 233. In holding that the contractor could recover for extra work in this case the court said: "In the progress of the work a fill became necessary along the side of the street, varying from three to twelve and fifteen feet in height so that in attempting to perform the contract it was discovered that if the top of the embankment was of the width of the street, the toe of the embankment must necessarily extend over the premises of abutting owners sufficiently to support the embankment with the earth slope required by the contract. If the fill was fifteen feet deep the toe of the bank would be thirty feet upon the adjoining owner's property. The adjoining owners refused to permit any portion of the embankment upon their premises and forbade it. An emergency, therefore, suddenly arose which neither of the parties seemed to have contemplated when the contract was made and to persist in the performance of the contract would render all concerned liable as trespassers and the work would probably be stopped. The only way out of the difficulty was, therefore, to construct a vertical wall commencing at the line of the street instead of the sloping embankment which would involve an expenditure not contemplated by the parties when the contract was executed. The city engineer with the knowledge and consent of the commissioner of public works verbally directed the contractors to construct this wall which was done at an expense of $913. * * * Monthly estimates were made on this contract and the commissioner of public works certified in writing to the correctness of the claim for the construction of this wall and also in another monthly estimate recognized in writing the propriety of this work. The common council accepted the estimate of October 23, 1893, made by the engineer acting for and in the name of the commissioner which embraced $550 for the stone work and ordered

may be required because of causes beyond the control of either party to the contract or because of acts done by either the contractor or the public corporation, the public corporation changing the contract requirements after its execution and before the completion of the work. For causes beyond the control of both parties unless covered by provisions of the contract, the contractor ordinarily assumes all risk.[916] If the "extras" are occasioned or consented to by the public corporation, it is liable

it paid. This was done; but subsequently the common council ordered the commissioner of public works to make a final estimate or account omitting the said extra work and making a statement that there was finally due the contractors on the contract but $792.36; and the common council also adopted a resolution that the stone wall was built without proper authority and the city was not liable. The city engineer was the only witness sworn. He testified that the work was necessary in order to carry out the contract to build this vertical wall and that it was extra work. * * * The work was not only necessary and proper but it was performed in good faith. No fraud is claimed but it is admitted that the contractors had properly performed the work and that it was worth the amount claimed by the plaintiff. The defendant has the benefit of this work and the plaintiff should not be deprived of the judgment." Following Brady v. City of New York, 20 N. Y. 312; Weston v. City of Syracuse, 82 Hun (N. Y.) 67. Watterson v. City of Nashville, 106 Tenn. 410, 61 S. W. 782. Extra work not authorized in the manner provided by a city charter cannot be a charge upon the city.

[916] Gartner v. City of Detroit, 131 Mich. 21, 90 N. W. 690. In this case the contract merely gave the contractor permission to tunnel if he saw fit without in any way agreeing to pay him therefor. On sinking a shaft preliminary to tunneling, quick sand was struck and the plan abandoned. The contractor then dug a trench but at a cost considerably exceeding the contract price. He sues to recover the cost of the trench as "extra." The court said: "To us the case seems a simple one. We think that it cannot be said that the fact that the job was let with an expectation that it would be tunneled indicates an intention to represent that it could be tunneled. On the contrary the language of the contract is a permission to tunnel and the indication that this was so understood is emphasized by the express provision of the contract quoted, imposing risks of obstructions upon the contractor. The job was advertised and let upon such terms and while we appreciate the hardship of having to perform a contract at a loss we cannot relieve the contractor from the obligation of his contract." Citing McBrian v. City of Grand Rapids, 56 Mich. 99.

Wheeler v. Van Houten, 12 Johns. (N. Y.) 311; McJimsey v. Traverse, 1 Stew. (Ala.) 244; Burnham v. City of Milwaukee, 100 Wis. 55, 75 N. W. 1014.

and,[917] on the other hand, if the contractor's acts cause extra work or the use of extra materials, he clearly should stand the loss.[918] Municipal contracts generally provide that no claims for "extras" shall be allowed unless pursuant to the written order or direction of a designated official or official body. Such provision is valid and the order or direction is then necessary to a legal claim for compensation on account of extra work or materials furnished by the contractor.[919]

[917] Zottman v. City & County of San Francisco, 20 Cal. 96; J. M. Griffith Co. v. City of Los Angeles (Cal.) 54 Pac. 383. But the consent should be in the manner authorized by law, in writing and by order of the council, otherwise, there is no liability even on a quantum meruit. Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495. The consent need not be expressed; it may be implied from acts of the corporation. Hamilton County Com'rs v. Newlin, 132 Ind. 27, 31 N. E. 465; Guthrie v. City of Dubuque, 105 Iowa, 653, 75 N. W. 500; City of Duluth v. McDonnell, 61 Minn. 288. The contrary rule of course is true that where no consent is given and extras are paid for without such consent the amount can be subsequently recovered. Steffen v. City of St. Louis, 135 Mo. 44, 36 S. W. 31; McCann v. City of Albany, 11 App. Div. 378, 42 N. Y. Supp. 94. The rule is also true where the extra work was made necessary by the mistake of a city official. Gearty v. City of New York, 171 N. Y. 61, 63 N. E. 804, reversing 62 App. Div. 72, 70 N. Y. Supp. 942.

[918] Hamilton County Com'rs v. Newlin, 132 Ind. 27, 31 N. E. 465.

[919] Campbell v. District of Columbia, 117 U. S. 615; J. M. Griffith Co. v. City of Los Angeles (Cal.) 54 Pac. 383; O'Hara v. City of New Orleans, 30 La. Ann. 152; Boston Elec. Co. v. City of Cambridge, 163 Mass. 64, 39 N. E. 787. The rule holds when the extra work was beneficial to the corporation and used by it. City of Duluth v. McDonnell, 61 Minn. 288. The court say: "The contract expressly provided that no claim for extra work should be made unless, before the performance, the village council should have first authorized the engineer in writing to do such extra work, nor unless, before its performance, the price to be paid therefor should have first been agreed upon in writing between the engineer and contractor, and approved by the village council and done in obedience to a written order from the engineer, given before the performance of the extra work. * * * The provisions of the contract referred to are proper and necessary in order to protect the public treasury. The defendant knew they were in the contract when he executed it; and to allow him, in utter disregard of its terms, to retain money paid to him by mistake would, under the circumstances, be inequitable against good conscience and against public policy. Any other rule would open wide the door for the perpetration of all sorts of raids and frauds on the public

§ 296. Public contracts; actions.

It is not usual, in an action against a public corporation on a contract, unless its right to contract in a particular matter is restricted, to show the authority for making the contract and the necessary steps taken pursuant to such authority leading to its formal execution.[920] In controverted cases unless the contrary appears in the contract, a slight variation in the manner of its performance will not afford a defense in an action upon it. This principle especially holds where the variation results in an advantage to the corporation.[921]

§ 297. Bond required of contractors.

It is customary in the making of all contracts by public corporations to include as one of the conditions of the contract the requirement that the contractor shall give a bond with satisfactory sureties running to the corporation,[922] and conditioned

treasury." Leathers v. City of Springfield, 65 Mo. 504; O'Brien v. City of New York, 65 Hun, 112, 19 N. Y. Supp. 793.

[920] Goodyear Rubber Co. v. City of Eureka, 135 Cal. 613, 67 Pac. 1043; City of Chicago v. Peck, 196 Ill. 260; City of Solomon v. Hughes, 24 Kan. 211.

[921] Brady v. City of New York, 132 N. Y. 415, 30 N. E. 757; Mulholland v. City of New York, 113 N. Y. 631.

[922] Stephenson v. Monmouth Min. & Mfg. Co. (C. C. A.) 84 Fed. 114. A creditor of a contractor on a bond given under How. Ann. St. Mich. § 8411b having a beneficial interest therein may sue in the name of the city without its consent. In this case the bond, by mistake, ran to the "City of Menominee" instead of to the "State of Michigan" as provided by statute. In holding that this did not vitiate it and that the contractor could sue in the name of the city under it the Court said: "The difference resulting from the mistake in drawing the bond so as to run to a promisee not authorized by the statute is, that if the bond had run to the statutory obligee, the statute itself granted authority for the starting of a suit in the name of the people of the state of Michigan for the use and benefit of anyone intended as a beneficiary; while there is no statutory authority by which defendant in error might have used the name of the substituted obligee as plaintiff for its use and benefit. That no one can use the name of another as plaintiff without his consent given in fact or by legal intendment is clear. But when a public municipality charged with the duty of taking and holding the bond required by this statute takes a bond properly conditioned but running to itself, it does by legal intendment consent to the use of its corporate name as plaintiff by anyone beneficially interested in the bond thus taken, when indemnified

upon the proper performance of the work,[923] the furnishing of satisfactory materials,[924] the payment of all debts in connection with the performance of the contract including labor and materials furnished.[925] The purpose of the first two conditions

against costs. No express authority of law is needed to authorize the use of the name of the city under such circumstances," citing Kiersted v. State, 1 Gill & J. (Md.) 231; and Ing v. State, 8 Md. 287.

City of Newton v. Devlin, 134 Mass. 490.

[923] Williams v. Markland, 15 Ind. App. 669, 44 N. E. 562; City of Ft. Madison v. Moore, 109 Iowa, 476; Seaboard Nat. Bank v. Woesten, 147 Mo. 467, 48 L. R. A. 279; City of New York v. Reilly, 59 Hun, 501, 13 N. Y. Supp. 521.

[924] Gosnell v. City of Louisville, 104 Ky. 201, 46 S. W. 722; Zipp v. Fidelity & Deposit Co. of Maryland, 73 App. Div. 20, 76 N. Y. Supp. 386; City of Portland v. Bituminous Pav. & Imp. Co., 33 Or. 307, 52 Pac. 28, 44 L. R. A. 527. Such a condition in a bond is held to be an undertaking to maintain the pavement constructed in repair for the designated time and not a mere guarantee of the character and materials.

[925] French v. Powell, 135 Cal. 636, 68 Pac. 92; Lane v. State, 14 Ind. App. 573, 43 N. E. 244; School Town of Winamac v. Hess, 151 Ind. 229; McKeon v. Sumner Bldg. & Supply Co., 51 La. Ann. 1961, 26 So. 430; Park v. Sykes, 67 Minn. 153; People v. Collins (Mich.) 71 N. W. 153. Construing the term "laborers" and "material men" as used in a contractor's bond under How. Ann. St. §§ 8411a, 8411b and 8411c.

Coit v. City of Grand Rapids, 115 Mich. 493; People v. Thompson, 119 Mich. 21, 77 N. W. 314. A person, not requested, who furnished slate black board is a material man and not a sub-contractor. Sepp v. McCann, 47 Minn. 364; and Salisbury v. Keigher, 47 Minn. 367; holds that Sp. Laws Minn. 1889, c. 360, provides for the payment of laborers employed by subcontractors as well as contractors.

Freeman v. Berkey, 45 Minn. 438, 48 N. W. 194; Ihk v. City of Duluth, 58 Minn. 182, 59 N. W. 960. The neglect of city officials to take the bond required by the municipal charter does not impose a liability upon the contractor.

American Surety Co. of New York v. Waseca County Com'rs, 77 Minn. 92, 79 N. W. 649. Where a bond has been given conditioned that the contractor shall pay all just claims for work and labor performed and materials furnished, payments cannot be withheld from him because he is in default with the laborers and material men.

City of St. Louis v. O'Neil Lumber Co., 42 Mo. App. 586; Devers v. Howard, 144 Mo. 671, 46 S. W. 625; City of St. Louis v. Von Phul, 133 Mo. 561, overruling Kansas City Sewer Pipe Co. v. Thompson, 120 Mo. 221; Kansas City v. O'Connell, 99 Mo. 357. A covenant in a bond for the payment of laborers does not give a right of action against the sureties by laborers for injuries sustained by them while employed by the contractor.

City of Springfield v. Weaver, 137 Mo. 650; Lyman v. City of Lincoln, 38 Neb. 794, 57 N. W. 531. The bond

named is to secure the performance of the work in a satisfactory manner; to provide a means by which the corporation may indemnify itself against any attempt on the part of dishonest contractors to furnish materials or perform work not of the character or quality required by their contract. The purpose of the third condition is to insure the payment of all bills by the contractor which, if unpaid, would furnish a basis for the filing of liens in favor of laborers or material men. Their prompt payment before the acceptance of work by the corporation insures a freedom from vexatious litigation as well as the opportunity afforded a contractor without paying his bills to collect his compensation from the municipality leaving it the possible obligation of paying again for the materials or services that can be collected under lien laws.[926] A creditor of a contractor may have such a beneficial interest in a bond as to enable him to sue thereon without the consent of the city. The right if it exists, usually is given by statute,[927] and it is not a prerequisite, ordinarily, to an action

may be required without an express statute or other legal provision. Mansfield v. City of New York, 15 App. Div. 316, 44 N. Y. Supp. 229. Such a condition ordinarily does not cover claims for damages suffered from personal injuries.

Rhea County v. Sneed, 105 Tenn. 581, 58 S. W. 1063; Town of Grand Isle v. Kinney, 70 Vt. 381; State v. Liebes, 19 Wash. 589; Wallace v. Skagit County, 8 Wash. 457; Electric Appliance Co. v. United States Fidelity & Guaranty Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. A failure by the city to require the filing, by the contractor, of receipts in full for labor and materials before the final payment on the work, releases the sureties on the bond.

[926] Read v. American Surety Co., 117 Iowa, 10, 90 N. W. 590; Whitehouse v. American Surety Co., 117 Iowa, 328, 90 N. W. 727; Kansas City v. McDonald, 73 Mo. App. 439; Camden Iron Works v. City of Camden, 60 N. J. Eq. 211, 47 Atl. 220; Norton v. Sinkhorn, 63 N. J. Eq. 313, 50 Atl. 506; Garrison v. Borio, 61 N. J. Eq. 236, 47 Atl. 1060, construing Gen. St. p. 2078, Act March 30, 1892; McDonald v. Village of Ballston Spa, 34 Misc. 496, 70 N. Y. Supp. 279; Hamilton v. Gambell, 31 Or. 328, 48 Pac. 433; City of Philadelphia v. Wistar, 35 Pa. 427; Herring-Hall-Marvin Co. v. Kroeger, 23 Tex. Civ. App. 672, 57 S. W. 980.

[927] State v. McCray, 5 Ind. App. 350, 32 N. E. 341; Callahan v. City of Boston, 175 Mass. 201, construing statutes of 1892, c. 270, relative to debts due for labor performed in constructing public works.

Devers v. Howard, 144 Mo. 671, 46 S. W. 625; Doll v. Crume, 41 Neb. 655, 59 N. W. 806. Only the authorized laborer and materialmen may sue on the condition in a contractor's bond to the city that he shall pay for all labor and materials furnished in executing the contract.

on a contractor's bond conditioned for the payment of claims for labor and material, that the payment of such claims should have been demanded.[928]

Baum v. Whatcom County, 19 Wash. 626. Under 1 Hill's Code, § 2415, a bond conditioned to pay all laborers, material men, etc., may be enforced by a material man.

The following cases hold that such right does not exist. Columbia Brick Co. v. District of Columbia, 1 App. D. C. 351. Material men not parties to a contract cannot enforce provisions relative to payment. Kansas City Sewer Pipe Co. v. Thompson, 120 Mo. 218, 25 S. W. 522. A materialman has no right of action on a bond containing such condition. Buffalo Cement Co. v. McNaughton, 156 N. Y. 702. Such a bond is intended solely for the benefit of the city and persons furnishing material cannot sue thereon. Electric Appliance Co. v. United States Fidelity & Guaranty Co., 110 Wis. 434, 85 N. W. 648, 53 L. R. A. 609. Usually, the bond is for the benefit of the city alone; a creditor having a claim for labor or material capable of collection through the filing of a lien does not have the right to sue on the bond given by the contractor.

[928] Lane v. State, 14 Ind. App. 573, 43 N. E. 244. "It is next insisted that the conclusions of law are erroneous because there is no finding that a demand was made before the suit was brought. The finding, however, does show that the road had been completed and that the contractors had recovered the full amount of the contract price and that the claims for labor, materials and board were due, and that the contractors had failed to pay the same and that certificates of indebtedness had been issued by the contractors for nearly all the claims and orders drawn upon third parties for the same which orders had been paid by the holders to the laborers and material men long before the commencement of the action. The superintendent was a public officer and it was a part of his official duty to enforce the bond for the benefit of the laborers and material men. When he learned that such claims had not been paid after the completion of the road, and full settlement had been made with the contractors, it was his duty to enforce the bond. The appellants contracted with the state with the understanding that they would be liable for such claims and it was their duty to see that such claims were paid and when they failed to do so there was a breach of the bond. The suit here is brought by the person designated by the law, in the first instance and perhaps the only one who can maintain the action. It is true that, * * * when the suit is brought by the laborer or material man on his own relation, a demand must be first made of the contractor. There the suit is brought by a person not a direct party to the bond. Here the suit is brought by the person designated by the law and one whom the appellants knew when they executed the bond, would be entitled to enforce it; while in the other case the laborers are unknown at the

§ 298. Rights of sureties.

Sureties on a contractor's bond given for either the faithful performance of the work or the payment of material men and laborers are not liable to third parties indirectly furnishing materials in performing the contract.[929] If the contractor fails to complete the work or abandons his contract, the sureties on the bond given by him may have the right to assume and perform the contract according to its terms and conditions; they then stand in the place of and are substituted for the original contractor entitled to his rights and subject to his obligations.[930]

time the bond is executed. The suit was a sufficient demand in this case."

[929] See cases cited § 297. City of Sterling v. Wolf, 163 Ill. 467. "The rule has been re-announced by this court in almost numberless cases, that the undertaking of a surety is strictly construed and may not be extended by implication or construction; that he cannot be held beyond the express terms of his undertaking. The liability is strictissimi juris. In case of doubt, the doubt is generally resolved in his favor. To hold that it was intended by the parties that the sureties for Real (the contractor) were to become responsible to third parties for all the material, labor and tools employed and used by him in the performance of his contract with the city would be to hold the sureties liable, not only beyond the letter of their contract, but make them liable by a most liberal and, we think, unjustifiable construction of their contract."

[930] Jones v. City of New York, 60 App. Div. 161, 70 N. Y. Supp. 46. The court here say: "The only question then remaining, is whether the offer by the board of education to the contractors that they might go on and complete the work, with a concession that the time that had elapsed between the 2nd of June, when the notice was given, and the 27th of June, when it was withdrawn, should not be counted as a part of the three hundred days, operated as a waiver of the forfeiture that had already occurred. If that offer had been accepted by the plaintiffs there can be no doubt that the contract would have been restored; but they refused peremptorily to take advantage of it, and, having done that, they are not now at liberty to say that the contract is not at an end. It is claimed, however, that the sureties having offered to complete the contract, the forfeiture as to them, was waived. But they never did offer. All that was done in that behalf was done by Mr. Winter who said that he went to the board of education and asked permission that one Hay, the indemnitor of the sureties, should be allowed to continue the work. He says expressly that he represented Mr. Hay and never had anything to do with the surety company, nor did he represent it. The contract was at an end. The surety company were no longer at liberty to do any work upon it. There was no obli-

In case of the assignment of the contract with the consent of all parties including the sureties, their relative obligations are not changed.[931]

§ 299. Subcontractors.

The statutes providing for the filing of liens by laborers or material men for labor performed or materials furnished do not ordinarily apply to subcontractors. The payment of a claim for either laborer or material may depend, therefore, upon the bringing of the person performing the labor or supplying the materials within either class, holding him as a subcontractor will defeat his right of securing the statutory lien; conversely the reverse is true. No general rule applicable to the construction of such statutes can be given the decisions of the different states must be consulted. The statute giving the lien may benefit the laborers of material men and subcontractors as well as contractors. So held by all the Minnesota cases cited.

gation on the part of the city or the board of education to make a new arrangement with them unless they saw fit."

[931] French v. Powell, 135 Cal. 636, 68 Pac. 92; Anderson v. City of Detroit (Mich.) 83 N. W. 145; People v. Powers, 108 Mich. 339; People v. Cotteral, 119 Mich. 27; Combs v. Jackson, 69 Minn. 336, 72 N. W. 565. "There is no evidence that plaintiff's assignors, when they performed labor in quarrying and crushing the rock, had particularly in mind any contract between their employer, Anderson, and Canney Brothers, or that they performed the labor for the specific or particular purpose of aiding in the execution of that contract or in reliance upon it as security for the payment of their labor, or that they, at that time, knew where or for what purpose the rock was to be used. It is claimed upon this state of facts, that although Anderson may have gotten out and furnished this material as sub-contractor, in the execution of the contract between Jackson and the City, and the material was so used, yet plaintiff's assignors had no right of action on the bond because they did not perform the labor 'particularly for such contract.' * * * If Anderson, as sub-contractor, got out and furnished this rock for this paving contract, and it was actually used therefor, then those who performed labor for him in preparing the material may maintain an action on the bond although while doing the work, they may not have had in mind the purpose of aiding in the execution of the contract between Jackson and the city. Any other construction, would, in a great measure, defeat the manifest purpose of the statute, and deprive of its benefits a large class of persons who stand most in need of its protection." Kansas City v. McDonald, 80 Mo. App. 444; Gilmore v. Westerman, 13 Wash. 390; James v. Davidson, 81 Wis. 321, 51 N. W. 565.

CHAPTER VI.

PUBLIC REVENUES; THEIR COLLECTION AND DISBURSEMENT.

I. Taxation.

II. Special Assessments.

(For complete analysis of this subdivision see page 773.

III. License Fees and Poll Taxes.

(For complete analysis of this subdivision see Vol. II.

IV. The Disbursement of Public Revenues.

(For complete analysis of this subdivision see Vol. II.

I. Taxation.

§ 300. Definition and nature.
301. Municipal power to tax.
302. The authority.
303. Limitations upon the power.
304. Purpose of taxation.
305. The payment of debts.
306. Taxation for the support of public schools.
307. School taxes; amount required.
308. Diversion of funds.
309. The construction of roads.
310. The levy of taxes for the establishment or maintenance of plants for the supply of water and light.
311. The exercise of the power.
312. The authority to tax and upon what based.
313. Exemptions.
314. Taxes; their levy and assessment.
315. Basis or authority for tax levy.
316. Agency of tax levy.
317. Apportionment of taxes.
318. Tax levies; preliminary proceedings.
319. Mode of levy and assessment.
320. Loss of power.
321. Errors in proceedings.
322. The power; when exercised.

323. The duty obligatory.
324. Equalization of tax levies.
325. Taxpayers' rights.
326. Lien and priority.
327. Collection of taxes.
328. Actions; questions raised.
329. Use of proper remedy by taxpayers to prevent collection of illegal taxes.
330. Compromise of taxes.
331. Right to prescribe and collect penalties.
332. Irregularities.
333. Enforcement of lien.
334. Summary proceedings.
335. The payment of taxes.
336. Their refunding.

§ 300. Definition and nature.

The power of taxation is one of the inherent attributes of sovereignty. It is that power, political and governmental in its nature, which can compel, if necessary, a contribution for the support of the government from those under its jurisdiction. Theoretically, it has no limit. It is that power most necessary to the existence and maintenance of government and the exercise of the various functions which are universally recognized as proper. It is through the existence of this power that its ordinary expenses are paid, and, in addition, it is enabled to maintain the various beneficent agencies having for their purpose the safety, advancement and the advantage of society. Under some theories, the individual is supposed, in return for a surrender to government of the right to tax his person and property, to receive the obligation of that government to protect him in the proper use and enjoyment of his property and to guard his personal rights, but ordinarily the power of taxation is a governmental and political necessity and there is no legal obligation to render a return.[1]

[1] Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242, 42 L. R. A. 646; Trustees of Public Schools v. Taylor, 30 N. J. Eq. (3 Stew.) 618. Cooley, Taxation, p. 2, "The justification of the demand is therefore found in the reciprocal duties of protection and support between the state and those who are subject to its authority, and the exclusive sovereignty and jurisdiction of the state over all persons and property within its limits for governmental purposes. The person upon whom the demand is made, or

The power of taxation is different in its nature from those other great governmental powers, namely, the police power, the power of eminent domain and the war power. The police power is purely regulative and its exercise designed to restrict the individual in the use of his physical powers and in the use and enjoyment of his property enforcing the maxim sic utere tuo ut alienum non loedas. Government recognizes the individual only as a member of society with obligations and duties to that society of which he is a member.[2]

The power of eminent domain is that inherent right possessed by the sovereign to appropriate private property for public use with the organic limitation in this land, "only upon the payment of just compensation," which must be "full, ample and complete" before the power can be exercised. There can be no taking under the power of eminent domain without the rendition of a pecuniary equivalent.[3]

whose property is taken, owes to the state a duty to do what shall be his just proportion towards the support of government, and the state is supposed to make adequate and full compensation, in the protection which it gives to his life, liberty and property, and in the increase to the value of his possessions, by the use to which the money contributed is applied. * * * The power of taxation is an incident of sovereignty, and is possessed by the government without being expressly conferred by the people, * * * and not only is the power unlimited in its reach as to subjects, but in its very nature it acknowledges no limits, and may be carried even to the extent of exhaustion and destruction thus becoming in its exercise a power to destroy. If the power be threatened with abuse, security must be found in the responsibility of the legislature that imposes the tax to the constituency which must pay it."

[2] Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215, with cases there cited defining taxes. See, also, People v. McCreery, 34 Cal. 432; Stockton & V. R. Co. v. City of Stockton, 41 Cal. 149; People v. Austin, 47 Cal. 360; Warren v. Henly, 31 Iowa, 31; Allen v. Inhabitants of Jay, 60 Me. 124; Weismer v. Village of Douglas, 64 N. Y. 91; Hilbish v. Catherman, 64 Pa. 154.

[3] Alexander v. City of Alexandria, 5 Cranch (U. S.) 1; Gilman v. City of Sheboygan, 2 Black (U. S.) 510. The exercise of the power of taxation is not liable to the objection that private property is taken for public purposes without compensation. Such provisions operate as a limitation only on the right of eminent domain. It does not affect the taxing power. Chambers v. Satterlee, 40 Cal. 497; Nichols v. City of Bridgeport, 23 Conn. 189; Brittin v. Blake, 36 N. J. Law, 442; Matter of Dorrance St., 4 R. I. 230; Lewis, Em. Dom.

The war power, like the power of taxation, is a governmental and political necessity, but properly used only for the maintenance or protection of national life or honor. The power of taxation being a governmental and political one, in the abstract sense is without limitation and can be exercised without restriction. In this country, however, there are well established and clearly defined limitations upon the right of the sovereign to levy taxes. These limitations and restrictions are to be found in the constitution of the United States and those of the different states and exist as well in what might be termed for want of a better phrase the fundamental principles of law and equity. The subject of taxation both in its constitutional and administrative aspects has been well considered by the authorities cited in the notes,[4] and a general discussion will not be here given except as delegated or granted subordinate governmental agents, and this in the briefest way. The power of the sovereign to delegate to subordinate bodies or agencies its powers of taxation is unquestioned though such grant usually conveys no unlimited or irrevocable rights.[5] The limitations upon the power usually applied by courts have for their purpose the imposition of taxes in a uni-

[4] Sedgwick, St. Const. Law; Hare, Am. Const. Law; Cooley, Const. Lim.; Desty, Taxation; Burroughs, Taxation; Cooley, Taxation.

[5] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; Stein v. City of Mobile, 24 Ala. 591; Baldwin v. City Council of Montgomery, 53 Ala. 437; Vance v. City of Little Rock, 30 Ark. 435; State v. Union Cent. Life Ins. Co. (Idaho) 67 Pac. 647; People v. City of Chicago, 51 Ill. 17; Livingston County Sup'rs v. Weider, 64 Ill. 427. "Corporate purposes must be for such purposes and such only as are germane to the objects of the creation of the municipality, at least, such as have a limited connection with those objects and manifest relation thereto." Huck v. Chicago & A. R. Co., 86 Ill. 352; Lucas v. Tippecanoe County Com'rs, 44 Ind. 524; Bradley v. McAtee, 70 Ky. (7 Bush) 667; City of New Orleans v. Turpin, 13 La. Ann. 56; Bracey v. Ray, 26 La. Ann. 710; State v. Linn County Ct., 44 Mo. 504; State v. Owsley, 122 Mo. 68; State v. Board of Education of St. Louis, 141 Mo. 45; State v. Mason, 153 Mo. 23; In re Zborowski, 68 N. Y. 88; Wingate v. Sluder, 51 N. C. (6 Jones) 552; Appeal of Durach, 62 Pa. 491; Appeal of Butler, 73 Pa. 448; East Tennessee University v. City of Knoxville, 65 Tenn. (6 Baxt.) 166; Waterhouse v. Cleveland Public Schools, 55 Tenn. (8 Heisk.) 857; Perry v. City of Rockdale, 62 Tex. 451; Bates v. Bassett, 60 Vt. 530, 1 L. R. A. 166; Peters v. City of Lynchburg, 76 Va. 927.

form, orderly and impartial way, both as to the subjects and methods of taxation and the enforcement of the power.[6] It is not

[6] City of Mobile v. Dargan, 45 Ala. 310; Sangamon County v. City of Springfield, 63 Ill. 66. A constitutional provision requiring uniform taxation in respect to persons and property is not contravened by a statute providing for a division and apportionment of taxes between a county and city although this apportionment discriminates against the county.

Adams v. Mississippi State Bank, 75 Miss. 701, 23 So. 395. A constitution providing that taxation shall be uniform and equal governs the imposition of taxes by all grades and classes of subordinate public corporations. Carolina Cent. R. Co. v. City of Wilmington, 72 N. C. 73. A constitutional requirement for taxation "by uniform rule" is violated by a charter clause providing for assessment by the mayor and aldermen.

London v. City of Wilmington, 78 N. C. 109; Rolph v. City of Fargo, 7 N. D. 640, 76 N. W. 242; 42 L. R. A. 646. The constitution of North Dakota, § 176, providing that laws shall be passed taxing by uniform rule all property according to its true value applies to general taxation only, not to "local assessments." The court say in part: "While in general theory the citizen receives a benefit equivalent to the tax he is called upon to pay, yet it is common knowledge that this is a mere fiction which is in conflict with the truth; and of course it is elementary law that the doctrine of benefit does not lie at the foundation of the taxing power and that the citizen cannot escape a tax by showing that he receives no benefit in fact. A multimillionaire may be compelled to pay an enormous school tax, although he has no child to be educated and he may be required to bear the weight of heavy taxes for other purposes although he should happen to be practically denied the protection of the laws by reason of the envy and hatred of which he may be the object because of his great wealth. The taxing power rests upon necessity and not sentiment. If organized society were to wait for the means to support civil government until an ideally just system of taxation could be devised and put into successful operation, it must wait like the rustic who tarried by the river's bank for the stream to pass by. What is it that so differentiates the power of local assessment from the power of general taxation that in one case the sovereign must give back in value all that is taken while in the other it can if necessary (unless there be constitutional checks) take from the citizen all his property without reference to his receiving in return any commensurate advantage or any benefit at all? Until this question is answered in favor of such a distinction, it is idle to talk of the enhanced value of the land assessed as the limit of the power of local assessment. When such an assessment is levied upon property for a particular improvement, a tax is as much collected as when the expense of the work is charged to the general tax levy. The only distinction is that the district is narrower and the mode of apportionment different. Usually,

a discretionary power when once granted and its exercise for legitimate purposes can be compelled by those who would suffer from a failure or neglect to tax.[7] It is a continuing power, the exercise or nonuse of which does not defeat the right to tax whenever necessary, subject to legal limitations.[8] When granted

too, only real property is considered in making the apportionment, and not all property, real or personal. In all other respects the two classes of cases are identical. The same power of taxation is exercised in each instance, and, except with respect to constitutional restrictions or inherent limitations, the legislative discretion is, in both classes of cases, absolute. We have already referred to those limitations which inhere in the very nature of the taxing power. None of them affect the question before us. The assessment is for a public purpose. It pertains to the district within which it is to be collected, and it is apportioned according to a uniform rule. When we turn to the constitution for light we find there no provision which relates to local assessments except the one which directs the legislature to restrict the power to make such assessments when exercised by municipal corporations. The overwhelming mass of authority supports the view that the proper construction of the uniformity article in our constitution is that it relates exclusively to general taxation, and has no reference to local assessments." Citing among other cases, Emery v. San Francisco Gas Co., 28 Cal. 345; Edgerton v. Town of Green Cove Springs, 19 Fla. 140; Hayden v. City of Atlanta, 70 Ga. 817; Goodrich v. Winchester & D. Turnpike Co., 26 Ind. 119; Hines v. City of Leavenworth, 3 Kan. 186; Wallace v. Shelton, 14 La. Ann. 498; Dorgan v. City of Boston, 94 Mass. (12 Allen) 223; Motz v. City of Detroit, 18 Mich. 495; Williams v. Cammack, 27 Miss. 209; Egyptian Levee Co. v. Hardin, 27 Mo. 495; Cain v. Davie County Com'rs, 86 N. C. 8; Hill v. Higdon, 5 Ohio St. 243; King v. City of Portland, 2 Or. 140; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332; and Richmond & A. R. Co. v. City of Lynchburg, 81 Va. 473.

Com. v. Halstead (Pa.) 7 Atl. 221; Germania Sav. Bank v. Town of Darlington, 50 S. C. 337. Construing act of 1884 (18 Stat. p. 923), and holding it repugnant to constitution, art. 9, § 1, providing for uniform and equal rate of assessment.

[7] Meriwether v. Muhlenburg County Ct., 120 U. S. 354, 7 Sup. Ct. 563; Mayfield Woolen Mills v. City of Mayfield, 111 Ky. 172, 61 S. W. 43; People v. Common Council of East Saginaw, 33 Mich. 164. Under a proper delegation of power, the determination by the common council of a city of what taxes should be levied for city purposes will not, ordinarily, be interfered with by the courts. State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Hall v. Selectmen of Somersworth, 39 N. H. 511; State v. City of Cincinnati, 19 Ohio, 178.

[8] Wells v. City of Savannah, 107 Ga. 1, 32 S. E. 669. "Plaintiffs in error contend that the contract (of exemption) they insist upon is evidenced sufficiently

by the sovereign to a subordinate agent, a public quasi or municipal corporation, it becoming then a delegated power, the rule universally holds that the exercise of the power cannot in turn be delegated to some officer or inferior body.[9] The power to be

by the conduct of the municipal officers at the time that the sales by the city took place. It was shown that when lots were put up for sale, the city marshal publicly announced that they would not be subject to city taxes; that this was generally understood by the city at large; and that for nearly a hundred years after these sales first began the municipal authorities failed to tax the lands, and in various ordinances afterwards passed, these ground-rent lands were exempted. The effect of these ordinances was merely to grant an exemption from taxes for the particular years to which they related. Mere non-user by a government of its power to levy a tax, it matters not for how long continued, can never be construed into a forfeiture of the power."

City of Lake Charles v. Police Jury of Calcasieu, 50 La. Ann. 346, 23 So. 376; Mills v. Charleton, 29 Wis. 400. In this case speaking of the taxing power the court said: "It moves constantly forward to its object until that is accomplished, and if turned aside by any obstacles or impediments, may return again and again to the same tax or assessment until, the way being clear, the tax is paid or the assessment collected. Such is the force of this power, or of the sovereign body which exercises it, that it may remove all obstacles and never cease to act until it has attained the appointed end for which it was delegated."

[9] Johnston v. City of Macon, 62 Ga. 645; State v. City of Des Moines, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285; Harward v. St. Clair-M. Levee & Drainage Co., 51 Ill. 130. "The power of taxation is, of all the powers of government, the one most liable to abuse, even when exercised by the direct representatives of the people; and if committed to persons who may exercise it over others without reference to their consent, the certainty of its abuse would be simply a question of time; no person or class of persons can be safely entrusted with irresponsible power over the property of others, and such a power is essentially despotic in its nature, and violative of all just principles of government. It matters not that as in the present instance, it is to be professedly exercised for public uses by expending for the public benefit the tax collected. If it be a tax as in the present instance, to which the persons who are to pay it have never given their consent, and imposed by persons acting under no responsibility of official position, and clothed with no authority of any kind, by those whom they propose to tax, it is, to the extent of such tax, misgovernment of the same character which our forefathers thought just cause of revolution. We are of opinion that we do no violence to the language of the clause in the constitution we have been considering by holding that it was designed to prevent such ill advised legislation as the delegation of the taxing power to any person or persons other than

legally exercised must be expressly granted and further,[10] it is one of a limited and restricted nature. Provisions granting it

the 'corporate authorities' of the municipality or district to be taxed. These authorities are elected by the people to be taxed or appointed in some mode to which the people have given their assent, and to them alone can this power be safely delegated."

Councilmen of Frankfort v. Deposit Bank, 22 Ky. L. R. 1384, 60 S. W. 19. The power to tax cannot be lost through an agreement to abide by the result of another suit. State v. McVea, 26 La. Ann. 151. The power exists in the legislature to delegate to subordinate municipal corporations the power to levy taxes for local uses.

Bergen v. Clarkson, 6 N. J. Law (1 Halst.) 352; Hance v. Sickles, 24 N. J. Law (4 Zab.) 125; Durach's Appeal, 62 Pa. 491. A constitutional right exists in the legislature to delegate the power of taxation to municipal corporations to be exercised within their jurisdiction.

Waterhouse v. Cleveland Public School Board, 68 Tenn. (9 Baxt.) 398. The delegation of the power to tax must come, however, within the provision of the constitution. Cooley, Taxation, p. 61. "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system, and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation. The power to tax is a legislative power. The people have created a legislative department for the exercise of the legislative power; and within that power lies the authority to prescribe the rules of taxation, and to regulate the manner in which those rules shall be given effect. The people have not authorized this department to relieve itself of the responsibility by a substitution of other agencies. But it is never assumed by the people that the legislature can take such supervision of all the infinite variety of interests in the state, and of all local as well as general affairs, as to be able to determine in every instance precisely what is needed in matters of taxation, and precisely what purposes shall at any time, under the particular circumstances, be provided for. There is a difference between making the law and giving effect to the law; the one is legislation and the other administration."

[10] United States v. Town of Cicero, 41 Fed. 83. The power given to construct public buildings and provide for the payment of the same it was held in this case did not necessarily carry with it an implied power to levy taxes sufficient to meet the obligations when due.

United States v. City of Burlington, 2 Am. Law Reg. (N. S.) 394; Vance v. City of Little Rock, 30 Ark. 435; Livingston v. City Council of Albany, 41 Ga. 21; Clark v. City of Davenport, 14 Iowa, 494; Daily v. Swope, 47 Miss. 367. Subordinate public corporations possess an inherent power of taxation. People v. Ingersoll, 58 N. Y. 1. The power when granted is not exercised by the corporation as agent of the state.

cannot be extended or enlarged by implication beyond the clear import of the language used in the granting clause.[11]

§ 301. Municipal power to tax

The use of the word "municipal" in the title of this section is intended to include not only municipal corporations proper, but all those public quasi corporations organized subsidiary to the sovereign. The term here is a comprehensive one and includes all subordinate grades of public corporations. The granted power in its nature and extent generally speaking is limited only by the

In re Second Ave. M. E. Church, 66 N. Y. 395. Municipal corporations have no inherent power to levy taxes. Commissioners of Asheville v. Means, 29 N. C. (7 Ired.) 406; Pullen v. Wake County Com'rs, 66 N. C. 361; Walker v. Edmonds, 197 Pa. 645, 47 Atl. 867; State v. Town of Maysville, 12 S. C. 76.

[11] Baldwin v. City Council of Montgomery, 53 Ala. 437; Metropolitan Life Ins. Co. v. Darenkamp, 23 Ky. L. R. 2249, 66 S. W. 1125. Acts or ordinances levying taxes should be construed most strictly in favor of the taxpayer and against the government.

City of Baltimore v. State, 15 Md. 376; Howell v. Village of Cassopolis, 35 Mich. 471. The grant of a power to tax should be construed in subordination to the general tax laws of the state unless the intent to create an exception is clearly expressed.

Smith v. City of Vicksburg, 54 Miss. 615; City of St. Louis v. Laughlin, 49 Mo. 559; Directors of Alfalfa Irr. Dist. v. Collins, 46 Neb. 411; Dean v. Charlton, 27 Wis. 522. A statute authorizing a municipal corporation to reassess and relevy special taxes void because of irregularities in the original proceedings must be strictly construed. The court say: "In the consideration of these statutes, it becomes important to settle the rule by which they are to be construed. It must be remembered that they are in derogation of the rights of the citizen who may be affected by them, in that they compel him to bear burdens which had been unlawfully imposed, or attempted to be imposed upon him and which he would not be compelled to bear but for those laws. It is probably too late to question the power of the legislature to pass retroactive statutes of this character; but to do so is a very great stretch of legislative power, frequently of doubtful expediency, the exercise of which is liable to do great injustice to individuals. It seems obvious that such statutes should be strictly construed. A due regard for individual rights and the plainest principles of justice, requires that they should have only the effect which the legislature clearly intended that they should have; and that in construing them, all reasonable doubts as to such intent should be resolved in favor of the citizen." Foster v. City of Kenosha, 12 Wis. 616.

authority conferring its exercise. The municipality where the general power is granted can tax all subjects within its jurisdiction not exempt by the laws of the state and subject only to the constitutional limitations upon the exercise of the power.[12] In construing the power as granted, it is considered a continuing one and as operating prospectively, never retrospectively.[13] The right cannot be granted by a state or the courts to tax when the state itself does not possess either the original power to tax in the manner attempted to be granted or the right itself.[14]

§ 302. The authority.

The authority or power to tax being a governmental power

[12] Vincent v. Hinsdale County Com'rs, 12 Colo. App. 40; Pratt v. City of Jacksonville, 36 Fla. 550. The delegation to a municipality of the power to fix the rate and provide regulations for the valuation of property does not comply with constitution of Florida art. 9, § 1, which declares that the legislature "shall provide for a uniform and equal rate of taxation and shall prescribe such regulations as shall secure a just valuation of all property."

City of Macon v. Central R. & Banking Co., 50 Ga. 620; Spann v. Webster County Com'rs, 64 Ga. 498. If the constitution provides for the assent of voters, a tax levied without this is invalid. Com. v. Milton, 51 Ky. (12 B. Mon.) 212; Wingate v. Sluder, 51 N. C. (6 Jones) 552; McCless v. Meekins, 117 N. C. 34; State v. Haywood County Com'rs, 122 N. C. 661; Smathers v. Madison County Com'rs, 125 N. C. 480; State v. Irvin, 126 N. C. 989. The cases of City of Columbia v. Beasly, 20 Tenn. (1 Humph.) 232, 34 Am. Dec. 646, and Hope v. Deaderick, 27 Tenn. (8 Humph.) 1, 47 Am. Dec. 597, sustain the general proposition that although the authority may be granted it must be exercised in accordance with constitutional provisions. Presidio County v. City Nat. Bank, 20 Tex. Civ. App. 511; Gilkeson v. Frederick County, 13 Grat. (Va.) 577.

[13] Wayne v. City of Savannah, 56 Ga. 448. The rule also operates in favor of the municipality. Property holders who have paid illegal taxes either voluntarily or under coercion in former years have no right to set off such payment against present taxes. Ohio & M. R. Co. v. People, 123 Ill. 648, 15 N. E. 276. Third Municipality v. Ursuline Nuns, 2 La. Ann. 611; Municipality No. 3 v. Michoud, 6 La. Ann. 605.

[14] Henderson Bridge Co. v. City of Henderson, 173 U. S. 592; Vance v. City of Little Rock, 30 Ark. 435. Courts of the United States can impart no taxing power to a municipal corporation. Kyle v. Malin, 8 Ind. 34; O'Donnell v. Bailey, 24 Miss. 386; Bank of Chester v. Town Council of Chester, 10 Rich. Law (S. C.) 104; City of Nashville v. Thomas, 45 Tenn. (5 Cold.) 600.

possessed only in the fullest extent by the sovereign, to be exercised by a subordinate agent, must be expressly given. A municipal corporation in its broad sense has no power to levy taxes or impose license fees, a species of taxation, when not expressly authorized so to do either by its charter or by some general provision of the law.[15] Where the authority to tax does not exist, no court has power to issue process compelling its exercise.[16] Ordinarily, the legislative branch of government has the exclusive power of taxation and its delegation or repeal must proceed from this branch.[17] The legislature in delegating it should provide for its exercise in an equal and uniform manner.[18] The

[15] Sanders v. Commissioners of Butler, 30 Ga. 679; City of Independence v. Moore, 32 Mo. 392.

[16] Vance v. City of Little Rock, 30 Ark. 435; United States v. City of Burlington, 2 Am. Law Reg. (N. S.) 394.

[17] North Missouri R. Co. v. Maguire, 87 U. S. (20 Wall.) 46; Meriwether v. Garrett, 102 U. S. 472; Hagar v. Yolo County Sup'rs, 47 Cal. 222; Colte v. Society for Savings, 32 Conn. 173; Extension of Hancock St., 18 Pa. 26; Bank of Pennsylvania v. Com., 19 Pa. 144; Catlin v. Hull, 21 Vt. 152.

City of Richmond v. Richmond & D. R. Co., 21 Grat. (Va.) 604. The power of taxation as conferred upon a municipal corporation is merely a delegated trust. It is not a contract between the state and such subordinate agency to be considered as conferring upon the latter an absolute power of taxation beyond the control of the legislature. The grant is, at all times, subject to repeal or modification by the sovereign.

[18] United States v. City of New Orleans, 98 U. S. 381. "The position that the power of taxation belongs exclusively to the legislative branch of the government no one will controvert. Under our system it is lodged nowhere else. But it is a power that may be delegated by the legislature to municipal corporations, which are merely instrumentalities of the state for the better administration of the government in matters of local concern. When such a corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of those purposes, its authorities, however limited the corporation, must have the power to raise money and control its expenditure. In a city even of small extent, they have to provide for the preservation of peace, good order and health, and the execution of such measures as conduce to the general good of its citizens; such as the opening and repairing of streets, the construction of sidewalks, sewers and drains, the introduction of water, and the establishment of a fire and police department. In a city like New Orleans, situated on a navigable stream, or on a harbor of a lake or sea, their powers are usually enlarged so as to em-

power of taxation in a municipal corporation, as a rule, is not general in its nature. Municipal corporations or subordinate corporations are local agencies of the government within a definite locality. The municipal power to tax, therefore, is restricted to community or local purposes.[19] General taxes cannot be levied

brace the building of wharves and docks or levees for the benefit of commerce, and they may extend also to the construction of roads leading to it or the contributing of aid towards their construction. The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting and serving no useful purpose."

City of Mobile v. Dargan, 45 Ala. 310; Security Sav. Bank & Trust Co. v. Hinton, 97 Cal. 214, 32 Pac. 3. A city, the organization of which is authorized by the legislature, may provide in its charter for local taxation. The court holding this power essential to municipal existence.

Wells v. City of Savannah, 107 Ga. 1; Sherlock v. Village of Winnetka, 68 Ill. 530; Harney v. Indianapolis, C. & D. R. Co., 32 Ind. 244; Clark v. City of Davenport, 14 Iowa, 494; Byrne v. City of Covington, 15 Ky. L. R. 33, 21 S. W. 1050; City of Alexandria v. White, 46 La. Ann. 449, 15 So. 15; Chicago, St. L. & N. O. R. Co. v. Town of Kentwood, 49 La. Ann. 931; Daily v. Swope, 47 Miss. 367; City of York v. C., B. & Q. R. Co., 76 N. W. 1065.

Chicago, B. & Q. R. Co. v. Klein, 52 Neb. 258, 71 N. W. 1069. Under a constitutional provision granting to all "municipal corporations" the power to assess and collect taxes, a township held a municipal corporation. Gest v. City of Cincinnati, 26 Ohio St. 275; State v. Kelly, 45 S. C. 457, 23 S. E. 281. The adoption of a constitutional provision may, however, repeal existing legislative authority for the levy and collection of taxes. Werner v. City of Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159; City of El Paso v. Conklin, 91 Tex. 537, 44 S. W. 988; Kerr v. Woolley, 3 Utah, 456.

[19] United States v. City of New Orleans, 98 U. S. 381; Southern R. Co. v. St. Clair County, 124 Ala. 491, 27 So. 23; State v. City of Davenport, 12 Iowa, 335. The duty to levy a special tax, its proceeds to be appropriated for a special purpose, is not performed by a levy of a general tax. Midland Elevator Co. v. Stewart, 50 Kan. 378, construing Kansas laws of 1887, c. 134.

McDonald v. City of Louisville, 113 Ky. 425, 68 S. W. 413. The grant of authority to subordinate public corporations to impose taxes

by one for the support, either of the nation, the state, or communities of an equal or inferior grade to itself.[20] On the contrary, it is quite generally held that for purely local or municipal uses, the legislature cannot require a subordinate corporation to levy taxes. This principle has been applied to acts attempting to compel municipal authorities to issue bonds for the cost of acquiring and maintaining public parks.[21]

for their own special local purposes deprives the general assembly of that power.

City of New Orleans v. Turpin, 13 La. Ann. 56; Lorie v. Hitchcock, 26 La. Ann. 154; Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500; Wingate v. Sluder, 51 N. C. (6 Jones) 552; Durach's Appeal, 62 Pa. 491; Hammett v. City of Philadelphia, 65 Pa. 146; Newman v. Justices of Scott County, 37 Tenn. (5 Sneed) 695; Hope v. Deaderick, 27 Tenn. (8 Humph.) 1. Such an act not unconstitutional. Ex parte Schmidt, 2 Tex. App. 196. If a municipality proceed within its lawful power, the courts are not authorized to interfere. Gilkeson v. Justices of Frederick, 13 Grat. (Va.) 577; Foster v. City of Kenosha, 12 Wis. 616.

[20] State v. Nelson, 105 Wis. 111.

[21] People v. City of Chicago, 51 Ill. 17. "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the state, over which, and their rights and effects, the state may exercise a general superintendence and control, we are not of opinion that power, such as it is, can be so used as to compel any one of our many cities to issue its bonds against its will, to erect a park or for any other improvement —to force it to create a debt of millions,—in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it and the structures which adorn them. What would be the universal judgment should the legislature, sua sponte, project magnificent and costly structures within one of our cities —triumphal arches, splendid columns, and perpetual fountains and require in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost and impose such costs as a lien upon his property forever? What would be the public judgment of such an act and wherein would it differ from the act under consideration?"

Lovingston v. Wider, 53 Ill. 302; People v. Common Council of Detroit, 28 Mich. 228; Blades v. Water Com'rs of Detroit, 122 Mich. 366, 81

§ 303. Limitations upon the power.

In addition to the general limitations upon the power to tax, as suggested in the preceding section, there will be found special limitations based upon specific grounds either relating to purpose or amount raised.

(a) Limitations as to rate or amount. In this country it is the aim of government as well as the desire of the individual that taxation should not result in a confiscation of private property. To secure this end, the constitutions or general statutes of the different states limit the amount of taxation which can be levied either by the government itself or any of its subordinate agencies upon property within its jurisdiction for a specific period of time.[22] This limitation may be designated by a rate per-cent[23] or it may

N. W. 271. The court in its opinion in this case in part said that it was not within the power of the legislature to compel taxation of city property for local purposes without the consent of the electors of the city, therefore, an act was unconstitutional and void providing for the operation and maintenance of city waterworks without a submission of the question to the voters.

[22] City of Cleveland v. United States, 111 Fed. 341. The levy in any one year cannot exceed the amount fixed by law although the levies for previous years have not reached such limit. The average for the series of years not exceeding the rate fixed by law.

Hays v. Hogan, 5 Cal. 241; Commissioners of Roads & Revenues v. Porter Mfg. Co. (Ga.) 30 S. E. 547. The constitution of Georgia, art. 7, § 7, par. 1, limiting the power of public corporations to incur debts, is held not to act as a limitation upon their taxing power.

Binkert v. Jansen, 94 Ill. 283; People v. Peoria, D. & E. R. Co., 116 Ill. 410; City of Leavenworth v. Norton, 1 Kan. 432; Clark v. City of Davenport, 14 Iowa, 494; Burnes v. City of Atchison, 2 Kan. 454; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 378; Stewart v. Kansas Town Co., 50 Kan. 553; Wattles v. City of Lapeer, 40 Mich. 624; Schneewind v. City of Niles, 103 Mich. 301; Benoist v. City of St. Louis, 19 Mo. 179; State v. Village of Perrysburg, 14 Ohio St. 472; State v. Humphreys, 25 Ohio St. 520; Cummings v. Fitch, 40 Ohio St. 56; State v. Town Council of Beaufort, 39 S. C. 5; In re Limitation of Taxes, 3 S. D. 456, 54 N. W. 417; Bassett v. City of El Paso, 88 Tex. 168.

Foster v. City of Kenosha, 12 Wis. 616. Where there is no limitation expressed in the legal organization of a city upon its powers of taxation, the general restriction applies that it is limited in this respect by the object and law of its creation and can only exercise it for legitimate municipal uses.

[23] United States v. Town of Cicero, 41 Fed. 83; State v. Southern R. Co., 115 Ala. 250, 22 So. 589; City of Santa Barbara v. Eldred, 95 Cal.

be fixed by specifying the gross amount which can be raised.[24] A tax in excess of the limitation provided by law is not necessarily

378, 30 Pac. 562; Wabash R. Co. v. People, 147 Ill. 196; People v. Lake Erie & W. R. Co., 167 Ill. 283; Town of Cicero v. McCarthy, 172 Ill. 279. A city charter without such limitation is not affected by a law subsequently passed.

Chicago & A. R. Co. v. People, 177 Ill. 91; Cleveland, C., C. & St. L. R. Co. v. Randle, 183 Ill. 364, construing Litchfield city charter, art. 9, as affected by general school law, art. 8 § 1. People v. Knopf, 183 Ill. 410; Otis v. People, 196 Ill. 542; Columbus Water-Works Co. v. City of Columbus, 48 Kan. 99; Chicago, R. I. & P. R. Co. v. Stanfield, 7 Kan. App. 274, 53 Pac. 772; Lafitte v. Morgans, 29 La. Ann. 1; Lamar Water & Elec. Light Co. v. City of Lamar (Mo.) 26 S. W. 1025; City of Stanberry v. Jordan, 145 Mo. 371, 46 S. W. 1093; State v. City of Great Falls, 19 Mont. 518, 49 Pac. 15; Mohmking v. Bowes, 65 N. J. Law, 469, 47 Atl. 507, construing New Jersey Laws 1866, p. 1047, § 4, as affected by Pub. Laws 1871, p. 1417; State v. Atkinson, 107 N. C. 317.

Cummings v. Fitch, 40 Ohio St. 56. If the rate as limited by law is exceeded, the excess alone is invalid. State v. City of Toledo, 48 Ohio St. 112, 11 L. R. A. 729; Gadsby v. City of Portland, 38 Or. 135, 63 Pac. 14; City of Williamsport v. Brown, 84 Pa. 438; Mowry v. Mowry, 20 R. I. 74, 37 Atl. 306; In re Limitation of Taxation, 3 S. D. 456, 54 N. W. 417.

Henderson v. Hughes County, 13 S. D. 576, 83 N. W. 682. Construing Constitution of South Dakota, art. 10, § 1, restricting the power of municipal corporations to levy taxes and assessments. Bright v. Halloman, 75 Tenn. (7 Lea) 309. If a rate is levied in excess of that authorized by law, the illegality goes only to the excess, not to the whole tax.

Muller v. City of Denison, 1 Tex. Civ. App. 293, 21 S. W. 391; Jefferson Iron Co. v. Hart, 18 Tex. Civ. App. 525, 45 S. W. 321. A special fund for which the full rate authorized by law had already been levied cannot be increased by the levy of taxes ostensibly for another purpose but for transfer to such fund. Lufkin v. City of Galveston, 63 Tex. 437; Somo Lumber Co. v. Lincoln County, 110 Wis. 286, 85 N. W. 1023, Construing Wisconsin Rev. St. 1898, § 925, sub-section 142a, prohibiting cities from levying a tax in excess of 3 per cent of the assessed valuation of real and personal property.

[24] Second Municipality v. Orleans Cotton Press Co., 6 Rob. (La.) 411; Wattles v. City of Lapeer, 40 Mich. 624; Taggart v. Board of Auditors, 73 Mich. 53, 40 N. W. 852; Newaygo Mfg. Co. v. Echtinaw, 81 Mich. 416, 45 N. W. 1010; People v. City of Syracuse, 128 N. Y. 632; Haughton v. Jones County Com'rs, 70 N. C. 466; Edwards v. Wilkes County Com'rs, 70 N. C. 571. The two last cases hold that a constitutional provision limiting the levy of taxes to a certain amount does not apply to taxes levied to pay debts against the corporation existing before the adoption of such constitutional provision.

void as a whole but will be sustained as to the portion within the limit if the excess can be separated from it.[25]

(b) Limitations as to purpose. To maintain a governmental organization of any subordinate agency, certain well recognized expenditures are deemed necessary. The limitation of rate or amount of tax to be raised in any one year may apply not only to such regular disbursements[26] but also to what may be termed

[25] Denver City R. Co. v. City of Denver, 21 Colo. 350, 29 L. R. A. 608; O'Kane v. Treat, 25 Ill. 557; Briscoe v. Allison, 43 Ill. 291; Allen v. Peoria & B. V. Co., 44 Ill. 85; People v. Nichols, 49 Ill. 517; Mix v. People, 72 Ill. 242; Whaley v. Com., 23 Ky. L. R. 1292, 61 S. W. 35. "It is argued for the taxpayers that as the constitution prohibits the levy of any tax rate in one year, in a county of which Nicholas is of a class, of more than fifty cents on a hundred dollars, the levy of twenty-five cents, when thirty-four cents had been previously levied, was void; that it being one sum and not separable, the whole of that levy was void. The general rule on this subject is, if the illegal tax or an illegal item embraced in the levy be separable from the remainder, that which is above the legal limit will be void, while that within will be upheld. Many eminent authorities may be cited to support this doctrine. * * * Nicholas County having adopted the free-turnpike system, its fiscal court was authorized to levy as much as twenty-five cents on the one hundred dollars for road and bridge purposes each year provided the total levy for the year did not exceed fifty cents on the $100. That court was the sole judge of the necessity of the levy and of the manner in which it should be applied upon its roads. If it went beyond the constitutional restriction, only that part that is without the court's power is contrary to the law. * * * It requires but a simple calculation to make the separation with precision. In such cases this court has uniformly held that the tax levied within the limit of the power will be sustained when it can be separated from the portion that is illegal." Levi v. City of Louisville, 97 Ky. 394, 28 L. R. A. 480; Hecock v. Van Dusen, 8 Mich. 359, 45 N. W. 343; State v. Mississippi Bridge Co., 134 Mo. 321; Benson v. Inhabitants of Bloomfield, 58 N. J. Law, 491; Rellstab v. Borough of Belmar, 58 N. J. Law, 489; Cummings v. Fitch, 40 Ohio St. 56; State v. Kelly, 28 Or. 225; State v. Kelly, 45 S. C. 457; Bright v. Halloman, 75 Tenn. (7 Lea) 309; Mowry v. Mowry, 20 R. I. 74, 37 Atl. 306; City of San Antonio v. Raley (Tex. Civ. App.) 32 S. W. 180.

[26] Drake v. Phillips, 40 Ill. 388. The power to levy taxes "for any other purpose they may deem necessary" carries with it the authority only to levy taxes for purposes of the same general scope and character as those before mentioned in the same law. Otis v. People, 196 Ill. 542. The appropriations and levy should specify the purpose for which the moneys raised are to be used. Mayfield Woolen Mills v. City of Mayfield, 22 Ky. L. R. 1676, 61 S.

special purposes or uses of public money which are recognized as proper but which are not regularly made from year to year. The erection of new buildings or construction of works of public improvement permanent in their character may be considered special purposes.[27] The power of a municipality to tax as restricted by such constitutional limitations must be ascertained from an examination of the authorities construing them,[28] and such provisions restricting either the amount or the rate levied, the purpose for which raised or the manner in which levied are never considered as unconstitutional because of being a restriction or limitation upon the general taxing powers of a community.[29]

§ 304. Purpose of taxation.

Specific taxation may be illegal, and therefore void, although within the limitation as to rate or amount fixed by law because of the purpose for which levied. The very essence of the validity of a tax under our theory of government is a public use of the moneys derived. Private property, if taken for other than a public purpose without the payment of pecuniary compensation is confiscation and cannot be sustained or upheld under any attribute or theory of government as understood and practiced here. In common with all legal questions, there are certain purposes clearly recognized as public in their nature, others as clearly private in their character and still others which lie along the dividing line between the two.

The less of government a people have, the more independent and prosperous they are. The less a government engages in what in their elementary and basic economic character are "private

W. 43. The obligation of a void contract where the city has received the benefits may be met by taxation "for current expenses" when the levy is within the constitutional limit. Rodman-Heath Cotton Mills v. Town of Waxhaw, 130 N. C. 293, 41 S. E. 488; State v. Haywood County Com'rs, 122 N. C. 815; Herring v. Dixon, 122 N. C. 424; Ainsworth v. Dean, 21 N. H. 400.

[27] Combs v. Letcher County, 21 Ky. L. R. 1057, 54 S. W. 177.

[28] Herring v. Dixon, 122 N. C. 424; State v. Haywood County Com'rs, 122 N. C. 815.

[29] City of Cumberland v. Magruder, 34 Md. 381; Assessors of Philadelphia v. Philadelphia Com'rs, 3 Brewst. (Pa.) 333.

enterprises," the more successful financially will be all the people within its jurisdiction.

Government should never undertake the execution or management of, nor extend aid to, enterprises, the character of which as defined by the use of the term "private" is questionable. The fact that a government engages in an enterprise does not change its economic character from a purely private enterprise or business to a public one. Taxation for all such questionable enterprises by the government is universally considered not only unwise but unconstitutional and invalid.[30]

[30] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655. "But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation.

"It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

"If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy the tax for that purpose. Sharpless v. City of Philadelphia, 21 Pa. 147, 167; Hanson v. Vernon, 27 Iowa, 28; Allen v. Inhabitants of Jay, 60 Me. 127; Lowell v. City of Boston, 111 Mass. 454; Whiting v. Sheboygan & F. L. R. Co., 25 Wis. 188. It is, therefore, to be inferred that when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

People v. Parks, 58 Cal. 624. In a drainage law, provision was made for the ostensible purpose of the act and also for the storage of débris from mines. The court says: "The storage of débris is in its nature a private enterprise in which a few only are interested. The drainage of a state is a public purpose in which the public may be interested. To promote a public purpose by a tax levy upon the property in the state is within the power of the legislature; but the legislature has no power to impose taxes for the benefit of individuals connected with a private enterprise even though the private enterprise might benefit the local public in a remote or collateral way."

Opinion of the Justices, 58 Me. 590. "Individuals and corporations embark in manufactures for the pur-

The legislative body of a sovereign, much less a subordinate body, possessing the right only to exercise such powers as may

poses of personal and corporate gain. Their purposes and objects are precisely the same as those of the farmer, the mechanic or the day laborer. They engage in the selected branch of manufactures for the purpose and with the hope and expectation not of loss but of profit. * * * The general benefit to the community resulting from every description of well-directed labor is of the same character, whatever may be the branch of industry upon which it is expended. All useful laborers, no matter what the field of labor, serve the state by increasing the aggregate of its products—its wealth. There is nothing of a public nature any more entitling the manufacturer to public gifts, than the sailor, the mechanic, the lumberman or the farmer. Our government is based upon equality of rights. All honest employments are honorable. The state cannot rightfully discriminate among occupations, for a discrimination in favor of one branch of industry is a discrimination adverse to all other branches. The state is equally to protect all, giving no undue advantages or special or exclusive preferences to any."

Cooley, Taxation, p. 103. "It is also agreed that the determination what is and what is not a public purpose belongs in the first instance to the legislative department. It belongs there because the taxing power is a branch of the legislative, and the legislature cannot lie under the necessity of requiring the opinion or the consent of another department of the government before it will be at liberty to exercise one of its acknowledged powers. The independence of the legislature is an axiom in government; and to be independent, it must act in its own good time, on its own judgment, influenced by its own reasons, restrained only as the people may have seen fit to restrain the grant of legislative power in making it. The legislature must, consequently, determine for itself, in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible. But it is also generally admitted that the legislative determination on this subject is not absolutely conclusive. It may be sufficiently so to put the administrative machinery of the state in motion; but when the exaction is made of an individual, and the power of the state is made use of to compel submission, he has always the right to invoke the protection of the law. And an appeal to the law for protection of individual property must necessarily render the question, which lies at the foundation of the demand, a judicial question, upon which the courts cannot refuse to pass judgment. It has been forcibly, and yet very truly, said, that an unlimited power in the legislature to make any and everything lawful which it might see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizen. In attempting to exercise the right, in any particular case, the legislature merely asserts its jurisdiction to act; but questions of jurisdiction are not usually concluded by a decision in its favor made by the party claiming

expressly be granted or delegated to it is limited in its right to levy taxes to those imposed for public purposes or those in which the people of the corporation have a general interest.[31] If the

it; they necessarily remain open, and may be disputed anywhere. This is as true of courts as it is of the legislature; jurisdiction comes from the law, and is not obtained by any tribunal through a simple assertion that it exists. When, therefore, the question of validity of taxation becomes judicial, if it shall appear that the exaction is made for a purpose not public, the right of the individual to protection is clear."

Wayland Political Economy, Book 4, c. 3, § 2. "The only ground on which the support of religion by public taxation can be defended is that its existence is necessary for the support of the civil government and that it can be sustained in no other manner than by compulsion. The first assertion we grant to be true; the second we utterly deny. Hence, we do not believe that any taxation for this purpose is necessary. All that religious societies have a right to ask of the civil government is the same privileges for transacting their own affairs which societies of every other sort possess. This they have a right to demand, not because they are religious societies but because the exercise of religion is an innocent mode of pursuing happiness. If these be not granted, religious men are oppressed and the country where such oppression prevails, let it call itself what it may is not, in this matter, free." Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375.

[31] Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655. "We have established we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent, and in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government though this may not be the only criterion of rightful taxation."

Webster v. Police Jury of Rapides, 51 La. Ann. 1204. Under Const. of 1879, arts. 163 and 202, granting the exercise of the taxation power by parishes for parish purposes and the care by each of its infirm, sick and

purpose for which the obligation is contracted is one not of a public character, a tax cannot be constitutionally or legally imposed to pay such obligation.[82] This question has already been dis-

disabled paupers, Act 157 of 1894 requiring parishes to meet the expense of treatment at Keeley institutes of persons unable to pay, is constitutional.

Merrick v. Inhabitants of Amherst, 94 Mass. (12 Allen) 500. The establishment of an agricultural college is a public purpose sufficient to authorize the appropriation of public moneys.

Sherman v. Village of Clifton Springs, 27 Hun (N. Y.) 390. A tax for the refund of illegal taxes paid during previous years is for a public purpose. Hixon v. Oneida County, 82 Wis. 515, 52 N. W. 445.

Curtis' Adm'r v. Whipple, 24 Wis. 350. "If we turn to the cases where taxation has been sustained as in pursuance of the power, we shall find in every one of them that there was some direct advantage accruing to the public from the outlay, either by its being the owner or part owner of the property or thing to be created or obtained with the money, or the party immediately interested in and benefited by the work to be performed, the same being matters of public concern; or because the proceeds of the tax were to be expended in defraying the legitimate expenses of government, and in promoting the peace, good order and welfare of society. Any direct public benefit or interest of this nature, no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals or corporations, will undoubtedly sustain a tax. In thus endeavoring to define how the public must be beneficially interested in order to justify the raising of money by taxation in cases like the present, we of course do not intend to include all the purposes for which money may be so raised. Taxes may be levied and collected for charitable purposes, but these constitute a peculiar ground for the exercise of the power which does not exist here.

"So claims founded in equity and justice in the largest sense, and in gratitude, will support a tax; such claims, however, and we think all others where taxation is proper, except claims founded in charity, may be referred to the general principle above spoken of, of public interest in, or benefits received by, the transactions out of which the claims arose."

[82] People v. Rio Grande County Com'rs, 11 Colo. App. 124; Habersham County Com'rs v. Porter Mfg. Co., 103 Ga. 613; Sleight v. People, 74 Ill. 47; Gerry v. Inhabitants of Stoneham, 83 Mass. (1 Allen) 319. The appropriation by vote of the inhabitants of a town of moneys to celebrate the Fourth of July and for other purposes renders illegal an assessment based upon such vote. Ada Tp. v. Kent Circ. Judge, 114 Mich. 77; Coit v. City of Grand Rapids, 115 Mich. 493; Cover v. Town of Baytown, 12 Minn. 124 (Gil. 71). Taxes cannot be levied for the purpose of indemnifying persons voluntarily paying bounties to volunteers. See, also, Freeland v. Hastings, 92 Mass. (10 Allen) 570, as holding that the legislature has no power

cussed in connection with the subject of the right of a public corporation to incur indebtedness. The cases there cited sustain the principles given in this section.[33] The construction of levees,[34] the maintenance of the public peace, safety and health,[35]

to authorize the repayment of money paid by individuals for substitutes. Wagner v. Jackson, 31 N. J. Law, 189. The cost of substitutes held not a public purpose authorizing the levy of taxes. But in Wisconsin it is held that the raising of money by taxation for the payment of bounties to volunteers enlisting in the military service of the United States is for a public purpose. See the cases of Brodhead v. City of Milwaukee, 19 Wis. 624; and Dinehart v. Town of La Fayette, 19 Wis. 677. See, also, the later case of State v. Tappan, 29 Wis. 664; In re Jensen, 44 App. Div. 509, 60 N. Y. Supp. 933 A tax is void levied to defray expenses incurred by public officials in defending unsuccessful prosecutions against them for official misconduct; the purpose not being a public one within the meaning of the constitution, art. 8, § 10.

Bush v. Orange County Sup'rs, 159 N. Y. 212, 45 L. R. A. 556; Montgomery v. Com., 91 Pa. 125; Jefferson Iron Co. v. Hart, 18 Tex. Civ. App. 525; Mitchell County v. City Nat. Bank, 91 Tex. 361; Drew v. Davis, 10 Vt. 506; Neale v. Wood County Ct., 43 W. Va. 90. Wisconsin Industrial School for Girls v. Clark County, 103 Wis. 651, 79 N. W. 422. A public corporation cannot expend moneys raised by general taxation in partial support of the corporation engaged in a private enterprise.

[33] State v. Rose, 26 Fla. 117, 7 So. 370; People v. Allen, 42 N. Y. 378. Construing New York Const. 1846, art. 1, § 9, requiring a two-thirds vote for every bill appropriating money "for local or private purposes" and holding that a bill appropriating money for the improvement of the navigation of the Bouquet River is void because appropriating money for a "local or private purpose." §§ 145 et seq. See, also, §§ 417 et seq., post.

[34] People v. Whyler, 41 Cal. 351. In this case the point was urged that this was an assessment and not a tax and therefore void under the California statute. Speaking of this point the court said: "The principal reason urged in support of the position that the charge is an assessment, is that it is levied for the purpose of making a local improvement. Acts almost innumerable have been passed, levying taxes for such purposes, and no cases are called to our attention which hold that by reason of the purpose for which they were levied, they became assessments. Taxes for the construction of roads, bridges and school houses are familiar instances. The funds to pay for the grading of a street, may be raised by taxes levied upon all the property of a town, should the law so direct; but the tax does not become an assessment, because the latter is the mode usually adopted to raise the funds for that purpose. There is no sufficient reason for holding that the charge is not what the Legislature declared it to be—a tax." State v. Maginnis, 26 La. Ann. 558.

the construction and repair of public buildings and improve-

[85] State v. Mason, 153 Mo. 23. The rule applied to a tax levied for the payment of bounties in Truesdell's Appeal, 58 Pa. 148. See, also, Hilbish v. Catherman, 64 Pa. 154, where the court said: "What are taxes but the revenue collected from the people for objects in which they are interested—the contributions of the people for things useful and conducive to their welfare? This being the purpose of taxation, there can be no difference between a precedent authority for payment to such an object and a subsequent compensation for the same thing. The case before us is a fit illustration. * * * There is no difference between this case and that of one who builds a bridge or a court house for a specified sum. He can recover no more; but if in fact he has, by a rise in prices, an act of God or for any other good cause, been compelled to expend a larger sum, will anyone doubt the power to pay the actual cost of the work out of the public treasury? The public received the benefit and it is just and right that the public money should pay for it."

Weister v. Hade, 52 Pa. 474; Wahlschlager v. Town of Liberty, 23 Wis. 362. In the absence of express authority, a town has no power to levy a tax for the raising of moneys to pay bounties to men drafted into the United States military service. See, also, State v. Tappan, 29 Wis. 664, as holding Wisconsin Laws 1869, c. 260, compelling taxation for the purpose of paying bounties to volunteers unconstitutional, not being for a municipal purpose, and also because of its compulsory features.

In respect to the expenditure of public moneys for the payment of bounties or pensions, see Trustees of Firemen's Benev. Fund v. Roome, 93 N. Y. 313. Cooley, Taxation, p. 110: "Some taxes levied by the Federal government are directly calculated and intended to benefit private individuals. For an illustration, it gives bounty land or pensions to those who have performed military or naval services for the country, notwithstanding it has made no promise, and is consequently under neither a legal nor a moral obligation to do so. But the primary object in all such bounties is not the private but the public interest. To show gratitude for meritorious public services in the army and navy by liberal provision for those who have performed them is not only proper in itself, but it may reasonably be expected to have a powerful influence in inciting others to self-denying, faithful and courageous services in the future, when the government, which is so ready to be generous as well as just, shall have need of their assistance. The same may be said of a like recognition of valuable public services rendered by other persons; the question in every case is not one of power, but of prudence and public policy."

State v. Tappan, 29 Wis. 664, 672. "That the legislature may confer upon cities, towns and villages power to raise money by taxation to pay bounties to those who, in time of war, shall enlist in the military service of the United States, has been settled by repeated decisions of this court and of the courts of other states. It was so held upon the grounds that claims for public serv-

ments,[86] the establishment and maintenance of public parks,[87] are uses which come within the definition of those for a public pur-

ices, or expenditures founded in equity and justice, in gratitude or charity, will support a tax, which is voluntarily imposed upon a municipality by a majority of the citizens thereof, or by the consent of the municipality, evidenced in some other manner. Brodhead v. City of Milwaukee, 19 Wis. 624. No person has the hardihood to deny that the men who enlisted during our late war to serve in the ranks (and these alone were entitled to bounties), became thereby entitled to the gratitude of the nation; and because of this, and because also, it was a matter of great public concern that the ranks of our armies should be constantly replenished by recruits from the walks of civil life, it was held that the legislature might authorize the various cities, towns and villages of the state to tax themselves respectively, to a limited extent, to promote the public welfare, and at the same time to recognize these obligations of gratitude."

[86] Durrett v. Buxton, 63 Ark. 397, Habersham County Com'rs v. Porter Mfg. Co., 103 Ga. 613, 30 S. E. 547. "The extra tax to build a court house was enjoined on the ground that the same was unconstitutional and therefore void. It was contended in the court below as well as in this court that the levy of the extra tax for this purpose violated that provision of the constitution contained in art. 7, § 7, par. 1, which declares that 'the debt hereafter incurred by any county, municipal corporation or political division of this state except as in this constitution provided for, shall not exceed seven percentum of the assessed value of all the taxable property therein and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one fifth of one percentum of the assessed value of taxable property therein, without the assent of two thirds of the qualified voters thereof at an election for that purpose, to be held as may be prescribed by law, but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property, * * * may be authorized by law to increase at any time the amount of said debt, three percentum upon such assessed valuation.' The position taken by counsel was that the levying of the tax was the creation of a debt, within the meaning of the section above quoted, and, that, the purpose for which it was levied not being 'to supply casual deficiencies of revenue,' the levy was illegal and void, because not submitted to a vote of the people of the county. We cannot concur in this view. The levying of a tax is not the incurring of a debt. The very purpose of the clause of the constitution above quoted was to compel the counties and other political divisions of this state, to pay by annual taxation, as far as possible all expenses which had to be borne. As, however, there might be instances in which the incurring of a debt was necessary and proper, the constitution does not absolutely prohibit it, but places a limit upon the power of the public authorities of the different counties to incur debts, and

pose. The payment of expenses incurred in opposing before the legislature the passage of an act annexing contiguous territory,[38] a donation to a private institution not under the control of the

even where the debt sought to be incurred is within the limit, requires the consent of two-thirds of the qualified voters, so that no debt may be incurred unless such a course is undoubtedly for the public good. * * * The necessities of the various counties in regard to these matters are to be determined by the peculiar conditions surrounding each county and therefore the sound judgment of the county authorities in each case must be relied upon to provide the public with proper buildings on the one hand and to protect the taxpayer from useless and unnecessary burdens in regard to such matters on the other. While the power of the county authorities to levy taxes for certain purposes is limited as to amount to be levied and as to others the power is dependent upon a recommendation of the grand jury still in reference to the duty of providing the county with public buildings * * * the right to levy a tax sufficient to carry into effect such purpose is unlimited as to amount." Walsh v. City Council of Augusta, 67 Ga. 293; Lewis v. Lofley, 92 Ga. 804.

Byrne v. City of Covington, 15 Ky. L. R. 33, 21 S. W. 1050. A general tax for the construction of a sewer is authorized where the improvement was a public necessity and the right to tax abutting property for the construction of such improvements did not exist. Combs v. Letcher County, 21 Ky. L. R. 1057, 54 S. W. 177; Friend v. Gilbert, 108 Mass. 408. The payment of additional compensation to a subcontractor on a public building comes within the rule. Hunter v. Justices of Campbell County, 47 Tenn. (7 Cold.) 49; Cresswell Ranch & Cattle Co. v. Roberts County (Tex. Civ. App.) 27 S. W. 737.

[37] South Park Com'rs v. First Nat. Bank, 177 Ill. 234, affirming Knopf v. Chicago Real Estate Board, 173 Ill. 196.

[38] Coolidge v. Brookline, 114 Mass. 592. In deciding that a municipal corporation could impose no tax for the purpose mentioned in the text, the court said: "Such power to tax, must, in all cases, spring from the statutes, and must be found there in terms, or be necessarily inferred from some corporate duty imposed or some corporate right given. The only exception to this rule is confined to a few cases of usage relating to the comfort and convenience of the inhabitants of a town, such as town clocks, hay scales, pumps, reservoirs, etc., and is not to be extended. Towns have been kept rigidly within this rule both by the legislature and by the courts. Its observance is necessary from the character of their organization and from the nature of the delegated powers which they exercise; and as there is no controlling power provided by law to restrain and limit them in the expenditures they can by law incur, and for which they can lay taxes, it is of the first importance to the taxpayer that they exercise this great power for authorized purposes, and a summary remedy against abuse of such legal power is given by the statute under

municipality,[39] an appropriation for the reimbursement of a township treasurer who has been robbed of public moneys while in his keeping,[40] refunding a donation given to the town without expectation of repayment,[41] the benefits which may come to a city or

which this bill is brought." Following Minot v. Inhabitants of West Roxbury, 112 Mass. 1.

[39] Hitchcock v. City of St. Louis, 49 Mo. 484.

[40] Thorndike v. Inhabitants of Camden, 82 Me. 39, 7 L. R. A. 463. A town has no power to levy taxes for the repayment of a tax collector who upon his personal responsibility accepted a note of a taxpayer as a cash payment of his taxes, and subsequently was unable to collect the same having accounted to the town for the fact of the note as cash.

People v. Onondaga Sup'rs, 16 Mich. 254; Bristol v. Johnson, 34 Mich. 123. In this case, one Bera, treasurer, had public funds stolen from him and reimbursed the township from his personal estate. The legislature passed an act calling for a tax to be levied, and Bera refunded. In holding this unconstitutional the court said: "There was unquestionably room for a strong moral appeal to the taxpayers of the township to divide the loss among the whole, instead of leaving it to fall wholly upon him; and the Legislature saw fit to enact that the amount should be raised from the taxpayers and refunded to him and in obedience thereto the sum was spread upon the roll and it became a lien upon the taxable real estate in the township, unless the enactment was invalid. The defendant, Johnson, as treasurer, proceeded to make collection and some of the taxpayers made payment without bringing into question the legality of the tax; but the complainants resisted and filed this bill. * * * Whatever may be said in favor of the moral fitness of the purpose to relieve Mr. Bera there can be no doubt of complainants' right to question their legal obligation or liability in the premises nor of their right to escape payment if not liable; and that as matter of law they were not liable appears to the court to have been settled beyond controversy. A repetition of the reasoning of former cases is not necessary and if further reasons might be added, they are not called for." But see the following cases holding that where public officials have been subjected to loss in an honest attempt to perform their public duty, they may be indemnified by the municipality for which they were acting: Hadsell v. Inhabintants of Hancock, 69 Mass. (3 Gray) 526; Nelson v. Inhabitants of Milford, 24 Mass. (7 Pick.) 18; Barcroft v. Inhabitants of Lynnfield, 35 Mass. (18 Pick.) 566; Fuller v. Inhabitants of Groton, 77 Mass. (11 Gray) 340; Baker v. Inhabitants of Windham, 13 Me. 74; Pike v. Middleton, 12 N. H. 278; Sherman v. Carr, 8 R. I. 431; Briggs v. Whipple, 6 Vt. 95.

[41] Perkins v. Inhabitants of Milford, 59 Me. 315; Osgood v. Town of Conway, 67 N. H. 100, 36 Atl. 608. The rule also applies to services voluntarily rendered a town. The levy of a tax for their payment is invalid. Citing, among other cases,

village from the establishment of a successful manufacturing plant,[42] the expenditure of public moneys for the entertainment of a presidential candidate attending an industrial exposition,[43] the construction of a dam at the expense of the taxpayers, the main purpose of which is to generate power for lease to private manufacturing enterprises which may thereby be induced to come to the city,[44] are not public purposes within the meaning of that phrase

Town of Lebanon v. Griffin, 45 N. H. 558; Buxton v. Chesterfield, 60 N. H. 357; Bartholomew v. Jackson, 20 Johns. (N. Y.) 28. The court said: "A promise to pay for services voluntarily rendered, without the request or authority of the promisor, is not enforceable, although they may be beneficial and valuable to him. * * * As the town did not become legally liable to pay for the services, under either an express or an implied contract, the imposition of a tax upon its citizens for that purpose would be unauthorized and illegal."

[42] Weismer v. Village of Douglas, 4 Hun, 201, 64 N. Y. 91. See, also, the following authorities relative to the right of taxation for the benefit of private business enterprises: Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; City of Parkersburg v. Brown, 106 U. S. 487; Commercial Nat. Bank v. City of Iola, 2 Dill. 353, Fed. Cas. No. 3,061; English v. People, 96 Ill. 566; National Bank of Cleveland v. City of Iola, 9 Kan. 689; McConnell v. Hamm, 16 Kan. 228; Central Branch U. P. R. Co. v. Smith, 23 Kan. 745; Opinions of the Justices, 58 Me. 590; Allen v. Inhabitants of Jay, 60 Me. 124; Lowell v. City of Boston, 111 Mass. 454.

Cooley, Taxation p. 126. "However important it may be to the community that individual citizens should prosper in their industrial enterprises, it is not the business of government to aid them with its means. Enlightened states, while giving all necessary protection to their citizens, will leave every man to depend for his success and prosperity in business on his own exertions, in the belief that by doing so his own industry will be more certainly enlisted, and his prosperity and happiness more probably secured. It may therefore be safely asserted that taxation for the purpose of raising money from the public to be given or even loaned to private parties, in order that they may use it in their individual business enterprises, is not recognized as an employment of the power for a public use. In contemplation of law it would be taking the common property of the whole community and handing it over to private parties for their private gain, and consequently unlawful. Any incidental benefits to the public that might flow from it could not support it as legitimate taxation."

[43] Moore v. Hoffman, 2 Cin. R. (Ohio) 453.

[44] Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375. "The power of taxation is only lodged in the city for public purposes. It has no authority to engage in business enterprises that are private in character. It is to the charter created

and the levy of taxes to meet such disbursements will be held illegal and can be enjoined. To authorize the levy of taxes by a subordinate corporation it is not necessary, however, that they be of strictly local character so long as the public receive some direct advantage. In a Wisconsin case[45] the court held that the legislature could authorize taxes for defraying the expenses of government, promoting the peace, good order and welfare of society, paying claims founded upon natural justice and equity or upon gratitude for public services or expenditures, or discharging the obligations of charity and humanity provided the liability of the corporation had been established. The limitation is the saving clause of this decision.

Railway aid. The use of a railroad though owned by a private corporation is public to such an extent, it has been repeatedly held, as to authorize taxation for its aid. This proposition at the pres-

by law that the city looks for its power to act and create a debt chargeable against the municipality, payable by taxes collected from its citizens. If the main purpose of the city is to engage in the unlawful enterprise, it cannot give the illegal act life by naming it for a purpose that is unlawful, and disguising the true purpose under the semblance of legal authority. Declaring the exercise of power in the given instance to be for a purpose within its charter powers does not add any validity to the illegal act: for such act is not only ultra vires the city charter, but is in law a fraud upon the rights of the taxpayers. The declaration made by the city council through the ordinances authorizing the issue of the bonds that the purpose in building the dam was to furnish the city with water and lights, although for an apparent legal purpose, is according to the allegations of the count of the petition quoted, for the main purpose of furnishing the city water power to engage in manufacturing enterprises, and that furnishing the city with water and lights is simply incidental to such main purpose. * * * If this be the principal purpose and object in erecting the dam, and issuing the bonds, the fact that there is incidentally connected with such enterprise a purpose that is lawful will not give any life and validity to the illegal purpose; but the whole transaction is tainted with the vice of the forbidden object, and is in its entirety illegal. The courts will not endeavor to separate the legal and illegal parts of the transaction, for this would be impracticable, and a court of equity will not undertake it." Citing among other cases Strahan v. Town of Malvern, 77 Iowa, 454, 42 N. W. 369; Cincinnati St. R. Co. v. Smith, 29 Ohio St. 307; Citizens' Bank v. City of Terrell, 78 Tex. 456.

[45] State v. Tappan, 29 Wis. 664; Mills v. Charleton, 29 Wis. 400.

ent time is not disputed though the power to levy taxes for this purpose must be expressly given. It can never be implied.[46]

§ 305. The payment of debts.

The payment by an individual as well as a public corporation of a legal debt or obligation is considered praiseworthy, and the levying of taxes, when within the limit fixed by law is not open to objection. The right to levy for this purpose need not be expressly given where there is first legal authority for the incurrment of the expenditure. The power to incur the expense implies the power and the duty to pay, the resulting obligation.[47] The performance of the duty can be enforced by mandamus.[48]

[46] Ogden v. Daviess County, 102 U. S. 634; Scotland County Ct. v. United States, 140 U. S. 41; Northern Pac. R. Co. v. Roberts, 42 Fed. 734; Brocaw v. Gibson County Com'rs, 73 Ind. 543; Stewart v. Polk County Sup'rs, 80 Iowa, 9; Burnes v. City of Atchison, 2 Kan. 454.

Clifton v. Hobgood, 106 La. 535, 31 So. 46. Under constitutional and statutory authority a special tax can be imposed in aid of a railroad that does not pass through nor terminate in the district taxed. Fullilove v. Police Jury of Bossier Parish, 51 La. Ann. 359. See, also, cases cited in § 145 et seq.

[47] United States v. City of New Orleans, 98 U. S. 381, reversing Fed. Cas. No. 15,871, 2 Woods, 230. "The number and variety of works which may be authorized, having a general regard to the welfare of the city or of its people, are mere matters of legislative discretion. All of them require for their execution considerable expenditures of money. Their authorization without providing the means for such expenditures would be an idle and futile proceeding. Their authorization, therefore, implies and carries with it the power to adopt the ordinary means employed by such bodies to raise funds for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose. For the same reason, when authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this too, without any special mention that such power is granted. This arises from the fact that such corporations seldom possess—so seldom, indeed, as to be exceptional—any means to discharge their pecuniary obligations except by taxation."

Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655; Quincy v. Jackson, 113 U. S. 332; Ex parte Parsons, 1 Hughes, 282, Fed. Cas. No. 10,774; City of

(a) Of judgments. So the payment of a judgment secured by due process of law against the corporation is considered a public purpose and not open to objection. As the only method possessed by public corporations for raising revenues is the levying of taxes in the manner provided by law, the levy and collection for this specific purpose will not be considered invalid,[49] and if officials

Cleveland v. United States (C. C. A.) 111 Fed. 341. Where a municipal corporation is authorized to contract debts when no mode for their payment is prescribed or provided, the authority to levy a tax for such purpose will be implied.

Nougues v. Douglass, 7 Cal. 65; Spring v. Collector of Olney, 78 Ill. 101; Iowa R. Land Co. v. County of Sac, 39 Iowa, 124; City of Aurora v. Lamar, 59 Ind. 400; Public School Com'rs v. Allegany County Com'rs, 20 Md. 449; Webster v. Baltimore County Com'rs, 51 Md. 395; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898. The payment of a debt contracted for a special purpose is limited to the funds derived from a tax levy as authorized by law although this may be insufficient.

Simmons v. Wilson, 66 N. C. 336. Constitutional provisions do not affect the power of taxation for the payment of debts contracted before the adoption of such provisions.

Slocomb v. City of Fayetteville, 125 N. C. 362; Voorhies v. City of Houston, 70 Tex. 331, 7 S. W. 679. Subsequent legislation cannot affect prior debts or the means existing at the time of contraction for their payment. Collier v. Peacock (Tex. Civ. App.) 55 S. W. 756. A debt of a previous year cannot be paid by the tax levy of a succeeding year. Shepard v. City of Kaysville, 16 Utah, 340, 52 Pac. 592.

[48] State v. City of New Orleans, 23 La. Ann. 358; Inhabitants of Lexington v. Mulliken, 73 Mass. (7 Gray) 280; Attorney General v. City of Salem, 103 Mass. 138; Com. v. City of Pittsburgh, 34 Pa. 496; State v. City of Milwaukee, 25 Wis. 122.

[49] Stryker v. Grand County Com'rs (C. C. A.) 77 Fed. 567; King v. Grand County Com'rs (C. C. A.) 77 Fed. 583; City of Helena v. United States, 104 Fed. 113. A tax levied for the payment of a judgment is a special tax as provided by § 4815 of the Political Code of Montana and not one for general municipal or administrative purposes as defined by § 4814 of the same code. Britton v. Platte City, 2 Dill. 1, Fed. Cas. No. 1,907; People v. Rio Grande County Com'rs, 7 Colo. App. 229, 42 Pac. 1032; City Council of Augusta v. Pearce, 79 Ga. 98; Chicago, R. I. & P. R. Co. v. Stanfield, 7 Kan. App. 274; First Nat. Bank v. Morton County Com'rs, 7 Kan. App. 739, 52 Pac. 580. The obligation to pay a judgment held a continuing one.

Shippy v. Wilson, 90 Mich. 45, 51 N. W. 353; Whitney v. Village of Hudson, 69 Mich. 189; State v. Clay County, 46 Mo. 231; Custer County v. Chicago, B. & Q. R. Co., 62 Neb. 657, 87 N. W. 341. A levy, however, for the payment of a judgment where none exists is invalid. United States Trust Co. v. Ter., 10 N. M. 416, 62 Pac. 987; Brown v.

refuse to perform their duty in this respect, they can be compelled by mandamus or other proper proceedings[50] unless the total tax levy is then at the full limit fixed by law.[51]

(b) Of bonds and interest. Where the express power has been given a public corporation to issue bonds, the implied power follows to levy taxes for their payment in the manner provided by law,[52] or for the payment of interest upon indebtedness whether

Assessors of Rahway, 51 N. J. Law, 279, 17 Atl. 122; City of Sherman v. Langham (Tex.) 40 S. W. 140; State v. City of Madison, 15 Wis. 33. An act of the legislature is unconstitutional which forbids a city from levying taxes to pay judgments against it. Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 34 L. R. A. 835.

[50] United States v. City of Key West (C. C. A.) 78 Fed. 88. "It is not against justice or good conscience that a municipal corporation should be given power to pay, in the only way it can pay, a debt which it had been given power to lawfully contract. The relator's judgment debt springs out of a contract which the judgment conclusively evidences the city had lawfully made with him. We therefore conclude that under the act of 1895, a special levy may be made by the city of Key West for payment of interest on its debt, and for sinking fund, to meet the principal of its debt, and that it is thus charged with the duty to pay the relator's judgment, which duty can be enforced by mandamus, the necessary substitute for an execution in such cases." First Nat. Bank of Ceredo v. Society for Savings (C. C. A.) 80 Fed. 581; People v. Rio Grande County Com'rs, 7 Colo. App. 229, 42 Pac. 1032; Sterling School Furniture Co. v. Harvey, 45 Iowa, 466; State v. Yellowstone County Com'rs, 12 Mont. 503; Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822; Sandmeyer v. Harris, 7 Tex. Civ. App. 515, 27 S. W. 284; State v. City of Milwaukee, 25 Wis 122.

[51] Iowa R. Land Co. v. Sac County, 39 Iowa, 124; Sterling School Furniture Co. v. Harvey, 45 Iowa, 466. "The code provides that the amount levied for school house fund shall not exceed ten mills on the dollar. § 1787 provides, 'when a judgment has been obtained against a school district the board of directors shall pay off and satisfy the same from the proper fund, by an order on the treasurer.' It is claimed that authority is given under this section to levy a tax in addition to the ten mills. * * * It is a fundamental principle, appertaining to the taxing power, that no taxes can be levied without express authority of law. * * * The nature of the obligation against the district is not changed by being put in the form of a judgment. * * * The judgment order is, or should be, against the school house fund and can be paid from no other." But see the case of Dawson County v. Clark, 58 Neb. 756, 79 N. W. 822, as holding to the contrary. Youngerman v. Murphy, 107 Iowa, 686; Phelps v. Lodge, 60 Kan. 122, 55 Pac. 840.

[52] See § 224, ante; Jordan v. Cass

such accrues upon bonds issued as above or upon other and general interest bearing legal corporate indebtedness.[53] This rule includes sinking fund provisions.[54]

County, 3 Dill. 185, Fed. Cas. No. 7,517. The owner of bonds can, by mandamus, directed to the proper authorities, compel them to levy and collect the taxes authorized and necessary for the payment of the bonds. United States v. Town of Cicero, 41 Fed. 83; United States v. Town of Cicero (C. C. A.) 50 Fed. 147. A taxing district, however, cannot be compelled to levy taxes in excess of the amount as limited by law. Town of Darlington v. Atlantic Trust Co. (C. C. A.) 78 Fed. 596. The payment of bonds which are a general corporate obligation cannot be limited to the proceeds of a special tax.

First Nat. Bank of Ceredo v. Society for Savings (C. C. A.) 80 Fed. 581; Security Sav. Bank & Trust Co. v. Hinton, 97 Cal. 214; Davis v. Brace, 82 Ill. 542. The authority to levy taxes sufficient to pay the annual interest on outstanding bonds of the corporation is a continuing grant for such purpose until the bonds have been paid. Denver City R. Co. v. City of Denver, 2 Colo. App. 34; Taylor v. McFadden, 84 Iowa, 262; Board of Education of Hawesville v. Louisville, H. & St. L. R. Co., 23 Ky. L. R. 376, 62 S. W. 1125; Covington Gas Light Co. v. City of Covington, 92 Ky. 312; State v. Hannibal & St. J. R. Co., 101 Mo. 136, 13 S. W. 505; Shackelton v. Town of Guttenberg, 39 N. J. Law, 660. The authority to levy taxes in excess of the legal limit will not be implied from a grant of authority to contract debts beyond that amount. Robertson v. Tillman, 39 S. C. 298, 17 S. E. 678; Wilson v. City Council of Florence, 40 S. C. 426, 19 S. E. 4; City of Charlotte v. Shepard, 122 N. C. 602, 29 S. E. 842; City of Guthrie v. Ter., 1 Okl. 188, 21 L. R. A. 841; Henderson v. Hughes County, 13 S. D. 576, 83 N. W. 682. The presumption exists that the tax levy is for the purpose of paying a valid obligation. Nalle v. City of Austin (Tex. Civ. App.) 21 S. W. 375; City of Austin v. Nalle, 85 Tex. 520, 22 S. W. 668.

[53] United States v. Town of Cicero (C. C. A.) 50 Fed. 147; United States v. City of Key West (C. C. A.) 78 Fed. 88; United States v. Village of Kent, 107 Fed. 190; Bowen v. West, 10 Colo. App. 322; City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489. A tax levy, however, cannot be made to pay interest on bonds authorized but not yet issued. McIntire v. Williamson, 8 Kan. 711, 54 Pac. 928; Louisville Sinking Fund Com'rs v. Grainger, 98 Ky. 319, 32 S. W. 954; City of Charlotte v. Shepard, 122 N. C. 602; Corbett v. City of Portland, 31 Or. 407; Burnett v. Maloney, 97 Tenn. 697, 34 L. R. A. 541; Nalle v. City of Austin (Tex. Civ. App.) 42 S. W. 780. Where the tax levy is partly in excess of the amount limited by law, the excess only is void.

Conklin v. City of El Paso (Tex. Civ. App.) 44 S. W. 79. A tax levy to pay interest on bonds is not void because insufficient in amount. City of Jefferson v. Marshall Nat. Bank, 18 Tex. Civ. App. 539, 46 S. W. 97; Wright v. City of San An-

(c) Obligatory payments on contracts. Where legal authority exists to contract, unless some other mode for raising funds with which to meet the contract obligation is provided, the implied power exists for the levying and collection of taxes for the payment of the debt which may be created through the carrying out of the contract.[55]

(d) The payment of warrants and claims. The corporate power also exists to levy taxes for the payment of legal outstanding warrants, and properly established adverse claims.[56]

tonio (Tex. Civ. App.) 50 S. W. 406; Shepard v. City of Kaysville, 16 Utah, 340.

Keystone Lumber Co. v. Town of Bayfield, 94 Wis. 491, 69 N. W. 162. A tax is invalid levied to pay interest on bonds deposited in escrow and not yet delivered to the ultimate beneficiary. Bigelow v. Town of Washburn, 98 Wis. 553. A tax cannot be levied for the payment of interest, however, where there is as yet no legal obligation for its payment.

[54] Burlington Water Co. v. Woodward, 49 Iowa, 58; Louisville Sinking Fund Com'rs v. Grainger, 98 Ky. 319; St. Louis County Com'rs v. Nettleton, 22 Minn. 356; Newark Aqueduct Board v. City of Newark, 50 N. J. Law, 126; Cummings v. Fitch, 40 Ohio St. 56.

[55] Citizens' Sav. & Loan Ass'n v City of Topeka, 87 U. S. (20 Wall.) 655; Marks v. Purdue University 37 Ind. 155; McGuire v. Justices of Owsley County, 46 Ky. (7 B. Mon.) 340; Mayfield Woolen Mills v. City of Mayfield, 22 Ky. L. R. 1676, 61 S. W. 43; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; School Dist. of Central City v. Chicago, B. & Q. R. Co., 60 Neb. 454, 83 N. W. 667; Johnston v. Cleaveland County Com'rs, 67 N. C. 101. Where there has been a failure to make a tax levy sufficient for the payment of interest upon outstanding bonds, the arrears cannot be paid by a levy of a rate sufficient to pay the whole. In re Borough of Millvale, 162 Pa. 374; State v. City of Milwaukee, 25 Wis. 122; McGillivray v. Joint School Dist., 112 Wis. 354, 88 N. W. 310, 58 L. R. A. 100.

[56] United States v. Macon County Justices & Treasurer, 75 Fed. 259; Flemming v. Trowsdale (C. C. A.) 85 Fed. 189; People v. Rio Grande County Com'rs, 11 Colo. App. 138, 52 Pac. 1133; Vincent v. Hinsdale County Com'rs, 12 Colo. 40, 54 Pac. 393. County officials have no power to levy a tax for the payment of a claim until it has been reduced to judgment. West School Dist. of Canton v. Merrills, 12 Conn. 437; Sleight v. People, 74 Ill. 47. The levy of taxes for the payment of a bond which has not been established as a lawful indebtedness against the corporation cannot be sustained as being a proper corporate purpose. Fuller v. Heath, 89 Ill. 296; First Nat. Bank of Garden City v. Morton County Com'rs, 7 Kan. App. 739, 52 Pac. 580; Auditor v. School Trustees of Frankfort, 81 Ky. 680; Vose v. Inhabitants of Frankfort, 64 Me. 229; Wisner v. Davenport, 5 Mich. 501; State v. Clay County, 46 Mo. 231; Bigelow v. Town of Washburn,

§ 306. Taxation for the support of public schools.

The support and maintenance of public schools is one of those purposes as to the public character of which there is no question, and, therefore, within the limits provided by law, the public corporation has the power to levy taxes for the support of a school system of the scope and efficiency commensurate and proportionate to the size and ability of the corporation.[57] The authority for this purpose must in common with the exercise of the power be found in some provision of statutory or constitutional law and must be exercised by the organization and in the manner designated whether such organization be a municipal corporation proper or a subordinate quasi one such as a school

98 Wis. 553, 74 N. W. 362. The validity of such claims will be presumed in the absence of contradicting evidence.

[57] Francis v. Southern R. Co., 124 Ala. 544, 27 So. 22; Horton v. Mobile School Com'rs, 43 Ala. 598; Jones v. State, 17 Fla. 411. A statutory provision that commissioners may levy a tax for school purposes is mandatory. Ayers v. McCalla, 95 Ga. 555; Marks v. Purdue University, 37 Ind. 155; Nelson v. Town of Homer, 48 La. Ann. 258; Newman v. Thompson, 9 Ky. L. R. 199, 4 S. W. 341. The teaching of Latin and Greek in a common school does not justify an injunction to restrain the collection of taxes levied for the support of such school. Cooley, Taxation, 119 et seq. Perry v. Brown, 21 Ky. 344, 51 S. W. 457. Constitutional limitations on tax rates apply to common school districts.

State v. City of New Orleans, 23 La. Ann. 358; State v. Graham, 25 La. Ann. 440. Neither appropriations of public moneys can be made nor taxes imposed for the support of an institution of learning which is not within the constitutional meaning a public institution. Such an institution is one controlled by the state through its agents and in which the state has a permanent interest. Cushing v. Inhabitants of Newburyport, 51 Mass. (10 Metc.) 508; State v. Hannibal & St. J. R. Co., 135 Mo. 618; State v. Vaughan, 99 Mo. 332, 12 S. W. 507; Piper v. Moulton, 72 Me. 155; State v. City of Omaha, 39 Neb. 745, 58 N. W. 442; Board of Education of Elizabeth v. Sheridan, 42 N. J. Law, 64; Reid v. Wiley, 46 N. J. Law, 473.

Holt v. Town of Antrim, 64 N. H. 284, 9 Atl. 389. Taxes cannot be levied for the construction of a school building to be leased to a corporation for school purposes. The test of a public use is not the right of enjoying the property wholly at the public expense but a common right free from discrimination. Com. v. Shaw, 96 Pa. 268; Kerr v. Woolley, 3 Utah, 456; Grand Island & N. W. R. Co. v. Baker, 6 Wyo. 369, 34 L. R. A. 835; Curtis' Adm'r v. Whipple, 24 Wis. 350. An act authorizing the levy of a tax for the benefit of a private educational institution is invalid.

district.[58] Subordinate governmental agencies are usually considered, in this respect, political or municipal organizations possessing the power to levy taxes for school purposes as coming within the grant of a general power of taxation for local or community purposes.[59]

[58] Cairo & F. R. Co. v. Parks, 32 Ark. 131; Worthen v. Badgett, 32 Ark. 496; Shaw v. Lockett, 14 Colo. App. 413, 60 Pac. 363; State v. L'Engle, 40 Fla. 392, 24 So. 539; Richards v. Lyon County Sup'rs, 69 Iowa, 612; Wood v. Farmer, 69 Iowa, 533; State v. Addis, 59 Kan. 762, 54 Pac. 1065; Marion & M. R. R. Co. v. Alexander, 63 Kan. 72, 64 Pac. 978; Marshall v. Donovan, 73 Ky. (10 Bush) 681; Tate v. Board of Trustees of Erlanger School Dist., 20 Ky. L. R. 1370, 49 S. W. 337; Common School Dist. v. Garvey, 80 Ky. 159. A mere irregularity does "not void a school tax properly voted."

State v. Board of Liquidation, 29 La. Ann. 77; Nelson v. Town of Homer, 48 La. Ann. 258. A municipal corporation cannot, under its general welfare clause, levy a tax for school purposes. Stuart v. School Dist. No. 1, 30 Mich. 69; Weston Lumber Co. v. Munising Tp., 123 Mich. 138, 82 N. W. 267; Curryer v. Merrill, 25 Minn. 1; Putnam v. City of St. Paul, 75 Minn. 514, 78 N. W. 90; State v. Missouri Pac. R. Co. (Mo.) 6 S. W. 862; In re Powers, 52 Mo. 218; State v. City of Omaha, 7 Neb. 267; Lee v. School Dist. No. 1, 36 N. J. Eq. (9 Stew.) 581; People v. Allen, 42 N. Y. 404; Rigsbee v. Town of Durham, 99 N. C. 341, 6 S. E. 64.

Lane v. Stanly, 65 N. C. 153. Townships in North Carolina have no power, either constitutional or statutory, to levy a tax for school purposes. Board of Education of Bladen County v. Bladen County Com'rs, 111 N. C. 578; School Dist. of Erie v. Smith, 195 Pa. 515; Mitchell v. Fox, 73 Tenn. (5 Lea) 420; Werner v. City of Galveston (Tex.) 7 S. W. 726; Muller v. City of Denison (Tex. Civ. App.) 21 S. W. 391, following Lufkin v. City of Galveston, 63 Tex. 438; Kinney v. Zimpleman, 36 Tex. 554; Willis v. Owen, 43 Tex. 41; City of El Paso v. Conklin, 91 Tex. 537, 44 S. W. 988; City of Ft. Worth v. Davis, 57 Tex. 225; Robertson v. Preston, 97 Va. 296, 33 S. E. 618; Washington County Sup'rs v. Saltville Land Co., 99 Va. 640, 39 S. E. 704.

[59] Horton v. Mobile School Com'rs, 43 Ala. 598; Opinion of the Justices, 67 Me. 582; Shepardson v. Gillett, 133 Ind. 125, 31 N. E. 788; Elkin v. Deshler, 25 N. J. Law, (1 Dutch.) 177; Landis v. Ashworth, 57 N. J. Law, 509, 31 Atl. 1017. "The tax is assailed upon the ground that a school district is not a political division of the state possessing powers of local government, and, therefore, taxes for public purposes cannot be levied exclusively upon the persons and property within it. This contention seems to us not well founded. School districts are formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children, and to that end the legal voters of each district are intrusted with specific powers of local government and

§ 307. School taxes; amount required.

The amount or rate which school authorities may levy for educational purposes must come within the common limit prescribed by law[60] if in excess of that limit, the proceedings and tax usually will be invalid only as to the excess.[61]

The authority for the levy of the tax may use general language and the question can then be raised whether certain uses or purposes come within the meaning of such general language. The language usually employed is the phrase "school purposes." The purchase and maintenance of a library for the use of the school does not ordinarily come within its meaning.[62]

the trustees whom they elect are made a body corporate to represent the district and its inhabitants. These characteristics mark them as political organizations." Lydecker v. Englewood Tp. Com'rs, 41 N. J. Law, 154; State v. Bremond, 38 Tex. 116.

[60] United States v. Independent School Dist., 20 Fed. 294. Mandamus will lie to compel the levying of the full amount provided by law if necessary. Griggs v. St. Croix County, 27 Fed. 333; Smith v. Speed, 50 Ala. 276; People v. City of Bloomington, 130 Ill. 406; St. Louis, R. I. & C. R. Co. v. People, 177 Ill. 78. Under Hurd's Rev. St., c. 122, art. 8, § 1, the amount required for school purposes can be separately stated, but the provision is mandatory. Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788; State v. Ewing, 22 Kan. 708; Glass v. Billings, 59 Kan. 776, 53 Pac. 125; Clark v. Deveraux, 8 Kan. App. 341, 57 Pac. 40. When within the limit fixed by law, the court will not, ordinarily, interfere with the levy of a certain rate or arbitrarily hold that it is oppressive or illegal. Marion & M. R. Co. v. Alexander, 63 Kan. 72, 64 Pac. 978; Collins v. Henderson, 74 Ky. (11 Bush) 74; Board of Education v. General Council of Covington, 20 Ky. L. R. 289, 45 S. W. 1045; Brown v. Board of Education of Newport, 22 Ky. 483, 57 S. W. 612; Board of County School Com'rs v. Gantt (Md.) 21 Atl. 548; Alvord v. Collin, 37 Mass. (20 Pick.) 418; Cowart v. Taxworth, 67 Miss. 322, 7 So. 350; State v. Phipps, 148 Mo. 31, 49 S. W. 865; Kansas City, Ft. S. & M. R. Co. v. Chapin, 162 Mo. 409, 62 S. W. 1000; State v. St. Louis, K. C. & N. R. Co., 75 Mo. 526; Hillburn v. St. Paul, M. & M. R. Co., 23 Mont. 229; Dawson County v. Clark, 58 Neb. 756; Hall v. Selectmen of Somersworth, 39 N. H. 511; Jodon v. City of Brenham, 57 Tex. 655; Winifrede Coal Co. v. Board of Education of Cabin Creek, 47 W. Va. 132, 34 S. E. 776; State v. Lamont, 86 Wis. 563.

[61] Chicago & A. R. Co. v. People, 147 Ill. 196; Chicago & A. R. Co. v. People, 155 Ill. 276; Wabash R. Co. v. People, 187 Ill. 289.

[62] Taylor v. Wayne Dist. Tp., 25 Iowa, 448; Manning v. Van Buren Dist. Tp., 28 Iowa, 332. Where the law requires a vote of the electors, an indebtedness cannot be incurred by the school directors before a tax

A tax for "heating and repairing purposes" has been held a tax for school and not for building purposes.[63]

The construction of new buildings is not ordinarily a "school purpose" but there must be special authority given for such use of public moneys or the levy of taxes for this purpose.[64] The

for that purpose has been voted. The court say: "Section seven, paragraph five, empowers the electors, when assembled in district township meeting, to vote a tax for certain purposes, among others 'for the payment of any debts contracted for the erection of school houses, and for procuring district libraries and apparatus for the schools.' This section contemplates that a tax may be levied for the purchase of apparatus. It is not authority for the purchase of apparatus before the tax is voted, thus authorizing the creation of an indebtedness to be paid by a tax afterward to be voted. * * * It contemplates that contracts may be made by the proper officers for the purchase of apparatus, after a tax has been voted for that purpose. This is made plain by section twenty which provides that the directors shall make all contracts, purchases and payments necessary to carry out any vote of the district. We find no provision clothing them with power to make contracts or purchases of school apparatus otherwise than as is provided in this section. It is obvious, therefore, that no such contract can be made by them unless authorized by a vote of the electors." Board of Education of Covington v. Board of Trustees, 24 Ky. L. R. 98, 68 S. W. 10.

[63] Elberg v. San Luis Obispo County, 112 Cal. 316; Chicago & A. R. Co. v. People, 155 Ill. 276; State v. Folk, 45 S. C. 491; Board of Education of Ogden v. Brown, 12 Utah, 251, construing such statutes in general.

[64] Knopf v. People, 185 Ill. 20, 57 N. E. 22; O'Day v. People, 171 Ill. 293; Greenwood v. Gmelich, 175 Ill. 526; Cleveland, C., C. & St. L. R. Co. v. Randle, 183 Ill. 364; Chicago & N. W. R. Co. v. People, 184 Ill. 240; Rose v. Hindman, 36 Iowa, 160; Seaman v. Baughman, 82 Iowa, 216, 47 N. W. 1091, 11 L. R. A. 354; Hibbs v. Directors & Secretary of Adams Tp., 110 Iowa, 306, 81 N. W. 584, 48 L. R. A. 535. A vote to levy a schoolhouse tax may be rescinded at a subsequent election when the tax has not been certified nor levied by the proper officers.

Marble v. McKenney, 60 Me. 332. A school house cannot be erected upon a lot other than that legally designated by the municipal officers of the town. If this is done, it will render a tax levied for such purpose illegal. Carlton v. Newman, 77 Me. 408. School officers are limited in their expenditures to the amount furnished by a vote of the electors.

State v. West Duluth Land Co., 75 Minn. 456, 78 N. W. 115; State v. Wabash, St. L. & P. R. Co., 83 Mo. 395. Under Rev. St. § 6880, taxes for "school purposes" cannot be levied for building school houses or for paying indebtedness. Eikenbary v. Porter, 60 Neb. 75; State v. Westerfield, 24 Nev. 29; Lee v. Trustees of School Dist. No. 1, 36 N. J. Eq. (9 Stew.) 581; Gale v. Mead, 4 Hill (N. Y.) 109; Stevens v. Kent, 26 Vt. 503.

term is usually inclusive of all those expenditures which come within the phrase "current expenses." The payment of teachers, the purchase of supplies, the payment of the salaries of employés and the maintenance of the school organization.[65]

§ 308. Diversion of funds.

Taxes as ordinarily levied throughout the country include specific rates or amounts for specific purposes. It is a well recognized principle that money raised in this manner when diverted from such use and diverted to another will not be then lost for the benefit of that special purpose for which levied. The corporation will still be liable for the expenditure of the specific amount for such purpose.[66]

[65] Board of Education of Woodland v. Board of Trustees, 129 Cal. 599, 62 Pac. 173. A grant of authority to levy a special tax "sufficient in amount to maintain a high school" vests the board of trustees with an undisputed discretion as to the rate of tax to be levied.

Richards v. Raymond, 92 Ill. 612; Newman v. Thompson, 9 Ky. L. R. 199, 4 S. W. 341; Cushing v. Inhabitants of Newburyport, 51 Mass. (10 Metc.) 508. The fact that branches of learning other than those required by the revised statutes are taught in a school does not deprive it of its character as a town school to be supported by public taxation.

Putnam v. City of St. Paul, 75 Minn. 514, 78 N. W. 90. An appropriation for the payment of salaries does not become a trust fund for the sole use and benefit of teachers already appointed. Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118. Under Const. art. 2, § 14, and art. 7, § 7, a school tax is not a "necessary expense" of a town. Wheeler v. Town of Alton, 68 N. H. 477, 38 Atl. 208.

[66] Maenhaut v. City of New Orleans, 2 Woods, 108, Fed. Cas. No. 8,939, and Ranger v. City of New Orleans, 2 Woods, 128, Fed. Cas. No. 11,564, hold that where a municipal corporation is authorized to levy a tax to pay the interest on an issue of bonds, the money collected and set apart for such purpose is a trust fund for the payment of such interest and the corporation can be restrained from using it for other purposes.

Vickrey v. Sioux City, 104 Fed. 164; Lee County v. Robertson, 66 Ark. 82, 48 S. W. 901; Yankton County v. Faulk, 1 Dak. 348; Town of Aurora v. Chicago, B. & Q. R. Co., 119 Ill. 246, 10 N. E. 27. If the use for which the tax is raised is subsequently held unlawful, this fund cannot be appropriated to other purposes.

President & Trustees of Rushville v. Town of Rushville, 32 Ill. App. 320; Pennington v. Coe, 57 Ill. 118; Toledo, St. L. & K. C. R. Co. v. Stephenson, 131 Ind. 203, 30 N. E. 1082; Hickman College v. Colored Common School Dist. A, 111 Ky. 944, 65 S. W. 20; Board of Education of Covington v. Trustees of

§ 309. The construction of roads.

The construction, maintenance or repair of public highways is considered such a purpose as will authorize without question the levy and collection of road tax moneys.[67] The general principles requiring uniformity and equality of operation apply equally to laws imposing road taxes[68] which must also be levied in the manner and by the board provided by law.[69] The rate or

Public Library, 113 Ky. 234, 68 S. W. 10; State v. City of New Orleans, 106 La. 469, 31 So. 55; Parish Board of School Directors v. City of Shreveport, 47 La. Ann. 21; Port Huron Board of Education v. Runnels, 57 Mich. 46; State v. Stone, 69 Miss. 375, 11 So. 4; School Dist. No. 1 v. Rhoads, 81 Mo. 473; Zimmerman v. State, 60 Neb. 633, 83 N. W. 919; School Dist. of Lincoln v. Fiske, 61 Neb. 3, 84 N. W. 401; State v. Storey County Com'rs, 17 Nev. 96; City of Hoboken v. Ivison, 29 N. J. Law (5 Dutch.) 65; Board of Education of Plainfield v. Sheridan, 45 N. J. Law, 276; Board of Education of East Las Vegas v. Tafoya, 6 N. M. 292, 27 Pac. 616; City of Greensboro v. Hodgin, 106 N. C. 182; State v. Marietta & N. G. R. Co., 108 N. C. 24.

People v. George, 60 Hun, 580, 14 N. Y. Supp. 475. See this case, however, for the effect of a change of organization upon the rule stated in the text. Oregon City v. Moore, 30 Or. 215, 46 Pac. 1017, 47 Pac. 851; German Tp. School Dist. v. Sangston, 74 Pa. 454; School Districts v. Edwards, 46 Wis. 150; State v. De Lano, 80 Wis. 259.

[67] People v. Whyler, 41 Cal. 351; San Luis Obispo County v. White, 91 Cal. 432. A bridge, as defined by the Political Code, § 2618, is a highway and a tax can be levied on the property within the road district for its construction. Commissioners of Highways of Goshen v. Jackson, 165 Ill. 17; Stone v. Woodbury County, 51 Iowa, 522; Hoffman v. Lynburn, 104 Mich. 494; Herring v. Dixon, 122 N. C. 420, 29 S. E. 368; State v. Haywood County Com'rs, 122 N. C. 812, 30 S. E. 352; Osborne v. Mecklenburg County Com'rs, 82 N. C. 400; Thompson v. Fellows, 21 N. H. (1 Fost.) 425; Bradford v. Newport, 42 N. H. 338; Warder v. Clark County Com'rs, 38 Ohio St. 639; Miller v. Hixson, 64 Ohio St. 39, 59 N. E. 749; City of Philadelphia v. Field, 58 Pa. 320. Construction of free bridge authorized. Com. v. Reiter, 78 Pa. 161; Smith v. Grayson County, 18 Tex. Civ. App. 153, 44 S. W. 921. Cooley, Taxation, p. 130.

[68] West School Dist. v. Merrills, 12 Conn. 437; Haney v. Bartow County Com'rs, 91 Ga. 770; Lima v. McBride, 34 Ohio St. 338; Adams v. Hyde, 27 Vt. 221.

[69] Chicago & N. W. R. Co. v. People, 193 Ill. 594; Kansas City, Ft. S. & G. R. Co. v. Scammon, 45 Kan. 481, 25 Pac. 858; Hudson v. Police Jury of Claiborne, 107 La. 387, 31 So. 868; Parsons v. Inhabitants of Goshen, 28 Mass. (11 Pick.) 396; Stetson v. Kempton, 13 Mass. 272; Burlington & M. R. R. Co. v. Lancaster County Com'rs, 12 Neb. 324; Hunter v. Justices of Campbell County, 47 Tenn. (7 Cold.) 49.

amount to be raised for this special purpose may be limited.[70] If one is levied or raised in excess of this, the same principle is ap-

[70] C. N. Nelson Lumber Co. v. Town of Loraine, 24 Fed. 456; People v. Wilson, 3 Ill. App. 368. The term "road purposes" as used in Rev. St. c. 121, is a general phrase and includes expenditures for the payment of damages arising from opening and laying out roads, the purchase of materials and road machinery.

Peoria & P. U. R. Co. v. People, 144 Ill. 458, 33 N. E. 873; Chicago & A. R. Co. v. People, 190 Ill. 20; Gosnell v. City of Louisville, 20 Ky. L. R. 519, 46 S. W. 722. The presumption exists that the tax levy for road purposes is within the constitutional limit.

Ada Tp. v. Grove, 114 Mich. 77, 72 N. W. 35; State v. Kansas City, St. J. & C. B. R. Co., 145 Mo. 596. Road taxes are county taxes within the constitution, art. 10, § 11, limiting the rate of taxation levied for such purposes. Libby v. State, 59 Neb. 264; Norcross v. Veal, 51 N. J. Law, 87, 16 Atl. 159; Herring v. Dixon, 122 N. C. 420, 29 S. E. 368; Southern R. Co. v. Kay, 62 S. C. 28; Jefferson Iron Co. v. Hart, 18 Tex. Civ. App. 525, 45 S. W. 321; Bertha Zinc Co. v. Pulaski County Sup'rs, 88 Va. 371.

Kane v. School Dist., 52 Wis. 502; Webster v. Douglas County, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451. 'The crucial question in this case is whether the county could legally spend more than $8,000 in one fiscal year upon highways under the provisions of section 1308, Rev. St. 1878. This section, after providing that county boards may adopt highways or parts of highways as county roads, or may designate highways or parts of highways for the purpose of spending money in their repair without adopting them as county roads, then provides that any county board 'may annually levy, on the taxable property of the county, a county road tax not exceeding eight thousand dollars which shall be expended under their direction in making culverts, grading, graveling, ditching or otherwise improving such highways.' It seems very manifest to us from a careful reading of the section that the amount of the tax fixes the amount which may be expended in any one year. The amount is plainly limited to the amount previously raised by the tax. The board may first raise a sum and then spend it. * * * In the present case, the board raised $8,000 by tax levied in November, 1893, and spent the entire sum before the 5th of June, 1894. Then they proposed to spend $8,000 more and pay for the work temporarily out of the normal school fund, and finally out of the levy to be made in November, 1894. This they had no power nor right to do. They, however, proceeded not in the manner required by section 1309 but in a lawless and irregular manner to parcel out $2,000 to each of the chairmen of the four county towns, and to allow each chairman to spend his portion as he chose. To say that this entire proceeding was irregular and illegal is to speak of it very mildly. * * * The temporary injunctional order, in no uncertain terms, prevented the board from carrying out the work which had been illegally commenced un-

plied as in the cases of a similar nature and the proceedings will be held invalid only as to the excess.[71] The construction and maintenance of highways must be distinguished from the making of a "local improvement" so called. The cost of local improvements is usually met by local assessments which, as to the basis of levy and collection, differ radically from taxes.[72] The legality of

der the resolution of June 5th. * * * The plain fact is that the acts of the public officials and contractors, after the injunctional order of August 7 was issued and served upon them, in proceeding with general road work, and in issuing orders to pay for the work and in actually paying for a good part of it, were and are utterly indefensible. They were deliberate contempts of court." Overruling Harrison v. Milwaukee County Sup'rs, 51 Wis. 645. See, also, Mueller v. Town of Cavour, 107 Wis. 599, 83 N. W. 944; Frederick v. Douglas County, 96 Wis. 411.

[71] Peninsular Sav. Bank v. Ward, 118 Mich. 87, 76 N. W. 161, 79 N. W. 911. The excess for the purpose of sustaining its validity will not be considered as having been levied for a separate purpose. The court say: "The statute restricts the labor to one half day on $100 valuation and the money tax to fifty cents upon such valuation. Section 1327 provides that a majority of the electors present may determine the amount of labor and money tax within these bounds. As has been seen, the electors voted a money tax of one per cent for highway purposes. It is urged that this was no more than it was within their power to raise, and that one-half of it should be treated as a vote of highway labor, and the remainder a money tax in which case neither would be excessive. The record shows that the entire amount was spread and if we might assume that no labor was done or commuted, which is improbable, we should still be confronted by the fact that the vote shows that the electors directed that amount to be spread upon the roll. We cannot conclude therefore, that any part of it was intended as a vote of highway labor. It is also suggested that we may assume that a part of the amount spread was a tax authorized by the board of supervisors but we think in view of the vote of the township, that the presumption is to the contrary."

[72] Barrow v. Hepler, 34 La. Ann. 362; Rogers v. City of St. Paul, 22 Minn. 494-507. "By common usage, especially as evidenced by the practice of courts and text writers, the term 'local improvements' is employed as signifying improvements made in a particular locality, by which the real property adjoining or near such locality is specially benefited. * * * An examination of these authorities will also show that the term 'local improvements' or terms synonymous, are more commonly applied to the grading, curbing and paving of streets than to any other class of improvements. Our constitution is to be presumed to have employed the term 'local improvements' in the sense which is thus attributed to it by common usage."

State v. Reis, 38 Minn. 371; Sperry v. Flygare, 80 Minn. 325, 49 L. R. A.

a local assessment is based upon the doctrine that the improvement will result in a local and special advantage to specific property, which should, therefore, pay the cost of such improvement, benefit or advantage. The community at large receiving no special benefit should not be required to pay its cost. The subject of local assessments will be considered later in this chapter.[73]

§ 310. The levy of taxes for the establishment or maintenance of plants for the supply of water and light.

The purposes, namely, a supply of water[74] and light,[75] indi-

757. A rural highway is not a local improvement and local assessments cannot, therefore, be imposed on abutting property to pay for its construction or improvement. The court say: "Damages for laying out such roads [rural highways] have been paid from the public treasury, and at no time have farm lands been assessed therefor, any further than in assessing damages, benefits to the land through which the highway passes have been deducted from the amount awarded to the landowner. But benefits accruing to the public generally have never been considered or allowed in reduction of individual damages. Until the passage of this act a rural highway was not understood to come within the meaning or to constitute a local improvement and if sustained it will completely change the method heretofore in existence and employed for laying out and establishing such road. The term 'local improvements' has been most generally used and employed in reference to improvements by municipal corporations proper, rather than to counties and towns, which are only quasi municipal corporations."

[73] Chapter VII, subd. II, §§ 337 et seq.

[74] City of Cleveland v. United States, 111 Fed. 341. To furnish a sufficient supply of water and light for public uses does not require an express grant of the power of taxation for these purposes. Holt v. City of Birmingham, 111 Ala. 369; Bowen v. West, 10 Colo. App. 322, 50 Pac. 1085; Frederick v. City Council of Augusta, 5 Ga. 561. The rule applied to the right of a municipal corporation to construct a canal for the purpose of securing a supply of water for public use where the city council was vested with "full power and authority to make such assessments on the inhabitants of the city or those who hold taxable property within the same for the safety, benefit, convenience and advantage of the said city as shall appear to them expedient."

Taylor v. McFadden, 84 Iowa, 262. "Appellant's further contention is that municipal corporations have no authority to levy taxes except as expressly conferred by statute and that no authority is given to levy a special tax for the erection of waterworks. In Jeffries v. Lawrence, 42 Iowa, 505, it is said: 'The doctrine everywhere prevails that no taxes can be levied by municipal corporations in the absence of author-

cated in the title of this section, have been repeatedly held of such a character as to warrant not only the expenditure of public money but the levy of taxes for such purpose. Public corporations may for these purposes incur indebtedness, expend moneys

ity conferred by the state, if not in terms yet by plain and unmistakable implication.' We think the authority given to such corporations to erect waterworks, by plain and unmistakable implication, carries with it the power to levy a tax for that purpose, provided such levy does not exceed the limitation."

Youngerman v. Murphy, 107 Iowa, 686, 76 N. W. 648; Hines v. City of Leavenworth, 3 Kan. 186; Manley v. Emlen, 46 Kan. 655; Waters v. Town of Laurel, 93 Md. 221, 48 Atl. 499; People v. Mahaney, 13 Mich. 481; Monroe Water Co. v. Heath, 115 Mich. 277, 73 N. W. 234.

State v. City of Kearney, 49 Neb. 325. An act authorizing the levy of taxes for a supply of water cannot impair or affect the obligation of any pre-existing contract. The power of taxation existing for the purpose of meeting a contract obligation has been repeatedly held a contract right which cannot be impaired by the passage of subsequent legislation. Brown v. City of Concord, 56 N. H. 375; Van Giesen v. Inhabitants of Bloomfield, 47 N. J. Law, 442; Hackensack Water Co. v. City of Hoboken, 51 N. J. Law, 220; Conger v. Inhabitants of Summit Tp., 52 N. J. Law, 483; Johnson v. Borough of Asbury, 58 N. J. Law, 604; Raton Waterworks Co. v. Town of Raton, 9 N. M. 70, 49 Pac. 898. The right of taxation for such a purpose, however, is limited to that authorized by law. Bank of Rome v. Village of Rome, 18 N. Y. 38; People v. Common Council of Long Island City, 76 N. Y. 20; Thrift v. Commissioners of Town of Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

City of Charlotte v. Shepard, 120 N. C. 411. The construction of city waterworks, however, is not a "necessary expense" within the constitution of North Carolina, art. 7, § 7, which provides that a tax except for necessary city expenses cannot be levied except upon a vote of a majority of its qualified electors. See, also, as holding the same, Thrift v. Commissioners of Town of Elizabeth City, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427, and Edgerton v. Goldsboro Water Co., 126 N. C. 93, 35 S. E. 243.

Hill v. Higdon, 5 Ohio St. 243; Maloy v. City of Marietta, 11 Ohio St. 636; Stiles v. Jones, 3 Yeates (Pa.) 491; City of Allentown v. Henry, 73 Pa. 404; Van Sicklen v. Town of Burlington, 27 Vt. 70; Gay v. City of New Whatcom, 26 Wash. 389, 67 Pac. 88; Foster v. City of Kenosha, 12 Wis. 616; Dean v. Borchsenius, 30 Wis. 236; Oconto City Water Supply Co. v. City of Oconto, 105 Wis. 76.

[75] Stewart v. Kansas Town Co., 50 Kan. 553; Hequembourg v. City of Dunkirk, 49 Hun, 550, 2 N. Y. Supp. 447; In re Village of Le Roy, 35 App. Div. 177, 55 N. Y. Supp. 149; State v. City of Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175.

already raised or provide for the future expenditure of moneys by the levy of taxes.

§ 311. The exercise of the power.

A public corporation or the sovereign itself can levy taxes only upon the persons and property within its jurisdiction. A personal tax upon nonresidents or upon their personal property is incapable of enforcement;[76] neither can a public corporation levy a tax upon real property lying beyond the corporate limits.[77] The converse of the rule thus stated is unquestionably true and all persons or property within the limits of a taxing district are

[76] City of St. Louis v. Wiggins Ferry Co., 78 U. S. (11 Wall.) 423; In re Mahoney's Estate, 133 Cal. 180, 65 Pac. 389. The rule, however, does not apply to an inheritance tax. Nonresident beneficiaries are subject to the tax to an equal extent with those residing within the limits of a taxing district. City of Augusta v. Dunbar, 50 Ga. 387; City of New Albany v. Meekin, 3 Ind. 481; Johnson v. City of Lexington, 53 Ky. (14 B. Mon.) 521; Louisville Bridge Co. v. City of Louisville, 81 Ky. 189; City of St. Joseph v. Saville, 39 Mo. 460; Moore v. Town of Fayetteville, 80 N. C. 154; Shriver v. City of Pittsburg, 66 Pa. 446.

[77] Shaw v. Lockett, 14 Colo. App. 413, 60 Pac. 363; Wilkey v. City of Pekin, 19 Ill. 160; Large v. Washington Dist. Tp., 53 Iowa, 663; Trigg v. Trustees of Glasgow, 65 Ky. (2 Bush) 594; Chicago, B. & Q. R. Co. v. Cass County, 51 Neb. 369, 70 N. W. 955; Wells v. City of Weston, 22 Mo. 384; Deason v. Dixon, 54 Miss. 585; Chicago, B. & Q. R. Co. v. Cass County, 51 Neb. 369; Chicago, B. & Q. R. Co. v. Nebraska City, 53 Neb. 453.

Sioux City Bridge Co. v. Dakota County, 61 Neb. 75, 84 N. W. 607. In this case the court epitomizes the law as follows: First, "A village cannot levy a tax on property the situs of which is not within the corporate limits." Second, "A tax levied on a whole property part of which is within and part without the territorial limits of the body imposing the same is invalid as to that part levied on the portion without the jurisdiction which renders the whole assessment void, unless the tax assessed against the part within the jurisdiction of the taxing body can readily be separated from the portion without it." Third, "A property owner is not required to appear before a taxing board in opposition to the assessment of a tax on property whose situs is not within the jurisdiction of such board." Fourth, "Where an assessment is wholly void, no tender of any sum is necessary to relief against the tax."

Allen v. Bidwell, 68 N. H. 245; Piper v. Singer, 4 Serg. & R. (Pa.) 354; Arthur v. School Dist. of Polk Borough, 164 Pa. 410; State v. City of Columbia, 27 S. C. 137; Neale v. Wood County Ct., 43 W. Va. 90, 27 S. E. 370.

subject to the taxes which it may impose.[78] Where persons or property are within the jurisdiction of different corporations, the limits of which are wholly or partially co-extensive with each other, they may be subject to the levy of taxes for the same or a different purpose by each of such corporate organizations.[79] To illustrate, property within the limits of a city, taxed by it for city school purposes, may be also taxed for similar county purposes by the county organization including such municipality. The authorities hold that the burden of proof is upon the organi-

[78] Alexander v. Town of Alexandria, 5 Cranch (U. S.) 1; Jones v. City of Columbus, 25 Ga. 610; Cutliff v. City of Albany, 60 Ga. 597. A constitutional provision "That all taxation shall be uniform upon the same class of subjects * * * within the territorial limits of the authority levying the tax" does not preclude a municipal corporation from taxing one business and not another.

Dunleith v. Reynolds, 53 Ill. 45; Raymond v. Hartford Fire Ins. Co., 196 Ill. 329; Toledo & W. R. Co. v. City of Lafayette, 22 Ind. 262; Tilford v. Douglass, 41 Ind. 580; Byram v. Marion County Com'rs, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; Hines v. City of Leavenworth, 3 Kan. 186; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498, 14 S. W. 493; Specht v. City of Louisville, 22 Ky. L. R. 699, 58 S. W. 607; Richardson v. Boske, 23 Ky. L. R. 1209, 64 S. W. 919; Adams v. City of Greenville, 77 Miss. 881. The authority to tax, as a rule, gives no power to impose taxes not levied during previous years. City of St. Joseph v. Hannibal & St. J. R. Co., 39 Mo. 476; Cobb v. Elizabeth City, 75 N. C. 1. Municipal taxes to comply with the constitutional provision requiring uniformity should be levied upon all property within the city not exempt.

Western Union Tel. Co. v. City of Richmond, 26 Grat. (Va.) 1. A corporation is a person within the meaning of laws providing for the levy of taxes. Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645.

[79] Martin v. Aston, 60 Cal. 63. But county officers cannot levy taxes for road purposes upon property within the limits of the city whose authorities have the power to levy taxes for the maintenance of its streets and alleys. People v. Knopf, 171 Ill. 191; Jackson Tp. v. Wood, 55 Kan. 628, 40 Pac. 897; Ryerson v. Laketon Tp., 52 Mich. 509; Chambers v. Adair, 23 Ky. L. R. 373, 62 S. W. 1128; Bordeaux v. Meridian Land & Industrial Co., 67 Miss. 304, 7 So. 286; Sargent v. Inhabitants of Milo, 90 Me. 374, 38 Atl. 341; Wheeler v. Town of Alton, 68 N. H. 477, 38 Atl. 208. Taxes cannot be levied upon property in a town for the support of district school teachers. Bertha Zinc Co. v. Pulaski County Sup'rs, 88 Va. 371. The rule, however, does not apply where the jurisdiction of the two districts is not co-extensive. But see, however, to the contrary, Kerlin v. Reynolds, 142 Ind. 460, 36 N. E. 693, 41 N. E. 827.

zation claiming jurisdiction of either persons or property for the purpose of taxation to maintain such jurisdiction.[80] The right to tax those moving from one taxing district to another about the time of assessment is generally determined by particular provisions of the statute as well as other questionable cases affecting the right of a taxing district to impose taxes based upon the ground of residence or location within its limits,[81] or rights affected by change of boundaries.[82]

[80] McConoughey v. City of San Diego, 128 Cal. 366; Galbreath v. Newton, 30 Mo. App. 380; Smith v. Barrett, 41 Mo. App. 460; Chicago, B. & Q. R. Co. v. Cass County, 51 Neb. 369, 70 N. W. 955; Hurlburt v. Green, 41 Vt. 490.

[81] Ex parte Upshaw, 45 Ala. 234; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067. Determining the rights of taxpayers where district boundaries have been changed after voting a tax but before its levy. Callaway v. Denver & R. G. R. Co., 6 Colo. App. 284, 40 Pac. 573; Pidgeon v. McCarthy, 82 Ind. 321. An acquiescence for sixty years in taxation by municipal authority will estop the owners of property from disputing the municipal right to tax because not within its jurisdiction.

Rapids Dist. Tp. v. Clinton Dist. Tp., 27 Iowa, 323; Montgomery v. City of Lebanon, 23 Ky. L. R. 891, 64 S. W. 509; Huckins v. City of Boston, 58 Mass. (4 Cush.) 543; Johnston v. Cathro, 51 Mich. 80; City of Detroit v. Detroit City R. Co., 76 Mich. 421; Manistee & N. E. R. Co. v. Railroads Com'rs, 118 Mich. 349, 76 N. W. 633. No contract relation, however, is created where no substantial consideration runs to the state. Detroit Citizens' St. R. Co. v. Common Council of Detroit (Mich.) 85 N. W. 96. Such a contract of exemption is assignable and may be transferred to another corporation. Budd v. Allen, 69 Hun, 535, 24 N. Y. Supp. 5; Arthur v. School District of Polk Borough, 164 Pa. 410; King v. Utah C. R. Co., 6 Utah, 281.

[82] Town of New Decatur v. Nelson, 102 Ala. 556, 15 So. 275; Hughes v. Ewing, 93 Cal. 414, 28 Pac. 1067; Callaway v. Denver & R. G. R. Co., 6 Colo. App. 284, 40 Pac. 573; Chambers v. Adair, 23 Ky. L. R. 373, 62 S. W. 1128; Capen v. Glover, 4 Mass. 305; Richards v. Dagget, 4 Mass. 534; Waldron v. Lee, 22 Mass. (5 Pick.) 323; School Dist. No. 9 v. School Dist. No. 6, 9 Neb. 331; Pickering v. Coleman, 53 N. H. 424; Ovitt v. Chase, 37 Vt. 196.

Madry v. Cox, 73 Tex. 538. Property annexed to a municipal corporation will be subject to taxation for the payment of its debts. See, also, as holding the same proposition, the next five cases. City of East St. Louis v. People, 124 Ill. 655; City of New Orleans v. Great Southern Tel. & Tel. Co., 40 La. Ann. 41; Newark Aqueduct Board v. City of Newark, 50 N. J. Law, 126; Voorhies v. City of Houston, 70 Tex. 331; and Lucia v. Village of Montpelier, 60 Vt. 537, 1 L. R. A. 169.

§ 312. The authority to tax and upon what based.

The authority for all municipal taxation must proceed from the sovereign. The basis of such taxation is the exercise of a sovereign right as a theory, but as a matter of practice the fact that the subject of taxation receives a local benefit, protection or advantage through the levying and collection of the taxes.[83]

As the authority to tax proceeds from the legislature, representing the sovereign, it necessarily follows that if an exclusive method has been provided by it for the taxation either of certain individuals or of specific property, these are exempt from all other taxation except special assessments or taxes;[84] such being levied for a specific purpose and resting upon a basis entirely different in its nature from that sustaining ordinary taxation do not come within the exemption. The municipal power to tax is limited to the methods[85] and subjects named in the express authority.[86]

[83] Hanson v. Vernon, 27 Iowa, 28; Mitchell v. Williams, 27 Ind. 62; Northern Liberties v. St. John's Church, 13 Pa. 104.

[84] City of Albany v. Savannah, F. & W. R. Co., 71 Ga. 158; Cincinnati, N. O. & T. P. R. Co. v. Com., 21 Ky. L. R. 418, 51 S. W. 568. "The petitions are all based upon a local assessment made by an assessor appointed by the school board. It is insisted that this is unwarranted. The law regulating the assessment of railroad property for the year 1893 is found in Gen. St. pp. 1042-1045. Section four provides: 'No county, city or incorporated town in this state shall hereafter assess, levy or collect any taxes on the property of railroad companies in this state except as provided by this article.' Section 4102 of the Kentucky Statutes contains the same provision. Section 4099 provides for the reports of school districts so that the proper assessment may be made. Section 4100 requires the money paid to the superintendent of public schools for the benefit of the district entitled thereto. Under these provisions, appellees could not assess the property of the railroad company, nor recover the taxes based upon an assessment so made."

City of Davenport v. Mississippi & M. R. Co., 16 Iowa, 348; Dubuque & S. C. R. Co. v. City of Dubuque, 17 Iowa, 120; Sears v. Boston St. Com'rs, 173 Mass. 350, 53 N. E. 876. The construction and management of a general sewerage system for an entire city should be raised by general taxation rather than special assessments. Kittle v. Shervin, 11 Neb. 65; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; New York, P. & N. R. Co. v. Northampton County Sup'rs, 92 Va. 661, 24 S. E. 221.

[85] Livingston v. City of Albany, 41 Ga. 21. Where the constitution provides for an ad valorem tax on property, even the legislature cannot authorize a subordinate corporation

§ 313. Exemptions.

Property may be exempt from taxation either because of the purpose for which used, its ownership or a specific grant of exemption.

(a) Public property exempt. It is axiomatic to state that property owned, controlled and used by public corporations for public purposes is exempt from all species of taxation and even in many instances from the levying of special taxes or assessments except when otherwise provided by law.[87] The rule, however, does

to levy a specific tax irrespective of the value of the property so taxed. State v. Severance, 55 Mo. 378.

[86] Baldwin v. City Council of Montgomery, 53 Ala. 437; City of Savannah v. Hartridge, 8 Ga. 23. The right to tax in common cannot be implied from a charter authorizing a municipal corporation to tax real and personal estate.

City Council of Augusta v. Dunbar, 50 Ga. 387. The rule also applies to the imposition of penalty imposed for a delay in the payment of taxes. Lanier v. City of Macon, 59 Ga. 187. The authority to tax all persons exercising any profession gives the right to tax the individual members of a law firm.

City of Columbus v. Flournoy, 65 Ga. 231; City of Newark v. State Board of Taxation, 67 N. J. Law, 246, 51 Atl. 67; Bank of Greensboro' v. Greensboro' Com'rs, 74 N. C. 385; Wilson v. Aldermen of Charlotte, 74 N. C. 748; State v. City Council of Charleston, 1 Mill, Const. (S. C.) 36. Bonds bearing interest are included within the term "taxable property." Jenkins v. City of Charleston, 5 S. C. 393; Ex parte Schmidt, 2 Tex. App. 196, construing the power of the city of Houston to tax fire and marine insurance companies.

City of Dallas v. Dallas Consol. Elec. St. R. Co., 95 Tex. 268, 66 S. W. 835, construing sections 118, 134, and 135 of the charter of the city of Dallas authorizing the council to levy taxes upon franchises and all other property of street railways as well as other corporations. Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645. A municipality has the right to levy taxes on all subjects not withheld from taxation by the legislature. Blanton v. Southern Fertilizing Co., 77 Va. 335.

[87] See post, § 339. People v. Doe, 36 Cal. 220; People v. Austin, 47 Cal. 353; People v. Salomon, 51 Ill. 37; Illinois Industrial University v. Champaign County Sup'rs, 76 Ill. 283; Reid v. State, 74 Ind. 252; Board of Regents v. Hamilton, 28 Kan. 376; Inhabitants of Worcester v. City of Worcester, 116 Mass. 193; Jersey City Water Com'rs v. Gaffney, 34 N. J. Law, 133; City of Rochester v. Town of Rush, 80 N. Y. 302.

Directors of the Poor of S. County v. School Directors, 42 Pa. 21. A public poor-house it was here claimed was subject to taxation for school purposes. The court say: "Tax the poor-house to support the schools? Why, this would be to take the poor taxes to support the schools; and the people must be

not apply to the property of public corporations not held for governmental purposes but in their economic and commercial capacity as private corporations and for their own profit.[88] The only means possessed by public corporations for the payment of taxes is derived from its levy and collection of taxes. They have no independent sources of revenue.[89] The levying and collecting of

taxed to pay the officers who perform such foolish service. If we require the townships, counties, towns, cities, and state, and the road, school, and poor authorities, to tax each other, we shall furnish fees enough for several hundred officers engaged in transferring from one public body to another the taxes which it has collected for its public purposes. These poor taxes must be collected to support the schools and the roads, and school taxes to support the poor, and so all around. Surely it is not too much to say this is absurd. The public is never subject to tax laws, and no portion of it can be without express statute. No exemption law is needed for any public property held as such." Cooley, Taxation, p. 172. "All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for governmental purposes was intended to be excluded, and the law will be administered as excluding it in fact. The grant, therefore, in general terms to a city of the power to tax, will not be held to confer power to tax state or county property, and the rule applies to the property of public educational and charitable institutions which perform public functions under state control, and to any other corporation of which the state is substantially the corporator, and which exists for governmental purposes."

[88] Town of West Hartford v. West Hartford Water Com'rs, 44 Conn. 360; McChesney v. People, 99 Ill. 216; In re Appeal of Des Moines Water Co., 48 Iowa, 324; City of Louisville v. Com., 62 Ky. (1 Duv.) 295. See, also, Anne Arundel County Com'rs v. Duckett, 20 Md. 468; Bailey v. City of New York, 3 Hill (N. Y.) 531; Lloyd v. City of New York, 5 N. Y. (1 Seld.) 369; Storrs v. City of Utica, 17 N. Y. 104; Western Sav. Fund Soc. v. City of Philadelphia, 31 Pa. 175.

[89] Fall v. City of Marysville, 19 Cal. 391; Low v. Lewis, 46 Cal. 549. "The property of a municipal corporation is not liable to taxation for municipal purposes. It cannot tax its own property." Cook County v. City of Chicago, 103 Ill. 646. A water tax, however, can be assessed against a public institution. Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386; Wyman v. City of St.

taxes upon public property would be an unnecessary expense and a useless multiplication of accounts.

(b) Other exemptions. In the grant of authority to tax, certain property may be excluded.[90] Where in the absence of such exemption, however, the general right to tax has been given, all property within the jurisdiction of the corporation can be taxed.

In this country there are two independent governments, the federal and the government of the states. Each within certain well defined restrictions is supreme, and it is beyond the power of either, within such limitations, to take any action which may impair or destroy the integrity of the other as an independent sovereignty. This principle applies to the levying of taxes.[91] The

Louis, 17 Mo. 335. A building used in part for a school house and in part for other purposes is not exempt. People v. De Witt, 59 App. Div. 493, 69 N. Y. Supp. 366. Construing § 4, N. Y. Laws 1896, c. 908, exempting from taxation property of municipal corporations used for public purposes except that not within the limits of the corporation.

[90] Savannah v. Atlantic & G. R. Co., 3 Woods, 432, Fed. Cas. No. 12,385; Baldwin v. City Council of Montgomery, 53 Ala. 437. Where, in the grant of authority to tax, the subjects of taxation are specifically enumerated, the right of the municipality to levy taxes will be limited to these subjects and the authority will not be construed as a general power to tax all subjects including others not so enumerated.

City of Albany v. Savannah, F. & W. R. Co., 71 Ga. 158; City of New Orleans v. Southern Bank of New Orleans, 15 La. Ann. 89; City of New Orleans v. Dunbar, 28 La. Ann. 722; Montague v. State, 54 Md. 481; Lee v. Thomas, 49 Mo. 112; State v. Arnold, 136 Mo. 446; Haines v. Mullica Tp., 51 N. J. Law, 412, 17 Atl. 941. An act excepting a certain township from the operation of tax laws is void because in contravention of N. J. Const., art. 4, § 7, prohibiting the legislature from passing private, local or special laws regulating the internal affairs of a town or county.

Bridge Proprietors v. State, 21 N. J. Law (1 Zab.) 384, and Bridge Proprietors v. State, 22 N. J. Law (2 Zab.) 593, hold that toll bridges are liable to taxation unless specially exempted. People v. Lee, 28 Hun (N. Y.) 469; Shapter v. Carroll, 18 App. Div. 390, 46 N. Y. Supp. 202; Carpenter v. Hopkinton School Trustees, 12 R. I. 574; City of Memphis v. Hernando Ins. Co., 65 Tenn. (6 Baxt.) 527; Washington County Sup'rs v. Saltville Land Co., 99 Va. 640, 39 S. E. 704; Newport News & O. P. R. & Elec. Co. v. City of Newport News, 100 Va. 157, 40 S. E. 645. An exemption from taxation, however, is never presumed; the right to levy taxes being a governmental one and not based upon contract.

[91] Wagner v. Jackson, 33 N. J. Law, 450. The levy of a tax for the payment of commutation money for exemption from military service in

right to tax includes the power to tax to the limit of confiscation. It includes, as Chief Justice Marshall said, "the power to destroy,"[92] therefore, agencies of either state or national gov-

the national army held illegal as obstructing the Federal government in performing its operations. The court say: "It is not disputed that any legislation by the state, or its municipal corporations, contrary to an act of Congress or which obstructs the Federal government in performing its functions, is invalid. It need not be in direct opposition to an act of Congress, or in terms annul it, but if such legislation tend or may tend to defeat its operation, the legislation is void. * * * As this township took away entirely from the drafted man the pecuniary inducement to enter the service wisely and deliberately provided by congress, which was not done by the legislation that gave the money to the drafted man if he served, the tax assessed for that purpose is illegal and must be set aside."

[92] McCulloch v. Maryland, 4 Wheat. (U. S.) 316-391. "The last, and greatest, and only difficult question in the cause, is that which respects the assumed right of the states to tax this bank, and its branches, thus established by Congress. This is a question comparatively of no importance to the individual states, but of vital importance to the Union. Deny this exemption to the bank as an instrument of government, and what is the consequence? There is no express provision in the constitution which exempts any of the national institutions or property from state taxation. It is only by implication that the army, and navy, and treasure, and judicature of the Union are exempt from state taxation. Yet they are practically exempt; and they must be, or it would be in the power of any one state to destroy their use. Whatever the United States have a right to do, the individual states have no right to undo. The power of Congress to establish a bank, like its other sovereign powers, is supreme, or it would be nothing. Rising out of an exertion of paramount authority, it cannot be subject to any other power. Such a power in the states, as that contended for on the other side, is manifestly repugnant to the power of Congress; since a power to establish implies a power to continue and preserve. There is a manifest repugnancy between the power of Maryland to tax, and the power of Congress to preserve, this institution. A power to build up what another may pull down at pleasure is a power which may provoke a smile, but can do nothing else. This law of Maryland acts directly on the operations of the bank, and may destroy it. There is no limit or check in this respect, but in the discretion of the state legislature. That discretion cannot be controlled by the national councils. Whenever the local councils of Maryland will it, the bank must be expelled from that state. A right to tax without limit or control, is essentially a power to destroy. If one national institution may be destroyed in this manner, all may be destroyed in the same manner. If this power to tax the national property and institutions exists in the state of

ernments cannot be taxed by the other without the consent of the taxed.[93] But the rule does not extend so far as to prevent the property of Federal or state agencies from being taxed in the same manner as similar property when no law forbids and when the effect of the taxation would not defeat or hinder the operations of government.[94] In the Federal constitution is found a declaration of some principles and exemptions protecting the national government from state attacks directly or indirectly through the imposition of taxes.[95] Congress may also provide for

Maryland, it is unbounded in extent. There can be no check upon it, either by Congress or the people, of the other states."

[93] Kansas Pac. R. Co. v. Prescott, 83 U. S. (16 Wall.) 603. Affirmed in this particular by Union Pac. R. Co. v. McShane, 89 U. S. (22 Wall.) 444, 462; Northern Pac. R. Co. v. Traill County, 115 U. S. 600; Central Pac. R. Co. v. State of Nevada, 162 U. S. 512. The rule applied to unpatented railroad land grants; such lands, as well as all public lands under the laws of the United States not taxable by state authorities.

City Council of Augusta v. Dunbar, 50 Ga. 387. A municipal corporation cannot impose a tax upon bonds issued by the state. See the following authorities among many others exempting agencies of the Federal government: Van Allen v. Assessors at Albany, 70 U. S. (3 Wall.) 573; First Nat. Bank of Louisville v. Com., 76 U. S. (9 Wall.) 353; McCulloch v. Maryland, 4 Wheat. (U. S.) 316; Osborn v. Bank of United States, 9 Wheat. (U. S.) 738; Dobbins v. Erie County Com'rs, 16 Pet. (U. S.) 435; National Commercial Bank v. City of Mobile, 62 Ala. 284; Sumter County v. National Bank of Gainesville, 62 Ala. 464; Melcher v. City of Boston, 50 Mass. (9 Metc.) 73; Flint v. City of Boston, 99 Mass. 141; North Ward Nat. Bank v. City of Newark, 39 N. J. Law, 380.

See, also, the following cases discussing an exemption of state agencies from taxation by the Federal government: Buffington v. Day, 78 U. S. (11 Wall.) 113; Ward v. Maryland, 79 U. S. (12 Wall.) 418; United States v. Baltimore & O. R. Co., 84 U. S. (17 Wall.) 322; Smith v. Short, 40 Ala. 385; Warren v. Paul, 22 Ind. 276; Moore v. Quirk, 105 Mass. 49; Sayles v. Davis, 22 Wis. 217; Cooley, Const. Lim. (5th Ed.) p. 598.

[94] Thomson v. Union Pac. R. Co., 76 U. S. (9 Wall.) 579. The court here said that a different rule "would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property, of any description by land or water or in supplying materials for the use of the government or in performing any service of whatever kind might claim the benefit of the exemption."

[95] Northwestern Union Packet Co. v. City of St. Paul, 3 Dill. 454, Fed. Cas. No. 10,346. An ordinance imposing a wharfage tax each trip upon every boat or vessel running

exemption from taxation by the states of property exclusively within its control or under its jurisdiction. Such laws are paramount and taxes levied in contravention of their terms are illegal and cannot be collected.[96]

(c) Contract exemptions. A public corporation may possess the power in consideration of certain benefits or advantages received or to be received, by contract express or implied, to relieve private property from the payment of taxes for a specified period,[97] where the consideration is substantial, the contract exemption can be enforced.[98]

or anchoring in front of a public wharf is void being in conflict with that provision of the Federal constitution, art. 1, § 10, cl. 2 prohibiting a state to levy any duty on tonnage without the consent of Congress, citing Cannon v. City of New Orleans, 87 U. S. (20 Wall.) 577.

The North Cape, 6 Biss. 505, Fed. Cas. No. 10,316. The prohibition in the Federal constitution against the imposition of "a duty on tonnage" does not prevent the taxation of a vessel under state laws for ordinary purposes.

[96] Brown v. Maryland, 12 Wheat. (U. S.) 419.

[97] Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, construing a certain exemption and holding that in the light of the state constitution and the prior decisions of the state courts it must be held subject to the power of the legislature to alter, amend or repeal it.

Whiting v. Town of West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860. "A municipal corporation has no element of sovereignty. It is a mere local agency of the state, having no other powers than such as are clearly and unmistakably granted by the law-making power. * * * The power of taxation is not only an attribute of sovereignty but it is essential to the existence of government and as all are protected by the government so all should contribute to its support. * * * So also is the power to make exemptions sovereign in its nature and likewise resides in the legislature unless the constitution otherwise ordains. It is, therefore, a legal solecism to say that the power of exemption or any other sovereign power is inherent in a municipal corporation which, though invested with certain governmental powers for local purposes, is in no particular sovereign."

Cooper v. Ash, 76 Ill. 11. An exemption must be of a class and not individually. Grand Gulf & P. G. R. Co. v. Buck, 53 Miss. 246; Mississippi Mills v. Cook, 56 Miss. 40; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 60 L. R. A. 33; State v. Hannibal & St. J. R. Co., 75 Mo. 208. The power to tax does not give the power to exempt which must be specifically given. People v. New York Tax Com'rs, 95 N. Y. 554. Exemption statutes must be strictly construed.

[98] Bartholomew v. City of Austin (C. C. A.) 85 Fed. 359. If the exemption from taxation prove void, the courts will enforce substantial

(d) Exemptions arising because of purpose for which property is used. The organization of a municipal corporation is supposed to result in certain local benefits to all persons and property within its limits, notably, fire and police protection. If property on account of the purposes for which used does not receive the benefits or advantages which usually accompany municipal organizations, the legislature may, by statutory exemption, exclude such property from the operation of tax laws granting municipal authority to tax.[99]

equities existing between the parties based upon a partial performance of the contract.

Montreal St. R. Co. v. City of Montreal, 23 Can. Sup. Ct. 259. Such a contract of exemption may not, however, relieve from all taxation. City of Dayton v. Bellevue Water & Fuel Gaslight Co., 24 Ky. L. R. 194, 68 S. W. 142. Exemption construed and held as being made without authority.

City of New Orleans v. Great Southern Tel. & Tel. Co., 40 La. Ann. 41, 3 So. 533. A charge of $5.00 per pole on the poles of a telephone company cannot be imposed where the permission has already been secured for the use of the streets under an ordinance duly passed.

[99] Gold Hill v. Caledonia Silver Min. Co., 5 Sawy. 575, Fed. Cas. No. 5,512. The question of benefit is held in this case a legislative, not a judicial one. State v. Southern R. Co., 115 Ala. 250; Town of Dixon v. Mayes, 72 Cal. 166, 13 Pac. 471. Land used solely for agricultural purposes when within corporate limits is still liable for taxation for municipal purposes.

St. Louis Bridge Co. v. City of East St. Louis, 121 Ill. 238, 12 N. E. 723. The part of the St. Louis Bridge within the corporate limits of East St. Louis is liable to taxation for municipal purposes although it receives no material benefit by reason of its location in respect to police protection or other advantages supposed to be derived from municipal organization.

Blain v. Bailey, 25 Ind. 165. Farm lands within city limits are, by the act of June 18, 1852, exempt from taxation for municipal purposes. Hamilton v. City of Ft. Wayne, 40 Ind. 491; Stilz v. City of Indianapolis, 55 Ind. 515. The right to tax, however, cannot be raised by the landowner in a collateral proceeding. City of Indianapolis v. Ritzinger, 24 Ind. App. 65, 56 N. E. 141; Conklin v. Town of Cambridge City, 58 Ind. 130; Town of Cicero v. Sanders, 62 Ind. 208.

Glover v. City of Terre Haute, 129 Ind. 593. In an action to enjoin the collection of taxes levied for municipal uses, the method for the annexation of platted suburban property cannot be raised. Langworthy v. City of Dubuque, 16 Iowa, 271. It is held that city "out lots" when benefited and enhanced in value are liable to taxation. The question is one of fact.

Fulton v. City of Davenport, 17 Iowa, 404; Deeds v. Sanborn, 22 Iowa, 214; Id., 26 Iowa, 419; Buell v. Ball, 20 Iowa, 282; Davis v. City of Dubuque, 20 Iowa, 458; Delman

§ 314. Taxes; their levy and assessment.

Where the levy of taxes by a subordinate agency is authorized by a sovereign, this then becomes an obligatory duty and can be

v. City of Ft. Madison, 30 Iowa, 542; Durant v. Kauffman, 34 Iowa, 194; Ford v. Town of North Des Moines, 80 Iowa, 626, 45 N. W. 1031. The fact that property within municipal limits is subject to overflow does not exempt it from taxes for municipal purposes.

Brooks v. Polk County, 52 Iowa, 460; Taylor v. City of Waverly, 94 Iowa, 661, 63 N. W. 347; Evans v. City of Council Bluffs, 65 Iowa, 238; Tubbesing v. City of Burlington, 68 Iowa, 691. Under Iowa Laws 1876, c. 47, § 4, amended by laws of 1878, c. 169, a tract of land within the city limit used for agricultural purposes and also for the owner's residence is not taxable. Farwell v. Des Moines Brick Mfg. Co., 97 Iowa, 286, 35 L. R. A. 63; Perkins v. City of Burlington, 77 Iowa, 553.

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. Land within the city limits occupied by lumber yards, pasture, etc., is not used for agricultural purposes within the law exempting such land from taxation for city purposes. Windsor v. Polk County, 109 Iowa, 156; Mendenhall v. Burton, 42 Kan. 570; Hurla v. Kansas City, 46 Kan. 738.

Simms v. City of Paris, 8 Ky. L. R. 344, 1 S. W. 543. Land not used exclusively for farming when within the limits of a city is liable to taxation for municipal purposes. Maltus v. Shields, 59 Ky. (2 Metc.) 553. An unplatted tract of nine acres of land used for residences within the city limits will be subject to taxation for municipal purposes. Torbett v. City of Louisville, 9 Ky. L. R. 202, 4 S. W. 345; Courtney v. City of Louisville, 75 Ky. (12 Bush) 419. The court in this case held that in order to subject real property within the corporate limits of a town or city to taxation for ordinary municipal purposes, there must be benefits actual or presumed to such property derived from the municipal corporation.

City of Covington v. Arthur, 12 Ky. L. R. 163, 14 S. W. 121; Trustees of Elkton v. Gill, 14 Ky. L. R. 755, 21 S. W. 579; Briggs v. Town of Russellville, 18 Ky. L. R. 389, 36 S. W. 558; City of Pineville v. Creech, 16 Ky. L. R. 172, 26 S. W. 1101; City of Lebanon v. Bevill, 18 Ky. L. R. 924, 38 S. W. 872; Town of Latonia v. Hopkins, 20 Ky. L. R. 620, 42 S. W. 248. Although agricultural lands receive no benefit from corporate organization, they are still subject to taxation for municipal purposes.

Bell County Coke & Imp. Co. v. City of Pineville, 23 Ky. L. R. 933, 64 S. W. 525; City of Frankfort v. Gaines, 88 Ky. 59; Eifert v. Town of Central Covington, 91 Ky. 194; Henderson Bridge Co. v. City of Henderson, 90 Ky. 498; Stickley v. Chesapeake & O. R. Co., 93 Ky. 323; Briggs v. Town of Russellville, 99 Ky. 515, 34 L. R. A. 193; City of New Orleans v. Michoud, 10 La. Ann. 763; Groff v. City of Frederick, 44 Md. 67; Smith v. City of Saginaw, 81 Mich. 123; Baldwin v. City of Hastings, 83 Mich. 639; Adams v.

enforced in courts having jurisdiction of the questions raised by the proper proceedings, generally a writ of mandamus directed

Yazoo & M. V. R. Co., 75 Miss. 275; Adams v. Mississippi State Bank, 75 Miss. 701.

Giboney v. City of Girardeau, 58 Mo. 141. An extension to the city limits is not necessarily illegal because it operates to subject to municipal taxes farm property. City of Stanberry v. Jordan, 145 Mo. 371; Bradshaw v. City of Omaha, 1 Neb. 16; Gottschalk v. Becher, 32 Neb. 653. Where suburban property is annexed to municipal organization under Comp. St. Neb. 1891, c. 14, § 95, it is exempt from taxation. Lancaster County v. Rush, 35 Neb. 119; Sage v. City of Plattsmouth, 48 Neb. 558; McClay v. City of Lincoln, 32 Neb. 412, 49 N. W. 282. Rev. St. Neb. 1866, c. 53, § 1, authorizes the taxation of unplatted lands within the city limits. Bailey v. Brown, 53 N. J. Law, 162, following Mendenhall v. Burton, 42 Kan. 570.

Kelly v. City of Pittsburgh, 85 Pa. 170. Lands embraced within the borders of a city and used only for farming purposes may be taxed for municipal objects from which the lands do not receive any protection or derive any benefit. Appeal of Hewitt, 88 Pa. 55; City of Erie v. Reed's Ex'rs, 113 Pa. 468. The final determination of whether real estate is within the limits of a city is rural and capable of receiving the benefits of street lighting, paving and other improvements, is left under act of February 25, 1870 (P. L. 242) to the council of the city of Erie. Their decision is conclusive unless this discretion is abused.

Carriger v. City of Morristown, 69 Tenn. (1 Lea) 116; Lum v. City of Bowie (Tex.) 18 S. W. 142. Suburban land annexed without the consent of the owner residing upon it is not subject to taxation for municipal purposes and an injunction will lie to restrain city taxes as levied. Norris v. City of Waco, 57 Tex. 635; Cook v. Crandall, 7 Utah, 344; Ellison v. Linford, 7 Utah, 166. Where farming land within the corporate limits will derive no benefit from the expenditure of taxes raised for municipal purposes, it is not subject to such taxation. Kaysville City v. Ellison, 18 Utah, 163, 55 Pac. 386, 43 L. R. A. 81; Ferguson v. City of Snohomish, 8 Wash. 668, 24 L. R. A. 795. Land used solely for agricultural purposes may be included within the limits of a municipal corporation and under act of March 27, 1890 (page 131) which provides for the incorporation, government and classification of such corporations, it is subject to general municipal taxation.

Frace v. City of Tacoma, 16 Wash. 69. It is not necessary that lands should receive the benefits of municipal organization to render a tax for such purposes valid. Powell v. Parkersburg, 28 W. Va. 698. Under West Va. Act of 1875, c. 54, §§ 101 and 103, outlying farming lands within the city limits can be taxed as city lands.

Weeks v. City of Milwaukee, 10 Wis. 242. The legislature has the power to annex farming lands to a city and subject them to the burden of taxation for municipal purposes. Davis v. Town of Point Pleasant, 32 W. Va. 289.

against the officials whose statutory and usual duty is to do those acts required by law and necessary to the legal levy and collection of taxes.[100] This power to compel by mandamus the performance of a duty is vested not only in state but also in the Federal courts; they can only compel the levy of a municipal tax when state laws authorize it to be levied and the proper officials neglect or refuse. A mandamus does not confer power upon those to whom it is directed, it only enforces the exercise of a power already existing when its exercise has become or is a duty.[101]

[100] See, also, authorities cited in the following note as sustaining the right to compel by mandamus a levy of taxes. The President v. City of Elizabeth, 40 Fed. 799; Vickrey v. Sioux City, 104 Fed. 164; Welch v. Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372. Where a municipal corporation refuses to levy a tax to pay a judgment or to elect officers whose duty it is to levy such taxes, a circuit court of the United States may appoint its marshal a special commissioner to assess, levy and collect the requisite tax.

Wells v. Cole, 27 Ark. 603; Meyer v. Brown, 65 Cal. 583; People v. Lake County Com'rs, 12 Colo. 89; Jones v. State, 17 Fla. 411. All prior proceedings must have been properly performed before mandamus will lie. State v. City of New Orleans, 42 La. Ann. 92; Attorney General v. City of Salem, 103 Mass. 138; Jarvis v. Warren County Sup'rs, 49 Miss. 603. A petition for mandamus to compel the levy of a tax that fails to state the particular district for the benefit for which this tax was levied is insufficient.

Musgrove v. Vicksburg & N. R. Co., 50 Miss. 677. Where certain subordinate officials refuse or neglect to levy a tax, Miss. Act of March 15, 1872 (p. 102) empowers the county auditor to perform their duties in this respect.

State v. Paddock, 36 Neb. 263, 54 N. W. 515. In this case the court writing the syllabus says: "South Omaha as shown by the census of 1890, is a city of the second class, having more than 8,000 and less than twenty-five thousand inhabitants, and not a city of the first class. The school board of South Omaha on the 6th day of June, 1892, made an estimate of the amount of school tax to be levied in said city for that year. This estimate was imperfect in its statements and details. The defendants held the same until July 14, 1892, when they refused to levy the tax. Afterwards proceedings in mandamus were instituted and the court rendered judgment for the defendants. Corrected estimates were then filed. Held, that such estimates related back to June 6 of that year, and that it was the duty of the defendants to levy the tax." Davis v. Simpson, 25 Nev. 123, 58 Pac. 146; Joint Free High School Dist. v. Town of Green Grove, 77 Wis. 532. See, also, Cooley, Taxation, pp. 734 et seq., for a full discussion of the question and the many authorities there cited.

[101] Butz v. City of Muscatine, 75 U. S. (8 Wall.) 575; Carroll County

§ 315. Basis or authority for tax levy.

The levy of a tax is usually based upon an assessment of property according to some uniform method prescribed by law,[102] or a gross tax may be levied directly by a vote of qualified electors to be apportioned subsequently and imposed upon property subject to it in some equitable and uniform manner.[103]

Orleans, 98 U. S. 381; Ex parte Parsons, 1 Hughes, 282, Fed. Cas. No. Sup'rs v. United States, 85 U. S. (18 Wall.) 71; Heine v. Levee Com'rs, 86 U. S. (19 Wall.) 655; Barkley v. 769; United States v. City of New States v. County of Clark, 95 U. S. Levee Com'rs, 93 U. S. 258; United 10,774; Welch v. Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372; Lansing v. County Treasurer, 1 Dill. 522, Fed. Cas. No. 16,538; Britton v. Platte City, 2 Dill. 1, Fed. Cas. No. 1,907; Com. v. Select & Common Councils of Pittsburgh, 34 Pa. 496; Com. v. Allegheny Com'rs, 37 Pa. 277.

[102] People v. Stockton & C. R. Co., 49 Cal. 414; Chicago & N. W. R. Co. v. People, 174 Ill. 80; City of Indianapolis v. Morris, 25 Ind. App. 409, 58 N. E. 510; City of Owensboro v. Callaghan, 13 Ky. L. R. 418, 17 S. W. 278; Halleck v. Inhabitants of Boylston, 117 Mass. 469, construing Mass. St. 1870, c. 196, § 3; Koontz v. Burgess & Com'rs of Hancock, 64 Md. 134.

Auditor General v. McArthur, 87 Mich. 457. A school tax affecting a portion only of the taxable property within the school district is void. Lockey v. Walker, 12 Mont. 577. Under Const. art. 12, §§ 4, 5, 11, municipal authorities are vested with a discretionary power in the determination of the property assessment, the basis of taxation. Stephens v. School Dist. No. 21, 6 Or. 353. The assessment of property for school taxes should be determined upon the same general principles governing the making and the assessments for general taxes. San Antonio St. R. Co. v. City of San Antonio, 22 Tex. Civ. App. 341. Construing San Antonio city charter, § 194, as limited by Const. art. 8, §§ 5 and 11, relating to the taxation of railroad property. Eustis v. City of Henrietta, 90 Tex. 468, 39 S. W. 567; Bigelow v. Town of Washburn, 98 Wis. 553, 74 N. W. 362; Hixon v. Oneida County, 82 Wis. 515.

[103] Murphy v. Harbison, 29 Ark. 340; Holland v. Davies, 36 Ark. 446. In the absence of a showing of an injury, a school district tax not held invalid because the polls were closed before the time fixed by law. Rogers v. Kerr, 42 Ark. 100. The vote should be for a specified amount. Cooper v. Miller, 113 Cal. 238, 45 Pac. 325; Prowers County Com'rs v. Pueblo & A. V. R. Co., 3 Colo. App. 398, 33 Pac. 682; Pickett v. Russell, 42 Fla. 116, 634, 28 So. 764; Ayers v. McCalla, 95 Ga. 555, 22 S. E. 295; Chicago & N. W. R. Co. v. People, 174 Ill. 80. A vote based upon a vote of the people and other preliminary proceedings is presumed valid.

Chicago & N. W. R. Co. v. People, 18a Ill. 240; Houston v. Clay County, 18 Ind. 396; Locker v. Keller, 110 Iowa, 707, 80 N. W. 433; Mac-

§ 316. Agency of tax levy.

The power of making such assessment is vested by law either in certain officials or official bodies;[104] they, in the performance of

Kenzie v. Wooley, 39 La. Ann. 944; Longyear v. Auditor General, 72 Mich. 415, 40 N. W. 738; Gamble v. Auditor General, 78 Mich. 302, 44 N. W. 329, and Newaygo County Mfg. Co. v. Echtinaw, 81 Mich. 416, 45 N. W. 1010, hold that upon a failure of the electors to levy the taxes needed, under How. St. of Mich. § 750, a town board has authority to act and raise the necessary amount.

Tillotson v. Webber, 96 Mich. 144, 55 N. W. 837; Williams v. Mears, 61 Mich. 86. The vote of electors to levy a tax can only be proved by official records. Auditor General v. Duluth, S. S. & A. R. Co., 116 Mich. 122, 74 N. W. 505; Auditor General v. Sparrow, 116 Mich. 574, 74 N. W. 881. When electors "neglect or refuse" to vote money to defray township expenses under public laws of Michigan, the town board are authorized to act in this respect. Thayer Lumber Co. v. Springfield Tp., 131 Mich. 12, 90 N. W. 677; Taft v. Barrett, 58 N. H. 447; Vail v. Bentley, 23 N. J. Law (3 Zab.) 532; Canda Mfg. Co. v. Inhabitants of Woodbridge Tp., 58 N. J. Law, 134, 32 Atl. 66; Apgar v. Van Syckel, 46 N. J. Law, 492. Meetings for such purpose must be regularly called.

Haley v. Whitney, 53 Hun (N. Y.) 119; Vaughn v. School Dist. No. 31, 27 Or. 57, 39 Pac. 393; Mowry v. Mowry, 20 R. I. 74, 37 Atl. 306; Martin v. School Dist. of Laurens, 57 S. C. 125. A taxpayer attending and taking part in the proceedings of such an election is estopped to deny its legality. Rhomberg v. McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571; Miller v. Crawford Independent School Dist., 26 Tex. Civ. App. 495, 63 S. W. 894; Adams v. Sleeper, 64 Vt. 544; Soens v. City of Racine, 10 Wis. 271.

[104] Purcell v. Town of Bear Creek, 138 Ill. 524, 28 N. E. 1085, affirming 39 Ill. App. 499; Bebb v. People, 172 Ill. 376. County Com'rs under Rev. St. of 1893, c. 139, have power to assess and collect town taxes. Chicago & N. W. R. Co. v. People, 174 Ill. 80. The signatures of a majority of the highway commissioners to a road tax list is sufficient to sustain its legality. Chicago & N. W. R. Co. v. People, 183 Ill. 247; Southern Warehouse & Transfer Co. v. Mechanics' Trust Co., 21 Ky. L. R. 1734, 56 S. W. 162. It is not necessary that the tax board should be one de jure. Connelly v. Trego County Com'rs, 64 Kan. 168, 67 Pac. 453; Hall v. Anne Arundel County Com'rs, 94 Md. 282, 51 Atl. 86; Mills v. Richland Tp., 72 Mich. 100; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218; State v. Aitken, 62 Neb. 428, 87 N. W. 153; Hayes v. Hanson, 12 N. H. 284.

Ne-ha-sa-ne Park Ass'n v. Lloyd, 25 Misc. 207, 55 N. Y. Supp. 108. The authority of taxing officials is confined to the territory within their jurisdiction. State v. Woodside, 30 N. C. (8 Ired.) 104. A majority of an official body acting at an official meeting may levy local taxes. Board of Education of Ogden v. Brown, 12 Utah, 251, 42 Pac. 1109.

their duties, are limited strictly to their statutory authority; tax laws are construed technically. The power to assess or levy taxes either as to amount or as affecting certain interests cannot be implied but must be found in some express provision of the law.[105] If the authority prescribes conditions either as to the manner,[106] the time,[107] or the place and manner[108] of the exer-

[105] Comstock v. County of Yolo, 71 Cal. 599, 12 Pac. 728; Peoria, D. & E. R. Co. v. People, 141 Ill. 483, 31 N. E. 113; Chicago & N. W. R. Co. v. People, 184 Ill. 174; State v. Hannibal & St. J. R. Co., 87 Mo. 236. A county court has no implied power to levy a tax, and conditions imposed by the legislature in conferring the power must be strictly observed.

State v. Hannibal & St. J. R. Co., 135 Mo. 618; City of Aurora v. McGannon, 138 Mo. 38; Libby v. State, 59 Neb. 264; Sharp v. Froehlich (N. J. Law) 37 Atl. 1024; Grady v. Kearney Tp. Committee, 59 N. J. Law, 86; City of Charlotte v. Shepard, 120 N. C. 411; Elliott v. Berry, 41 Ohio St. 110; Morris v. Cummings, 91 Tex. 618, 45 S. W. 383. Where a special grant to levy taxes is doubtful, the doubt should be resolved against the exercise of the power. City of Denison v. Foster, 90 Tex. 22; Mueller v. Town of Cavour, 107 Wis. 599, 83 N. W. 944.

[106] Hilliard v. Bunker, 68 Ark. 340. No roll call of yeas and nays necessary on voting appropriations. Leachman v. Dougherty, 81 Ill. 324; Atchison, T. & S. F. R. Co. v. Maxwell, 10 Kan. App. 370, 59 Pac. 1087; City of Somerset v. Somerset Banking Co., 109 Ky. 549, 60 S. W. 5. Where a city council has authority to levy taxes, the action of a quorum is necessary to levy a legal tax. State v. Mississippi River Bridge Co., 134 Mo. 321, 35 S. W. 592; State v. Odom, 1 Speers (S. C.) 263; Henderson v. Hughes County, 13 S. D. 576, 83 N. W. 682.

[107] City of San Luis Obispo v. Pettit, 87 Cal. 499; St. Louis Bridge & Tunnel R. Co. v. People, 127 Ill. 627. Commissioners who meet for the determination of the tax rate on the day fixed by statute may defer action until an adjourned meeting, and a levy made then is valid.

Hodges v. Crowley, 186 Ill. 305. A levy of taxes for future years cannot be made nor based upon the assessment of a previous year. Chicago & N. W. R. Co. v. People, 193 Ill. 594; Clark v. Town of Noblesville, 44 Ind. 83; Wilcox v. Eagle Tp., 81 Mich. 271, 45 N. W. 987. In re Cloquet Lumber Co., 61 Minn. 233. "It is urged by respondent that this tax is illegal and void, for the reason that the statute requires the village council to specify the amount of tax to be levied and not the rate per cent. Laws 1885, c. 145, § 34 (Gen. St. 1894, § 1251) provides: 'The village council shall, on or before the 15th day of August, in each year, by resolution, to be entered of record, determine the amount of corporation taxes to be levied and assessed on the taxable property in such village for the current year, which shall not exceed in any one (1) year two percentum of the assessed valuation of such property. * * * On or before the first day of September, in each year, the village recorder shall deliver to the

cise of the power, such conditions must be complied with that the tax be legal. Limitations upon the power of taxation usually

county auditor a copy of all such resolutions, certified under his hand and the corporate seal of such village, and such auditor shall enter such taxes upon the tax books in the same manner as he is required to do in levying town taxes.' Gen. St. 1904, § 1557 provides: 'All taxes shall be levied or voted in specific amounts and the rates per-centum shall be determined from the amount of property as equalized by the state board of equalization each year, except such general taxes as may be definitely fixed by law. The state tax shall be levied by the legislature and the rate of such tax shall be certified by the auditor of state to each county auditor on or before the first day of October, annually.' * * * Construing these two sections together it is evident that it is the imperative duty of the village council to fix the specific amount of the tax to be levied, not the rate; and that it is the duty of the county auditor to calculate and ascertain the rate. This the county auditor must do after the state board of equalization has equalized the assessment, while the village council are required to determine the amount of money necessary to be raised before said board has acted. On behalf of the state it is urged that it should be presumed that the village council inspected the assessment book and ascertained the assessed valuation of all the taxable property in the village before they passed the resolution in question, and that they fixed the rate specified in the resoluion accordingly. Even if it should be so presumed, it does not follow that the resolution could be upheld as the assessed valuation of the village might be very materially changed by the subsequent equalization. But we are of the opinion that it should not be so presumed. Said section 1557 provides that 'the rates percentum shall be determined from the amount of property as equalized by the state board of equalization.' There is as much reason for presuming that the council attempted to estimate what that valuation would be after it was finally equalized, or that they took a random guess at what such valuation was or would be without any examination or investigation at all. Some of the members may have made such investigation and others not. To sustain this resolution would be to open the door to the most loose and reckless methods of conducting public business. Such a way of specifying the amount to be raised by taxation might be made a cover for raising a fund much larger than necessary, without calling public attention to the fact. The language of the statute is imperative, the intention plain. By specifying in dollars and cents the amount to be raised, it is more readily understood by the members of the council and the interested public; and there is less opportunity for fraud, deception or mistake." Borough of Eatontown v. Metzgar, 43 N. J. Law, 170; Hernandez v. City of San Antonio (Tex. Civ. App.) 39 S. W. 1022; Berry v. City of San Antonio (Tex. Civ. App.) 46 S. W. 273.

[108] People v. Chicago & N. W. R.

exist restricting the amount which can be legally levied or collected by either specifying the gross rate or amount. Officers in charge cannot exceed in this regard the limitations thus set.[109]

Co., 183 Ill. 311; Chicago & N. W. R. Co. v. People, 184 Ill. 240. Officers must act as a body and at the place designated by law. The court say: "The nineteenth objection is to the school tax levied in Union District number nine in the towns of Grafton and Coral. Here, again, the directors had a meeting and figured out that they wanted $250. The meeting was held in April. There was no certificate made by the board and nothing done about it, but on August 3, 1898, one of the directors got a certificate and signed it, and took it to the house of the president and he signed it, and it was taken to the treasurer. The certificate was a nullity. * * * The twentieth objection was to the town tax of Seneca. * * * The evidence, however, showed that the clerk sent a certificate of some sort to the county clerk and the county clerk said it was not right and sent him another blank which he filled up but he does not know what he wrote. He was told afterward that it was not right, and he told another party to tell the county clerk to correct it. The certificate was changed by the county clerk and showed an erasure which was not explained. The certificate was in regular form when offered on the trial, but it had been altered. He could not authorize the county clerk to make a certificate for him, and he might just as well have sent word to the clerk to make the certificate as to alter it. The certificate upon which the levy was made was illegal."

[109] Thatcher v. Chicago N. W. R. Co., 120 Ill. 560; Village of Hyde Park v. Ingalls, 87 Ill. 11. On the other hand, courts ordinarily will not interfere in the exercise of the discretion vested in municipal officers to levy taxes when within the limit fixed by law. Hale v. People, 87 Ill. 72. The power to levy and collect special assessments exists independent of any provisions as to the rate or amount of general taxes which can be legally raised.

Vittum v. People, 183 Ill. 154; Indianapolis School Com'rs v. Magner, 84 Ind. 67. The authority to levy a poll tax cannot be implied from a provision granting the power "to levy all taxes for the support of the schools" limited by a clause making it unlawful "to levy or assess taxes for any one year exceeding in the aggregate 20 cents on each $100 of property."

City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445; Joyner v. Inhabitants of School Dist. No. 3, 57 Mass. (3 Cush.) 567; Somo Lumber Co. v. Lincoln County, 110 Wis. 286, 85 N. W. 1023. In the statute (under discussion) it is provided that: "'A tax levied for any one year for municipal purposes together with the tax required to be levied for state, county, county school and school district purposes, and for delinquent taxes for the preceding year, shall not exceed the amount of three percent of the assessed value of real and personal property of the city in that year.' * * * Counsel for the defendants contend that this is unconstitutional and also void for uncertainty. We per-

Where rates, however, or amounts, are levied in excess of those allowed by law, this condition does not usually render the whole tax void if the illegal excess can be separated from that authorized when the excess alone is usually held void and not capable of enforcement.[110] The converse of this principle is also true that where officials act within the limits prescribed by law and within their discretionary powers, their action cannot be set aside by higher authority.[111]

ceive no uncertainty in the language employed. The constitution of this state expressly gave to the legislature power, and charged it with the duty 'to provide for the organization of cities and incorporated villages and to restrict their power of taxation so as to prevent abuses in assessments and taxation.' The restriction in question must be deemed to have been made pursuant to such mandate." State v. Laramie County Com'rs, 8 Wyo. 404, 55 Pac. 451.

[110] McIntosh v. People, 93 Ill. 540; Atchison, T. & S. F. R. Co. v. Woodcock, 18 Kan. 20; Union Pac. R. Co. v. Cheyenne County, 64 Neb. 777, 90 N. W. 917; Dalton v. City of East Portland, 11 Or. 426; Nalle v. City of Austin, 91 Tex. 424, 44 S. W. 66; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496; Rowell v. Horton, 57 Vt. 31; State v. Headlee, 22 Wash. 126, 60 Pac. 126. A tax levy if too large may be reduced by the county commissioners originally making it.

[111] Board of Education of Sacramento v. Trustees of Sacramento, 96 Cal. 42; Wood v. School Corp. of Tipton, 132 Ind. 206; Seward v. Rheiner, 2 Kan. App. 95; Union School Dist. v. Parris, 97 Mich. 593; State v. Lakeside Land Co., 71 Minn. 283, 73 N. W. 970. In this case the school tax having been extended on the tax list, the county commissioners undertook to regulate the levy of the same. Justice Mitchell said: "The line of argument adopted * * * is substantially as follows: The act creating the independent school district of Duluth provides that it 'shall be governed by the provisions of the general laws of the state of Minnesota governing independent school districts, not inconsistent with the provisions of this act;' that as the special act makes no provision for the levy of taxes for any purpose, therefore we must refer to the provisions in that regard of the general laws governing independent school districts; that those laws provide that 'all taxes raised by virtue of this chapter shall be levied and collected, * * *' and that as Gen. St. 1894, § 1557, provides that 'county taxes shall be levied by the county commissioners,' therefore, taxes for the purposes of an independent school district must be levied by the county commissioners. It will be noticed that the provision for levying taxes in independent school districts is substantially the same as that applicable to common school districts (Gen. St. 1894, § 3693) unless the word 'special' used in the latter has some restrictive effect,—a question which is not important here. * * * Counsel's argument is sound if the meaning which they attach to the word 'levy' is correct.

§ 317. Apportionment of taxes.

Tax officials may have in addition to their ordinary duties the further one of apportioning between different funds, or subsidiary organizations, the taxes they may have previously levied or assessed; this duty, it is usually held, is not discretionary but a purely ministerial act involving no judicial functions.[112] The

But there is fallacy in the argument. School districts, like towns and cities, are territorially, but in no other sense, parts of the county in which they are situated. According to the general policy of our laws, they are, as quasi municipal corporations, and for the purposes for which they are created, co-ordinate with, and not subordinate to, the counties in which they are situated. The counties are created for certain purposes and these other quasi municipalities for entirely different purposes. Each, within its own particular sphere, manages its own affairs exempt from the control or supervision of the other, unless otherwise expressly provided by statute. They levy their own taxes and expend them for their own purposes although for reasons of convenience and economy, the county officials are generally used as mere ministerial agents to extend the taxes on the tax lists and collect them. They all levy their own taxes in the sense of voting them or determining their amount, but, having no machinery of their own for their collection, they are required to certify their action to the county auditor, whose duty it is to extend them on the tax books as part of the taxed for the current year, and thereafter the county treasurer collects them, the same as other taxes, and pays them over to the municipality to which they belong. No reason can be assigned why this system should not apply to school districts or independent school districts as well as to other quasi municipalities, or why their power to levy taxes for their own purposes should be subject to the veto or supervision of the county commissioners. And we find nothing in the statute indicating any legislalative intent to make them an exception to the general rule." Board of Education of Kingfisher v. City of Kingfisher, 5 Okl. 82, 48 Pac. 103.

[112] City of New Orleans v. Fisher, 180 U. S. 185. Interest cannot be collected upon funds that officials have collected and failed to properly apportion until after the lapse of time when required to do so or a failure to account for the same on demand. The court say: "The city occupied the position as agent of the school board to collect and pay over school taxes, yet it may fairly be said that, under the legislation upon the subject, it was not the duty of the city to pay the money over immediately, but only as occasion might arise and that, as no charge of fraudulent conversion was made, interest would not commence to run until after failure to pay when required to do so, or failure to account on demand. Where interest is sought by way of damages for delay, courts of equity exercise a certain discretion as to its allowance. In view of the acquiescence

usual principles apply regulating the performance of such acts as distinguished from those of a discretionary or judicial character.

§ 318. Tax levies; preliminary proceedings.

The proceedings involved in the levy or assessment or collection of a legal tax may be roughly classed as those preliminary to the actual levy or assessment and those which are authorized as the result of such preliminary proceedings.

The validity of the tax considered with reference to such preliminary proceedings may depend upon an official act based upon some express provision of a charter, ordinance, legislative act or constitution or the legal action of the duly qualified electors for their taxing district.[113]

of the school board in the retention by the city of the interest collected on school taxes, an acquiescence in good faith so far as appears, the attitude of the city as a public corporation; and the lack of averment or evidence of demand prior to the filing of the bill, or of effort to compel an accounting, we think that interest should not be allowed in this case prior to May 11, 1896."

Town of Fairplay v. Park County Com'rs, 29 Colo. 57, 67 Pac. 152; Sangamon County Sup'rs v. City of Springfield, 63 Ill. 66. In such apportionment if one political division is apparently unjustly discriminated against, still the statute authorizing the action, however, is not in contravention of the constitutional provision requiring taxes levied to be uniform in respect to persons and property within the jurisdiction of a taxing district. Maloy v. Madget, 47 Ind. 241. The use of moneys thus apportioned for an improper purpose can, however, be restrained.

Dist. Tp. of Spencer v. Dist. Tp. of Riverton, 56 Iowa, 85; Sheridan v. Van Winkle, 43 N. J. Law, 579; Wallendorf v. Justices of Cole County, 46 Mo. 228; School Dist. No. 1 v. Webber, 75 Mo. 558; In re Railroad School Tax Apportionment, 78 Mo. 596. A law providing for the apportionment of school taxes levied on railroad property to be distributed to different school districts in proportion to the number of school children is not unconstitutional as levying taxes on property in one district for the benefit of another.

State v. Schnecko, 11 Mo. App. 165; Clark v. Sheldon, 134 N. Y. 333, 19 L. R. A. 138. Any action by officials diverting a fund from the purpose designated by law is illegal; there is a personal responsibility in case of an improper use. Seanor v. Whatcom County Com'rs, 13 Wash. 48; State v. Lamont, 86 Wis. 563.

[113] Weber v. Ohio & M. R. Co., 108 Ill. 451; St. Louis, R. I. & C. R. Co. v. People, 177 Ill. 78; South Park Com'rs v. First Nat. Bank, 177 Ill. 234; Cole v. State, 131 Ind. 591, 31 N. E. 458; Constant v. Parish of East Carroll, 105 La. Ann. 286, 29 So. 728; Irvin v. Gill, 155 Pa. 8; Board

This may be either an official order or certificate of a prescribed form covering the matters required by law[114] or it may consist of a certificate or an estimate of the probable amount or rate of taxes necessary to meet the expenditures or current expenses either of the municipality itself or of some one of its divisions or departments.[115] If the statute prescribes the form of such

of Education of Ogden v. Brown, 12 Utah, 251, 42 Pac. 1109.

[114] Baltimore & O. S. W. R. Co. v. People, 156 Ill. 189, 40 N. E. 834. In an action to set aside taxes, such a certificate is not conclusive. Chicago & N. W. R. Co. v. People, 171 Ill. 525; Reed v. City of Louisville, 21 Ky. L. R. 1636, 61 S. W. 11; Sage v. Stevens, 72 Mich. 638, 40 N. W. 919; Township of Bangor v. Smith Transp. Co., 106 Mich. 223, 64 N. W. 28; Muskegon v. Martin Lumber Co., 86 Mich. 625; Port Huron Tp. v. Potts, 78 Mich. 435; Burlington & M. R. R. Co. v. Lancaster County Com'rs, 12 Neb. 324; State v. Elba Sup'rs, 34 Wis. 169. The notice, however, should be in writing.

[115] People v. Lodi High School Dist., 124 Cal. 694; People v. Knopf, 171 Ill. 191; Chicago & N. W. R. Co. v. People, 171 Ill. 249. The failure to comply with directory provisions only will not invalidate a tax depending for its legality upon a certificate, not filed as provided by law. Ritz v. Tannehill, 69 Iowa, 476; State v. City of Shreveport, 33 La. Ann. 1179; Police Jury of Pointe Coupee v. Bouanchaud, 51 La. Ann. 860; City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445; Turnbull v. Alpena Tp., 74 Mich. 621, 42 N. W. 114.

Auditor General v. McArthur, 87 Mich. 457. The burden of proof is upon the one attacking the correctness and legality of such a certificate or statement. Boyce v. Peterson, 84 Mich. 490; Adams v. Capital State Bank, 74 Miss. 307, 20 So. 881; State v. Phipps, 148 Mo. 31, 49 S. W. 865. A correct estimate may be substituted for an imperfect one if done within the time fixed by law. The proceedings are based upon such statement as filed, and errors in the old one will not affect the tax levy.

Kansas City, Ft. S. & M. R. Co. v. Chapin, 162 Mo. 409, 62 S. W. 1000; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292. "The measure we are considering, adopted December 18th, assumed to appropriate $50,000 out of the general fund of the city for the purpose of paying salaries, and the incidental expenses of the city government, including the payment of city orders; and also, incidentally, for the purpose of 'defraying the expense of erecting and completing and installing an electric light plant for said city, and the operating expenses of the same during said fiscal year.' From this language it appears that, while the city council attempted to appropriate a gross amount ($50,000) from the general fund of the city for certain purposes mentioned, it does not specify the sum or amount which each or either purpose it to receive. From this language it is impossible to determine how much of this appropriation may be expended for any one purpose named in the enactment. We are far from holding that in an

return, order, certificate or estimate, it can, if not in this form, furnish no basis for subsequent legal proceedings.[116] If, however,

appropriation out of the general fund of a city to meet the ordinary expenses incident to carrying on the city government each item of expense must be anticipated, and stated in dollars and cents in the appropriation bill. No such rigid and fanciful requirement as that suggested is made by the law, and we certainly shall not attempt to read into the statute by construction any such embarrassing rule. But a costly improvement such as that contemplated in the contracts in question does not fall within the operating expenses of a city organized under the Code. The statute differentiates improvements from ordinary expenses, and places them in a class by themselves. The statute meets this feature of the case by an express provision which forbids the city council or any officer of the city from adding an expenditure upon any 'improvement' of the city over and above the amount named in the annual appropriation bill. It declares: 'And no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill.' This language imports that city improvements, such as expensive public buildings, must be provided for in terms and in amount by an ordinance embracing the annual appropriations of the funds of the city. When so mentioned in the annual appropriations the law, as has been shown, further requires the council to levy the sum appropriated upon the taxpayers of the city, and then no other expenditures therefor can be made until an additional sum is appropriated and levied in the succeeding fiscal year, except by the express sanction of the voters. We can think of no greater abuse of corporate power by the council of a city under the restrictions of said charter than would be involved in expending the funds of a city in the erection of costly public buildings and improvements without either passing an ordinance authorizing the construction of such improvements, or an ordinance appropriating any specific amount to be expended in their construction. The notion can never be tolerated that a city council may, without let or hindrance, from the law or the taxpayer, and at its election, proceed to deplete the general fund of the city by withdrawing therefrom sums of money indefinite in amount with which to build costly public improvements which improvements have had no legal authorization either from the council or the taxpayers and for which no specific sums of money have ever been appropriated or levied. Once concede this power in the council and it follows as a sequence that any city council may exhaust the general funds at pleasure by expenditures for public improvements which have no legal authorization and for the construction of which no funds have been provided. Fortunately, no such construction of the law is permissible in view of its very explicit provisions to the contrary." Powell v. St. Croix County Sup'rs, 46 Wis. 210.

[116] State v. Gadsden County Com'rs, 17 Fla. 418; Peoria, D. & E.

no form is prescribed by law, one which follows substantially the statutes and showing, if necessary, the authority, is considered sufficient.[117]

The statutes or constitution may provide the time and the manner in which the official action in the preceding paragraph shall be taken. All the requirements or provisions of the law for such preliminary matters as well as the manner or time[118] in

R. Co. v. People, 141 Ill. 483, 31 N. E. 113; St. Louis, R. I. & C. R. R. Co. v. People, 147 Ill. 9; Chicago & A. R. Co. v. People, 163 Ill. 616; Chicago & A. R. Co. v. People, 171 Ill. 544; St. Louis R. I. & C. R. Co. v. People, 177 Ill. 78. A certificate forms the basis of action by the tax levying officers. People v. Chicago & N. W. R. Co., 183 Ill. 311; St. Louis & S. F. R. Co. v. Gracy, (Mo.) 28 S. W. 736. If information required by the statute can be ascertained from calculations on the data given in the estimate, this will be sufficient.

Lamb v. Hurff, 38 N. J. Law, 310; Corrigan v. Duryea, 40 N. J. Law, 266. The certificate of a district clerk should show the authority of the electors authorizing the action. Townsend v. City of New York, 16 Hun (N. Y.) 362; Thomson v. Harris, 88 Hun, 478, 34 N. Y. Supp. 885; Arnold v. Juneau County Sup'rs, 43 Wis. 627.

[117] Gill v. Dunham (Cal.) 34 Pac. 68; Chicago & N. W. R. Co. v. People, 184 Ill. 240. The omission of what is "held a surplusage" does not affect the legality of a tax. Robbins v. Barron, 33 Mich. 124; Boyce v. Auditor General, 90 Mich. 314, 51 N. W. 457; Boyce v. Sebring, 66 Mich. 210. Where the certificate contains facts from which the items can be ascertained, 'a failure to specify these will not invalidate it or the proceedings thereunder. State v. West Duluth Land Co., 75 Minn. 456, 78 N. W. 115. The rule also applies to a provision of the statute which is directory merely and not mandatory. Kansas City, Ft. S. & M. R. Co. v. Chapin, 162 Mo. 409, 62 S. W. 1000. The estimate need not recite that the levy was authorized by the board. People v. Wright, 68 Hun (N. Y.) 264.

[118] Hodgkin v. Fry, 33 Ark. 716; Cowgill v. Long, 15 Ill. 202; Gage v. Nichols, 135 Ill. 128, 25 N. E. 672, following Mix v. People, 72 Ill. 241. A legal tax levy cannot be based on a certificate filed after the date fixed by statute. The court say: "It is next urged that the local tax for town, school, road and bridge purposes and the tax for the payment of interest on registered bonds, were not levied in the manner and within the time prescribed by law, and are, therefore, void. Section 122, Laws 1872, p. 31 provides that 'the proper authorities of towns, townships, districts and incorporated cities, towns and villages shall annually, on or before the second Tuesday in August, certify to the county clerk the several amounts which they require to be raised by taxation.' In this case, the certificates were not filed until after the time specified in the act had expired. The language of the statute is plain and entirely unambiguous. It will

which action shall be taken are considered technical and mandatory in their nature and as such construed strictly and as limitations and restrictions upon the power of taxation whether as exercised by the sovereign itself or by one of its delegated agencies.[119] The power is not possessed as a matter of original

bear no construction. But it is urged that the law is merely directory. Had the General Assembly intended to permit the filing of the certificate at any time before the collector's books were delivered to him by the clerk, why not say so and not have specified that the act should be done on or before a specified day? They must be presumed to have known that, from carelessness or want of information, cases would occur in which the certificate would not be filed, and yet they have made no provision for such a contingency. It is said no reason exists why the levy should be made and returned by the second Tuesday in August. There may be the most cogent reasons. If any illegality should exist in the rate of the tax, or the manner of its levy, or want of power to levy the tax, either because the law has not authorized it, or because it is not for an authorized purpose, or if, from any other reason, the tax is illegally levied, the taxpayers should have a reasonable time within which to take steps to prevent its extension on the collector's books. Again, to enable the books to be properly prepared, the clerk must have a reasonable time for their preparation and the extension of the various taxes after the levy is made. If the officers have until the time the books are delivered to the collector to make and return their levy, there would, to render the act effective, be a duty devolving on the clerk to extend the tax on the collector's books. The General Assembly has required the assessor's books to be returned by a specified day, and all taxes to be levied by a designated period, that the clerk may after that time, and before the day he is required to deliver the books, have time to prepare them and extend all the taxes. If then, these local officers may legally at any time, make their levy, and the clerk is bound to regard and act upon it, then they have it in their power to hinder, delay and obstruct the collection of the entire revenue, by their negligence or incompetency. Such a power to obstruct the collection of all taxes, in the municipality making such a levy, cannot exist, nor was it intended that it should. The only remedy, as the law now exists, is, for the people to select competent officers, who are faithful in the discharge of their duties, and when they are not, hold them responsible for the neglect of such a plain and obvious duty of the existence of which we cannot suppose any such officers could be ignorant." Michigan Land & Iron Co. v. Republic Tp., 65 Mich. 628, 32 N. W. 882.

[119] Harding v. Bader, 75 Mich. 316, 42 N. W. 942; Auditor General v. McArthur, 87 Mich. 457; Pike v. Hanson, 9 N. H. 491. Tax officials should be duly sworn as provided by law before they can legally exercise their official duties.

right by a subordinate public corporation but only as a delegated power; a narrow and strict, not a broad construction, therefore, is always given to acts or authority delegating the performance of a power. The general effect of the principles thus stated is to render all acts or proceedings void unless they are executed in the manner, by the agency and at the time prescribed by law.[120]

[120] Wabash R. Co. v. People, 138 Ill. 303, 28 N. E. 134. The filing of the required preliminary lists or certificates will be presumed. Williams v. Inhabitants of School Dist. No. 1, 38 Mass. (21 Pick.) 75. A directory provision as to the time of taking certain official action construed not as a limitation upon the authority to act.

Michigan Land & Iron Co. v. Republic Tp., 65 Mich. 628, 32 N. W. 882; In re Wood, 24 Misc. 561, 54 N. Y. Supp. 30; People v. Clark, 45 App. Div. 65, 60 N. Y. Supp. 1045; Squire v. Cartwright, 67 Hun (N. Y.) 218. "Section nineteen of the highway law (c. 568, Laws 1890) provides that commissioners of highways shall also make at the second meeting of the town board in each year 'a statement of the improvements necessary to be made on such highways and bridges, and an estimate of the probable expense thereof, beyond what the labor to be assessed in that year will accomplish; a duplicate of which shall be delivered by the commissioners to the supervisors of the town, who shall present such duplicate statement to the board of supervisors, who shall cause the amount so estimated, not exceeding five hundred dollars in any one year, to be assessed, levied and collected in such town in the same manner as other town charges.' This is intended to provide for the highway expenses of the ensuing year. If in the preceding year the appropriation made was insufficient to keep in repair the highways and bridges, the proper procedure for the highway commissioner, and the only way in which he could create an obligation against the town, was to apply under the provisions of section ten of the highway law, to the town board, for its consent to make the improvements required; and section eleven of the act provides a method by which he could obtain payment therefor. It is not claimed that the commissioner obtained the consent of the town board to make the improvements in the preceding year for which he had insufficient funds to pay. We are unable to find in the highway law or other statutes of the state, any provision authorizing a highway commissioner to create a debt against a town, except in the manner provided in the tenth section of the highway law, unless the amount expended by the commissioner the previous year was a legal claim against the town, he had no authority to retain the money of the town raised to keep in repair the highways and bridges therein for the ensuing year, nor had the town board authority to allow his claim. We think it is clear that under the provisions of the highway law, the money raised in Janu-

§ 319. Mode of levy and assessment.

Upon the proper performance of the preliminary steps as required by law and briefly discussed in the preceding section, the power then becomes vested in public officials to make the actual levy and assessment. This, as well as the preliminary proceedings, must be done in the manner or mode prescribed by law, otherwise the power does not exist.[121] The constitution of the state,[122] the charter of a particular municipal corporation,[123] the general laws of the state,[124] or ordinances passed by subordinate public corporations,[125] direct in detail the steps necessary to be done and the manner in which they shall be taken.

ary, 1899, for improvements to be made on the highways of the town, could not legally be expended or used to pay expenses made by the commissioner on account of the highways and bridges beyond the appropriation of the prior year. Such expenditure was unauthorized and created no legal claim against the town." Citing People v. Auditors of Esopus, 74 N. Y. 310; People v. Warren County Sup'rs, 82 Hun (N. Y.) 298; People v. Ulster County Sup'rs, 93 N. Y. 397.

[121] Hilliard v. Bunker, 68 Ark. 340, 58 S. W. 362; People's Nat. Bank v. City of Ennis (Tex. Civ. App.) 50 S. W. 632; City of San Antonio v. Berry, 92 Tex. 319.

[122] Street v. Craven County Com'rs, 70 N. C. 644; Brothers v. Currituck County Com'rs, 70 N. C. 726.

[123] Snell v. City of Ft. Dodge, 45 Iowa, 564.

[124] People v. Macoupin County Court, 54 Ill. 217; People v. Wallace, 70 Ill. 680; People v. Knopf, 171 Ill. 191. Construing Rev. St. Ill. 1874, c. 139, art. 4, § 4 and art. 13, § 7, as affected by constitution, art. 9, §§ 9 and 10; Wood v. School Corp. of Tipton, 132 Ind. 206. Construing Rev. St. Ind., 1881, §§ 4467-4468; State v. Aitkin, 62 Neb. 428, 87 N. W. 153.

[125] City of San Luis Obispo v. Pettit, 87 Cal. 499; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434. "We will first consider the validity of the alleged tax of 1884, for which the city treasurer sold the property on 1885. At that time the amended charter of the city of Fargo, adopted in March, 1881, was in force. Among other provisions of the charter were the following: 'Section five. The powers hereby granted shall be exercised by the mayor and council of the city of Fargo as hereinafter set forth.' * * * 'Sec. thirteen. All ordinances of the city shall be passed pursuant to such rules and regulations as the mayor and council may prescribe: provided that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council,' etc. Section twelve declares that the 'mayor and council' of the city of Fargo 'shall have power to levy and collect taxes for general purposes.' Section four of an ordinance not pleaded, but offered in evidence, also confines the power in express terms upon the 'mayor and council'

§ 320. Loss of power.

The authority to levy taxes may exist as an original or direct power and again as one delegated by some superior body or organization. The power is then exercised under authority of written law and when once given becomes vested to the extent that it cannot be lost through its misuse or abuse, or the neglect to exercise it by the officials to whom the right is given.[126] Gen-

to 'levy the necessary taxes' on the 'first Monday of September.' The answer expressly avers that the several acts pleaded by the defendant as constituting the assessment, equalization and levy of the taxes of 1884 and embracing also the sale of plaintiff's property by the city treasurer in 1885 for such taxes, and the execution and delivery of the tax certificates and tax deed, were all and singular done and performed under and by virtue of 'chapter six of the ordinances of the city of Fargo.' At the trial plaintiff claimed that no such ordinances existed, because the same was never legally enacted or adopted by the city council, for the reason that upon the passage of the ordinance by the council the 'yeas and nays were not entered upon the record of the city council' as was required to be done by section thirteen of the city charter. We think the evidence fully sustained plaintiff's contention on this point and the trial court found it to be true, as a matter of fact, that the yeas and nays were not entered in the record of the city council upon the passage of the ordinance and that said record contains no entry of or concerning the passage of said ordinances, except as follows: 'April 19th, 1881, council met pursuant to adjournment. Revised ordinances were accepted and old ones repealed.' Upon this record we are compelled to hold * * * that the alleged ordinance was not legally passed or adopted and hence never became a valid enactment. * * * The proof offered wholly fails to show a valid levy of the city tax in question and we therefore rule that the alleged city tax for which the lots were sold was void." State v. Hoff (Tex. Civ. App.) 29 S. W. 672; Peoples' Nat. Bank v. City of Ennis (Tex. Civ. App.) 50 S. W. 632.

[126] Himmelmann v. Cofran, 36 Cal. 411; Lappin v. Nemaha County, 6 Kan. 403; Kansas City, Ft. S. & G. R. Co. v. Tontz, 29 Kan. 460. A tax not held invalid because of a failure of the proper recording officers to enter the same upon the tax records. City of Bangor v. Lancey, 21 Me. 472; Libby v. Burnham, 15 Mass. 144; Howell v. City of Buffalo, 15 N. Y. 512; Woodruff v. Fisher, 17 Barb. (N. Y.) 224; People v. Haines, 49 N. Y. 587.

People v. Feitner, 65 App. Div. 224, 72 N. Y. Supp. 641, following same case in 61 N. Y. Supp. 432. In this case the petitioner claimed the board had lost the right to enforce the assessment as originally made because an officer of the board had made certain representations to it as to the time he would have to ask for a review of the assessment. The court said: "It is stated by the petitioner that the secretary of the

erally, however, a single exercise of the taxing power is deemed to exhaust it for the time being, especially when the power can only be legally exercised at regular recurrent intervals.[127] No extended discussion can be given within the limits of this work which will explain in detail the powers of the various agencies to whom may be given the delegated power of levying taxes. It varies with the laws of each state and in all cases with the dissimilar charter provisions of many and different municipal organizations.[128]

§ 321. Errors in proceedings.

Tax laws as ordinarily passed and changed by legislative bodies from session to session are often incongruous, inconsistent

board informed it that the assessment had not been fixed on the 6th day of April, 1900, and that the tax against the petitioner and other corporations would not be made out until May 1, 1900. The return of the commissioners is conclusive upon this subject. If the board in fact made the assessment and deposited the books for inspection of the public, as the return says they did, any statement made by the secretary, however erroneous, could not have the effect of invalidating such act. As to the time when it is said that the secretary stated that the assessment would be finally made up, it was correct as a statement of the law, as, in effect, it was saying that on May 1, 1900, the books would be closed and such is the requirement of the law." Oliver v. Carsner, 39 Tex. 396. But the power as vested in certain officials is exhausted by their action levying taxes for the year. Subsequent officials cannot relevy the same tax for that same year.

[127] Vance v. City of Little Rock, 30 Ark. 435; State v. Van Every, 75 Mo. 530; Cummings v. Fitch, 40 Ohio St. 56; Oregon Steam Nav. Co. v. City of Portland, 2 Or. 81; Oliver v. Carsner, 39 Tex. 396; Dean v. Lufkin, 54 Tex. 265.

[128] City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489; Hopkins v. People, 174 Ill. 416, 51 N. E. 757, construing Rev. St. Ill., c. 139, art. 4, § 3; Fisher v. People, 84 Ill. 491. "The doctrine is certainly * * * that unless the power to tax clearly appears from the act it cannot be exercised; but we are not to pervert language from its ordinary and plain signification and resort to a forced and unnatural interpretation to come to the meaning of the act. We are to presume that words in general use were understood and used in their ordinary sense, where nothing to the contrary expressly appears, and if, from an examination of all the language applicable to the subject, it is clear it was intended the power of taxation should be exercised, it is sufficient." Smith v. City of Louisville, 12 Ky. L. R. 337, 14 S. W. 349, construing act of Kentucky May 12, 1884; Sprague v. Abbott, 58 Vt. 331.

and complicated, resulting in many errors unintentionally made by officers to whom is charged the duty of administering them. The question then becomes important of the effect of such errors upon tax proceedings. The general rule applies that these provisions or statutory requirements are mandatory in their nature and because as being the outward manifestation of the sovereign power which in its result is a confiscation of property should be construed technically and strictly.[129] The error may be one immaterial in its character and not affecting the justice of the tax, or the proceedings may substantially follow the direct provisions of the law. They will then be held valid and the taxes levied capable of collection or enforcement.[130]

[129] Chicago & A. R. Co. v. People, 171 Ill. 544; People v. Chicago & N. W. R. Co., 183 Ill. 311; Cooley, Taxation, p. 266. "The question regarding the revenue laws has generally been whether or not they should be construed strictly. To express it in somewhat different language, the question is whether, when a question of doubt arises in the application of a statute to its subject-matter or supposed subject-matter, the doubt is not to be solved in favor of the citizen, rather than in favor of the state upon whose legislation the doubt arises, and whether such solution is not most in accord with the general principles applied in other cases. Strict construction is the general rule in the case of statutes which may divest one of his freehold by proceedings not in the ordinary sense judicial, and to which he is only an enforced party. It is thought to be only reasonable to intend that the legislature, in making provision for such proceedings, would take unusual care to make use of terms which would plainly express its meaning, in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such cases seems reasonable, because presumptively the legislature has given in plain terms all the power it has intended should be exercised. It has been very generally supposed that the like strict construction was reasonable in the case of tax laws."

[130] Chicago & N. W. R. Co. v. People, 174 Ill. 80. Errors or informalities not affecting the tax itself may, under the proper authority, be corrected by the person through whose neglect the same were occasioned. City of Somerset v. Somerset Banking Co., 22 Ky. L. R. 1129, 60 S. W. 5. Where the authority exists, a defective tax levy may be canceled and a proper levy subsequently made if done within the time fixed by law. George v. Inhabitants of Second School Dist., 47 Mass. (6 Metc.) 497; City of Baltimore v. Gorter, 93 Md. 1, 48 Atl. 445. An ordinance levying a tax containing surplusage is not thereby rendered void. Johnson v. Finley, 54 Neb. 733, 74 N. W. 1080. In this case the trial court held the tax valid. It was urged

The doctrine of ratification also applies in connection with this subject, that if an act which has been delegated for its per-

on appeal that the decision should be reversed because the ordinance under which the tax was levied was not proved in the method given by the statute. Overruling this as an immaterial point, the court said: "The argument of the appellant is that the enactment or existence of this ordinance could be proved and proved only, in the manner provided by section 124 of said chapter 12a, which is as follows: 'All ordinances of the city may be proven by the certificate of the clerk under the seal of the city and when printed or published in a book or pamphlet form, and purporting to be printed or published by authority of the city council, shall be read and received in all courts and places without further proof.' The ordinance in question it appears had not been printed or published in book or pamphlet form; at least it was not attempted to prove the ordinance by the introduction of such book or pamphlet. Nor was it attempted to prove the ordinance by the certificate of the city clerk under the seal of the city. But we do not understand that the existence or passage of an ordinance of a city of the metropolitan class can be proved only in the method provided by said section 124. Certainly, the original ordinance and proceedings of the city council, showing its passage and approval are as competent evidence that the ordinance was passed and approved as a certificate of the city clerk under the seal of the city, that the ordinance attached to the certificate was a copy of the original ordinance on file in his office. We think that when a party desires to prove the existence of an ordinance of a city of the metropolitan class, he may pursue the method pointed out by said section 124, or he may resort to common-law methods of proof." Citing, Clough v. State, 7 Neb. 320; Orford v. Benton, 36 N. H. 395; Henderson v. Hughes County, 13 S. D. 576, 83 N. W. 682; Rhomberg v. McLaren, 2 Tex. Civ. App. 391, 21 S. W. 571.

[131] Williams v. Albany Sup'rs, 122 U. S. 154; Shepardson v. Gillette, 133 Ind. 125, 31 N. E. 788; Atchison, T. & S. F. R. Co. v. Woodcock, 18 Kan. 20; Crittenden v. Robertson, 13 Mich. 58; State v. Richards, 42 N. J. Law, 497; Squire v. Cartwright, 67 Hun, 218, 22 N. Y. Supp. 899. "The effect of the confirmatory resolutions of September 14, 1891, remains to be considered. One of these assumed to confirm as an entirety, the tax and warrant of October 11, 1890. Still the electors could not by way of ratification do any more than they could have done at the time, and they, in October, 1890, had no right to say that certain items of expenditure might be raised by special tax, in violation of the provisions of the statute, which required them to be raised, if at all, by the annual tax, and after certain formalities. The language of Judge Denio, in Peterson v. City of New York, 17 N. Y. 449, is applicable. At page 454 he says: 'No sort of ratification can make good an act without the scope of the corporate authority, so, where a charter or a statute binding upon the corporation has committed a class of acts

formance to some other person or body is improperly done, that body or organization possessing the original power can, in the proper manner, ratify its irregular performance. The ratification relates back and renders the act of equal force and legal effect as though done at the proper time and in the proper manner.[131]

§ 322. The power; when exercised.

In delegating to subordinate bodies or officials the right to exercise the power of taxation, a time is usually fixed within which certain acts shall be done. The failure to perform these within or at the prescribed time is generally held to result in a loss by that subordinate official or organization of the right to do the particular act authorized,[132] or, to state the doctrine in another way, if the performance of any act relating to or connected with the exercise of the power of taxation is limited to a prescribed time, the failure to act within or at that time by the delegated body results in a loss of the right. However, when such provisions of the law are held to be directory merely, not mandatory in their character, the failure to follow their terms will not render invalid proceedings based upon such action.[133]

to particular officers or agents other than the general governing body, or where it has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects.'" East Tennessee, V. & G. R. Co. v. City of Morristown (Tenn. Ch. App.) 35 S. W. 771. The rule also applies to the right to correct a defective assessment and levy.

[132] Board of Education of San Diego v. Common Council of San Diego, 128 Cal. 369; Harper v. Elberton Com'rs, 23 Ga. 566. Where no time limit is fixed, the power may be exercised upon any day. Gage v. Nichols, 135 Ill. 128, 25 N. E. 672, following Mix v. People, 72 Ill. 241; Wabash, St. L. & P. R. Co. v. Binkert, 106 Ill. 298; Keokuk & H. Bridge Co. v. People, 161 Ill. 132; Town of Williamsport v. Kent, 14 Ind. 306; Huntsman v. City of La Porte, 15 Ind. 357; Clark v. Town of Noblesville, 44 Ind. 83; Fahlor v. Wells County Com'rs, 101 Ind. 167; Standard Coal Co. v. Independent Dist. of Angus, 73 Iowa, 304, 34 N. W. 870; Dollar Sav. Bank v. Ridge, 79 Mo. App. 26; Walker v. Edmonds, 197 Pa. 645, 47 Atl. 867. If, however, the provision requiring action to be taken within or at a certain time is directory merely, such action may be then taken later.

[133] Tousey v. Bell, 23 Ind. 423. "The ground upon which it is sought to reverse the ruling of the court, so far as the same relates to the individual taxes of Tousey, is that the assessment was not made

§ 323. The duty obligatory

The use of the power as well as its mode of exercise is usually considered obligatory when delegated to subordinate officials or

until the 4th day of June. The 21st section of 'the act for the incorporation of cities,' etc., provides that 'the assessor shall, before the first Monday in May in each year, unless otherwise directed by the common council, make out, etc. Said assessment shall be completed at the time above indicated and return made thereof to the clerk of the city, unless by an order of the common council, further time be given him.' The council on the 7th of May passed an order extending the time for completing the assessment. It is insisted, however, that such action could only be taken by the council before the first Monday in May and that any order made after the time fixed by law for the return was void. In considering this question we will be aided in determining what power the legislature has conferred upon the common council in the section by looking at the intent and purpose of the enactment. The first object plainly was to fix the date before which the assessment should, as a rule, be completed. The second object was to place a discretionary power somewhere to extend that limit when circumstances might require it. Keeping these objects in view, of what moment is it whether this discretionary power is exercised before or after the first Monday in May? The legal presumption would be that the assessor would comply with the direction contained in the section, and complete his list by the day named; and until the limit has been passed, the council may not be able to determine as to the necessity of such further grant of time. This power is to be exercised or not, at the discretion of the common council, and the court should grant the latest moment of time within the liberal spirit and intent of the act, to enable full information to be had, and indeed absolute certainty attained of the necessity requiring its exercise. This power is clearly granted to the council for remedial purposes. It places within their hands the power to grant relief when from any cause the officer cannot comply with the direction given in the statute. Such a grant should be construed largely and beneficially, so as to advance the remedy. But the provision of the statute itself fixing the time would be but directory, were it not that it requires action on the part of the council to extend the time; and certainly when they have attempted to exercise that power a more strict rule should not be applied than would have prevailed in the absence of any grant of power to enlarge the time." Citing Gale v. Mead, 2 Denio (N. Y.) 160.

Perrin v. Benson, 49 Iowa, 325; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; Nixon v. City of Biloxi, 76 Miss. 810, 25 So. 664. Action may be taken at an adjourned meeting concerning tax matters which were properly before the regular meeting though no express provision is made in the statute for a recess or ad-

organizations; it is to be exercised not at the will or discretion of such delegated agent but in the manner and at the time set by law.[134] The performance of the duty can be required and compelled. Officers cannot through a failure to perform acts commanded by law, either deprive the organization which they represent of the right to exercise the power of taxation or affect individuals whose contract or other obligations would be defeated, impaired or destroyed by a failure to levy taxes.[135]

§ 324. Equalization of tax levies.

In each of the states will be found constitutional provisions relating to and limiting the exercise of the power of taxation. The clause as found in the constitution of the state of Minnesota is illustrative in its character.[136] The burden of these constitutional provisions is equality and uniformity. Taxation to be valid must be exercised upon this principle. To secure this result, we have boards of equalization or review for the correction and equalization of assessments and of taxes levied and assessed either as against specific individuals or property. The powers of such board within their authority are generally plenary and in the absence of fraud not subject to review by the courts except as pro-

journment. Hayes v. Hanson, 12 N. H. 284; Scammon v. Scammon, 28 N. H. 429.

[134] State v. Sullivan, 51 Ill. 486. "This was an application for judgment for taxes. * * * Having been properly levied, so far as appears, in both towns, it was the duty of each to proceed with the collection. If Saunamin has failed to perform its duty, parties interested can have their remedy, but its failure is no reason why the authorities of the town of Sullivan should not be permitted to collect the tax in that town." People v. Lockport Sup'rs, 49 Hun, 32, 1 N. Y. Supp. 460.

[135] Hart Tp. v. Oceana County, 44 Mich. 417; People v. Lockport Sup'rs, 49 Hun, 32, 1 N. Y. Supp. 460.

[136] Minnesota Const. art. 9, § 1. The constitutional provision of Minnesota is in part as follows: "All taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the state; provided, that the legislature may, by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, or both, without regard to a cash valuation, and in such a manner as the legislature may prescribe."

vided by law.[137] Taxes are void which are levied without, either as to the assessment or the tax proceedings proper, being brought before the proper body for the purpose of equalization and correction.

§ 325. Taxpayers' rights.

To protect, however, the individual from the exercise of the power in an arbitrary or fraudulent manner, the right is given to appeal to the courts for the correction of abuses and a satisfaction of the injuries he may have suffered.[138] The right to

[137] City of Tampa v. Mugge, 40 Fla. 326, 24 So. 489; Stewart v. Collier, 91 Ga. 117, 17 S. E. 279; People v. Chicago, B. & Q. R. Co., 164 Ill. 506; Kinsey v. Sweeney, 63 Iowa, 254; Fonda v. City of Louisville, 20 Ky. L. R. 1652, 49 S. W. 785; Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511. If notice of a meeting of such a board is required by law to be published, this is an indispensable prerequisite to legal action.

Streight v. Durham, 10 Okl. 361, 61 Pac. 1096. Taxpayers are charged with knowledge of statutory provisions fixing a time of meeting for such boards of equalization and correction. Scollard v. City of Dallas, 16 Tex. Civ. App. 620, 42 S. W. 640; Board of Education of City of Ogden v. Brown, 12 Utah, 251, 42 Pac. 1109; Pierce County v. Spike, 19 Wash. 652.

[138] Drake v. Phillips, 40 Ill. 388. Where an injunction has been granted restraining a tax collector from collecting an illegal tax, the town which he represents is liable for the costs in the case; there is no personal liability on the part of the collector.

Newton v. Roper, 150 Ind. 630; Meyer v. Dubuque County, 43 Iowa, 592. The remedy for an erroneous assessment is by application to the board of equalization, not by mandamus, to compel county officials to correct errors alleged.

Johnson v. City of New Orleans, 105 La. 149, 29 So. 355. Such a proceeding, however, must be brought in good faith to entitle a taxpayer to relief.

New Orleans, M. & C. R. Co. v. Dunn, 51 Ala. 128. A threatened usurpation of power by corporate authorities or the violation of the duty imposed by law whereby the burden of taxation will be increased may be prevented by a court of equity upon application of a taxpayer within the district.

Shaw v. Inhabitants of Becket, 61 Mass. (7 Cush.) 442; Parsons v. City of Northampton, 154 Mass. 410, 28 N. E. 350; Welch v. City of Boston, 126 Mass. 442, following Bancroft v. City of Cambridge, 126 Mass. 438; Barnstable Sav. Bank v. City of Boston, 127 Mass. 254; Chauvenet v. Arundel County Com'rs, 3 Md. 259; Steffes v. Moran, 68 Mich. 291, 36 N. W. 76. The interest of a taxpayer in a tax improperly levied may be so small as to defeat his right to maintain a bill restraining the payment of the ex-

review the levy and assessment of taxes for the purpose of correcting such errors or irregularities may be vested in a court legally authorized in this respect but performing in addition to such duties others of an administrative or executive character. This body is generally considered quasi judicial in its character and in the performance of its duties requiring the exercise of judgment and discretion.[139] The usual rules which ap-

penditure to pay which the tax was levied.

State v. Weyerhauser, 68 Minn. 353; State v. Hannibal & St. J. R. Co., 135 Mo. 618. The fixing of too low a rate is not a valid objection to the validity of a local school tax.

Normand v. Otoe County Com'rs, 8 Neb. 18; Kip v. City of Paterson, 26 N. J. Law (2 Dutch.) 298; In re Wood, 24 Misc. 561, 54 N. Y. Supp. 30; Middleton v. Robbins, 54 N. J. Law, 566; Benson v. Inhabitants of Bloomfield Tp., 58 N. J. Law, 491; Haley v. Whitney, 53 Hun (N. Y.) 119; People v. Hatch, 60 Barb. (N. Y.) 228. An appeal will not lie to the county judge from the refusal of a school district meeting to vote a tax requested for the reimbursement of a trustee.

City of Columbia v. Beasly, 20 Tenn. (1 Humph.) 232; Smith v. City of Nashville, 88 Tenn. 464, 7 L. R. A. 469; Berry v. City of San Antonio (Tex. Civ. App.) 46 S. W. 273. The presumption exists in all cases where the validity of tax levies is raised that all prior proceedings have been regular and that authority exists for the levy.

Board of Education of Ogden v. Brown, 12 Utah, 251; Heth v. City of Radford, 96 Va. 272. A city charter containing no provision by which the owner of property may have its assessed valuation reviewed and corrected for purposes of taxation is void because it deprives him of his property without due process of law in violation of the 14th amendment of the constitution of the United States.

Town of Grand Isle v. Town of Milton, 68 Vt. 234, 35 Atl. 71. A judgment entered by stipulation does not necessarily preclude one of the parties from subsequently raising the question of the legality of the tax levied as the result of a judgment.

[139] St. Louis Bridge & T. R. Co. v. People, 127 Ill. 627; People v. Cook County Com'rs, 176 Ill. 576; Collins v. Davis, 57 Iowa, 256; Hudson v. Police Jury of Claiborne Parish, 107 La. 387, 31 So. 868; State v. Byers, 67 Mo. 706; State v. Kansas City, St. J. & C. B. R. Co., 149 Mo. 635. The power vested in the county court by Rev. St. 1889, §§ 7732, 7731, to ascertain the levy, amount and rate of taxation for different purposes is exclusive and cannot be exercised by any other other tribunal; the circuit court in the proper proceeding may determine such a tax illegal but it cannot revise the rate. State v. Ormsby County Com'rs, 6 Nev. 95. Such a body in granting relief cannot go beyond the application made. People v. Schoonover, 47 App. Div. 278, 62 N. Y. Supp. 180; Huntingdon County v. Kauffman, 126 Pa. 305.

ply to the performance of duties of such a character would apply here. The power to review and correct may not be vested in any particular court but one possessed by the ordinary judicial organizations of the state to be exercised when brought within their jurisdiction upon the proper pleadings and in the manner provided by law.[140] In proceedings brought by the taxpayer to restrain the collection of a tax which he deems illegal or unjust, it is necessary to bring in as parties defendant either the official representatives[141] or the corporation itself,[142] as required by law. Where officers are to be made parties defendant, a defect of parties through the failure to name all the necessary officials does

[140] Pence v. City of Frankfort, 19 Ky. L. R. 721, 41 S. W. 1011; Greene v. Mumford, 5 R. I. 472. An injunction will not be issued by a court of equity to restrain the collection of general taxes based upon an improper assessment of property when a remedy at law is sufficiently adequate. Wells v. Lincoln Board of Education, 20 W. Va. 157. The petition should be filed within forty days as required by law from the time of making an illegal levy.

State v. Cornwall, 91 Wis. 565, 73 N. W. 63. "It is the contention of the appellant that all the towns, villages and cities affected by the determination of the commissioners are necessary parties plaintiff and should all be joined with the relator, or at least that the relator should expressly state that it is made in their behalf. A moment's reflection will convince that this cannot be the true solution of this question; for no town, village or city is in the least affected by the determination of the commissioners. It does not in the least affect the revenues of the town, nor impose a debt upon it, as a political organization. But it does immediately and directly affect each taxpayer in the amount of his tax. The general tax is not a debt against the town but is a direct charge upon the taxpayer. And the determination of the commissioners but determines the relative proportion of the general tax which shall be charged upon the taxpayers of each town. So, the town not being the real party in interest, the relation should not be in its name nor in its behalf. Any citizen was competent to bring the action; for it is the settled rule of this state, and is in accord with the great weight of American authority, that where the relief sought is a matter of public right, the people at large is the real party and any citizen is entitled to a writ of mandamus to enforce the performance of such public duty. It is sufficient if he is a citizen and as such, interested in the execution of the law."

[141] City of Richmond v. Crenshaw, 76 Va. 936; Newcomb v. Horton, 18 Wis. 566. This case also holds that one taxpayer cannot sue in behalf of himself and all other taxpayers entitled to the same relief; each must bring his several action.

[142] Jarvis v. Robertson, 126 Ind. 281. An action naming as defendant a person representing in his official capacity several distinct and separate public corporations should correctly state the corporation

not ordinarily warrant the dismissal of the proceedings or a dissolution of a temporary injunction which may have been granted.[143] In such a proceeding where the taxpayer is the moving party, all questions that may determine or affect the legality of the tax can be considered, such as a proposed use of the tax levy;[144] the question of whether the tax levy is in excess of the

against which the action is brought. See note on Taxpayers' Actions, 22 Abbott's New Cases, 86.

[143] Pickett v. Russell, 42 Fla. 116, 28 So. 764; Wall v. Eastman, 1 Mich. 268. There is no personal liability on the part of the public official made defendant in such case. "By reason of the refusal of the defendant below to issue his warrant for the collecting of the rate bill, the district lost the amount which would have been collected from the individuals sending pupils to the district school, for the payment of the teacher; and was obliged to collect by a tax on the property within the district the amount required; in consequence of which the plaintiff below, being an inhabitant of the district, owning taxable property therein, was compelled to pay a tax of eight dollars, for the recovery of which this suit is brought. If any right of action accrued, it was in favor of the corporation of which the plaintiff below was a member, and not to him individually. If the plaintiff below could sustain this action, every person who paid any portion of the judgment in favor of the teacher against the district might also sustain a separate action for the amount paid by him; and upon the same principle, in case of the default of a county treasurer, every individual in the county who should be compelled to pay a tax to make good the fund lost might also maintain a separate action against the treasurer for the amount paid by him. No such principle it is believed, has ever been sanctioned or recognized by any judicial tribunal whose decisions have been reported in the books."

[144] Seligman v. City of Santa Rosa, 81 Fed. 524. A taxpayer has, however, no right of intervention to prevent the expenditure of money already collected for the reason that the tax was invalid.

Mutual Life Ins. Co. v. Powell, 89 Fed. 437; Russell v. Tate, 52 Ark. 541, 7 L. R. A. 180; Smith v. Omaha & C. B. R. & Bridge Co., 97 Iowa, 545, 66 N. W. 1041. Where public aid has been granted a bridge company, taxpayers may sue to recover payments made to it where there has been a failure to comply with the required conditions. Gray v. Bourgeois, 107 La. 671, 32 So. 42. Moneys raised by taxation for one purpose cannot be used for another and such attempted use can be restrained by a taxpayer.

Prince v. Crocker, 166 Mass. 347, 32 L. R. A. 610; Morton v. Carlin, 51 Neb. 202, 70 N. W. 966; Blood v. Manchester Elec. Light Co., 68 N. H. 340, 39 Atl. 335; Clarke v. Sheldon, 57 Hun, 586, 10 N. Y. Supp. 357. A taxpayer can maintain an action in a town's behalf to compel the use of tax moneys for the purpose authorized.

Calhoun v. Millard, 121 N. Y. 69, 24 N. E. 27, 8 L. R. A. 248. A tax

limit prescribed by law;[145] the right of the corporation in question to levy and collect the tax;[146] or the legality of the meeting at which the taxes were voted.[147] The court may apply the doctrine of estoppel, however, to the one raising or attempting to raise the last as well as other questions.[148] If the use to which the moneys proposed to be raised is legal and within the limit prescribed by law it cannot ordinarily be questioned by the taxpayer[149] unless there is an attempted diversion of the funds raised for a specific purpose from their proper use.[150]

levy for the payment of railroad aid bonds lawfully issued will not be enjoined because neither "an illegal act" nor a "waste" within the meaning of the New York laws 1881, c. 531, § 1.

City of Ft. Worth v. Boulware, 26 Tex. Civ. App. 76, 62 S. W. 928. The burden of proof is upon the taxing district to establish its lien by showing that the property was actually in existence and subject to it.

[145] Davis v. Petrinovich, 112 Ala. 654, 36 L. R. A. 615; Spilman v. City of Parkersburg, 35 W. Va. 605.

[146] Town of Douglasville v. Johns, 62 Ga. 423; City of Grand Rapids v. Blakely, 40 Mich. 367; East River Bank v. Butterworth, 51 N. Y. 637.

[147] Kentucky Union R. Co. v. Bourbon County, 8 Ky. L. R. 881, 2 S. W. 687; Guillory v. Avoyelles R. Co., 104 La. 11, 28 So. 899; Sentell v. Police Jury of Parish of Avoyelles, 48 La. Ann. 96.

[148] City of Evansville v. Pfisterer, 34 Ind. 36; Sleeper v. Bullen, 6 Kan. 300; Vicksburg S. & P. R. Co. v. Scott, 52 La. Ann. 512; Motz v. City of Detroit, 18 Mich. 495; Kellogg v. Ely, 15 Ohio St. 64; State v. Bader, 56 Ohio St. 718, 47 N. E. 564. A voluntary payment of taxes assessed against a taxpayer may estop him from bringing an action to enjoin the levy and collection of the tax.

[149] Casey v. Independent School Dist., 64 Iowa, 659. Where the use is lawful and the tax has been legally levied, irregularities cannot be made the basis of an action to enjoin the payment of a tax in connection with the making of the contract to pay the obligation of which the tax is levied.

Anderson v. City of Mayfield, 14 Ky. L. R. 370, 19 S. W. 598. The collection of taxes will not be enjoined for the reason that moneys raised are being improperly expended by the authorities. The court say: "The charter of the City of Mayfield provides that the assessor shall make his assessment and return his lists to the proper office by a certain time. This was not done. The assessment was made after the prescribed period. This provision is not, however, for the benefit of the taxpayer. It is not important to him. Its object is to secure for the city order and dispatch in the collection of its taxes and the transaction of its business. Such provisions are not regarded as mandatory, in the absence of words importing that the required act shall not be done at any other time than that designated. No such negative words are contained in the charter.

§ 326. Lien and priority.

Both taxes and special assessments have a lien paramount, prior and superior on the property subject to them[151] which cannot be lost by the laches or neglect of public officials charged with enforcing tax laws.[152] This lien need not be expressly given that it may exist,[153] and attaches usually from the time that the taxes

A person should not be allowed to rely upon the mere nonfeasance of an officer when it is not important to that person, and thus escape the performance of his own duty. Even the omission of property in making an assessment, either through negligence or default of the assessing officer, or where it occurs through mistake of law, does not vitiate the tax. If so, as all men are fallible, no tax could ever be collected and the government would fail. The requirement being merely directory, the making of an assessment at a later period did not render it and the proceedings based upon it void. Even if the taxes were being improperly expended, yet the taxpayer cannot, therefore, refuse to pay his tax. He cannot have relief in this way. He must do his duty and look to the law to compel a proper expenditure. The tax in question was authorized by the city charter; and, in such a case, whether its imposition be necessary is a matter for the determination of the taxing power. It was attempted in one of these cases to prevent the collection of the tax, provided it was legal, by the assertion of an alleged indebtedness of the city to the taxpayer. This cannot be done unless expressly authorized by statute. A tax grows out of a duty and not out of contract. It is not collectible by suit unless expressly authorized. It is not a demand founded upon a contract or a judgment. * * * If the rule were otherwise, the machinery of government would be liable to interruption. The nature of a municipal tax—the purpose of it—forbids the assertion of a demand as a set-off unless expressly authorized by statute. This rule is necessary to the continuance of the government." Central R. Co. v. Mutchler, 41 N. J. Law, 96.

[150] State v. Jersey City, 54 N. J. Law, 49, 22 Atl. 1052.

[151] Parker v. City of Jacksonville, 37 Fla. 342, 20 So. 538. A lien, however, exists only against the specific property upon which the delinquent taxes are levied. Bothwell v. Millikan, 104 Ind. 162; City of Middlesboro v. Coal & Iron Bank, 22 Ky. L. R. 380, 57 S. W. 497; Hohenstatt v. City of Bridgeton, 62 N. J. Law, 169, 40 Atl. 649; Burnet v. Dean, 60 N. J. Eq. 9, 46 Atl. 532. An act, however, which provides that "in villages and other municipal corporations" taxes shall be a lien on real estate until paid is in contravention of constitutional provision art. 4, § 7, paragraph 11, which prohibits the legislature from passing private or local or special laws regulating the internal affairs of towns and counties.

[152] Justice v. City of Logansport, 101 Ind. 326; Eschbach v. Pitts, 6 Md. 71.

[153] Kansas City v. Payne, 71 Mo. 159; City of Jefferson v. Whipple, 71 Mo. 519. The lien, however, must be given through some provision of

are entered in the records kept for such purpose after their assessment and levy.[154] The lien of special assessments, however, may vary with different provisions as found in the charters of various municipal corporations which must be consulted to determine questions raised in individual cases.[155] The statute of limitations may, by law, run against such lien and after the time thus prescribed it cannot be enforced.[156]

§ 327. Collection of taxes.

When the right to levy and collect taxes has been once granted to a subordinate agent by the sovereign, it then becomes, to the extent of taxes levied under such authority, one which cannot be taken away by subsequent action of the legislature.[157] Its exercise can be invoked either by the corporation itself or some of

the city charter. O'Neill v. Dringer, 31 N. J. Eq. (4 Stew.) 507; Howell v. City of Philadelphia, 38 Pa. 471; Allegheny City's Appeal, 41 Pa. 60; People's Nat. Bank v. City of Ennis (Tex. Civ. App.) 50 S. W. 632.

[154] Eaton v. Chesebrough, 82 Mich. 214. Taxes become a lien from the time when the assessment roll and warrants for collection come into the hands of the receiver of taxes. Selby v. Levee Com'rs, 14 La. Ann. 434; Matter of Drainage Com'rs, 28 La. Ann. 513; McQuiddy v. Gates, 69 Mo. App. 156; City of Port Townsend v. Eisenbeis, 28 Wash. 533, 68 Pac. 1045.

[155] City of Philadelphia v. Greble, 39 Pa. 339.

[156] Peoples' Homestead Ass'n v. Garland, 107 La. 476, 31 So. 892.

[157] City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56. "It is argued by defendant's counsel that, as the city of Dubuque is a municipal corporation organized for political purposes, its corporate powers may be abridged or entirely taken away, being in no sense vested rights as against the state. It is, therefore, insisted that the city may be lawfully deprived of the right to collect taxes legally levied. Without contesting the correctness of counsel's premises, it is very plainly to be seen that their conclusion is a non-sequitur. It must be remembered that a municipal corporation though a public and political institution, deriving its life and powers from the state, possesses a private and proprietary character and, as such, may acquire and hold property and make contracts. It is protected in its property by the same constitutional guarantees that extend over natural persons and the restriction upon legislative action impairing the obligation of contracts preserves those made with it. Rights held by it in its last named character are beyond legislative control and interference." Citing, Bowdoinham v. Town of Richmond (6 Greenl.) 6 Me. 112; Benson v. City of New York, 10 Barb. (N. Y.) 223; Trustees of Aberdeen Female Academy v. City of Aberdeen, 21 Miss. (13 Smedes & M.) 645; Town of Milwaukee v. City of Milwaukee, 12 Wis. 93; State v. Haben, 22 Wis. 660.

its creditors who have become such upon the faith of the authority and because of the resulting tax levy.[158]

The grant of a right ever carries with it the implied power to use all proper, necessary or reasonable means and agencies for carrying it into effect.[159] The right to levy taxes implies the power to enforce or collect either in an action[160] brought by the corporation against the party delinquent in their payment or through summary proceedings against persons or property subject to

[158] Trafton v. Inhabitants of Alfred, 15 Me. 258. No such right can be based, however, upon an illegal tax.

[159] Amite City v. Clements, 24 La. Ann. 27. The grant of a power to levy taxes carries with it the implied right to enforce their payment through judicial proceedings. City of Aurora v. McGannon, 138 Mo. 38, 39 S. W. 469; Stifel v. MacManus, 74 Mo. App. 558; Davis v. Simpson, 25 Nev. 123, 58 Pac. 146; Torrey v. Willard, 55 Hun, 78, 8 N. Y. Supp. 392; Clark v. Locke, 56 Hun, 643, 9 N. Y. Supp. 918. A city having general powers may accept a mortgage on real estate as security for taxes which had accrued thereon. City of Wilmington v. Sprunt, 114 N. C. 348, 19 S. W. 348.

[160] Appanoose County v. Vermilion, 70 Iowa, 365, 30 N. W. 616. There must exist statutory or constitutional authority to enable a county to maintain an action to recover delinquent taxes.

City of Burlington v. Burlington & M. R. Co., 41 Iowa, 134. A municipality may, at its election, avail itself of a special remedy provided by law for the collection of taxes or its general right to sue.

City of Covington v. Covington Gas Light Co., 8 Ky. L. R. 515, 2 S. W. 326; City of Somerset v. Somerset Banking Co., 22 Ky. L. R. 1129, 60 S. W. 5; Vanceburg & S. L. Turnpike Road Co. v. Maysville & B. S. R. Co. (Ky.) 63 S. W. 749; Louisville Bridge Co. v. City of Louisville, 23 Ky. L. R. 1655, 65 S. W. 814; Greer v. City of Covington, 83 Ky. 410; Brown v. City of Cape Girardeau, 90 Mo. 377, 2 S. W. 302; State v. Edwards, 162 Mo. 660, 63 S. W. 388. A delinquent tax bill certified by the collector of taxes admissible in such an action brought to collect taxes under Rev. St. 1889, § 7626.

State v. Rainey, 74 Mo. 229. A judgment in a tax case rendered by a court of competent jurisdiction and with no defect of parties is not open to collateral attack. Eyerman v. Blaksley, 78 Mo. 145. In such an action that provision of the city provision of the city charter making special tax bills prima facie evidence of liability is not unconstitutional as changing "the rules of evidence in any judicial proceeding" contrary to Missouri constitution, art. 4, § 53.

City of St. Joseph v. Kansas City, St. J. & C. B. R. Co., 118 Mo. 671; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496; Dallas Title & Trust Co. v. City of Oak Cliff, 8 Tex. Civ. App. 217, 27 S. W. 1036; City of Seattle v. Doran, 5 Wash. 482; Albany Mut. Bldg. Ass'n v. Laramie, 10 Wyo. 54, 65 Pac. 1011.

the lien.[161] The party plaintiff to such an action is usually the corporation represented by the officers or agents to whom, by law, has been given the exercise of such duty.[162] The true owner should be made a party defendant. Proceedings brought against one who is not the owner of property cannot result in an enforceable judgment against such true owner.[163] The question of summary proceedings will be considered in a succeeding section.[164] A subsequent purchaser of property upon which illegal taxes have been levied is substituted for the owner at the time of their assessment and levy so far as proceedings to restrain their collection is concerned.[165]

[161] McKay v. Batchellor, 2 Colo. 591. In such an action tax officials have no authority to distrain property outside of the taxing district. Doggett v. Walter, 15 Fla. 355; Parker v. City of Jacksonville, 37 Fla. 342, 20 So. 538; Smith v. Jones, 40 Ga. 39; Johnson v. Boske, 23 Ky. L. R. 1845, 66 S. W. 400, following Richardson v. Boske, 23 Ky. L. R. 1209, 64 S. W. 919; City of Jefferson v. Curry, 77 Mo. 230; McCrary v. City of Comanche (Tex.) 34 S. W. 679.

[162] School Dist. of Ft. Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418. An attorney's fee can be included as a part of the penalty, "costs," etc.

Parker v. City of Jacksonville, 37 Fla. 342, 20 So. 538; Webster v. Chicago, 62 Ill. 302; People v. Brislin, 80 Ill. 423; Trustees of Elizabethtown Dist. Public School v. Louisville & N. R. Co., 17 Ky. L. R. 160, 30 S. W. 620; Board of Education of Hawesville v. Louisville H. & St. L. R. Co., 23 Ky. L. R. 376, 62 S. W. 1125; Danforth v. Williams, 9 Mass. 324; Port Huron Tp. v. Potts, 78 Mich. 435, 44 N. W. 289; Auditor General v. Maier, 95 Mich. 127, 54 N. W. 640; Bangor Tp. v. Smith Transp. Co., 112 Mich. 601, 71 N. W. 143. A township under How. St. § 737, can collect a tax due in a suit authorized by its supervisors.

State v. Robyn, 93 Mo. 395, 6 S. W. 243; City of Aurora v. Lindsay, 146 Mo. 509, 48 S. W. 642; Chrigstrom v. McGregor, 74 Hun, 343, 26 N. Y. Supp. 517; City of Wilmington v. Stolter, 122 N. C. 395; McCombs v. City of Rockport, 14 Tex. Civ. App. 560, 37 S. W. 988.

[163] Keating v. Craig, 73 Mo. 507. The trustee named in a deed, by which land subject to a specific tax has been conveyed, held not a necessary party under the charter of the city of Kansas City, Missouri. City of St. Joseph v. Baker, 86 Mo. App. 310.

[164] See post, § 334.

[165] Vesta Mills v. City Council of Charleston, 60 S. C. 1. This was a suit for an injunction to restrain the city of Charleston from collecting a tax from the Vesta Mills. The court said: "'We now come to the main question and that is whether the plaintiff, the Vesta Mills, is liable for the city taxes. * * * And the answer depends upon a proper construction of an ordinance of the city of Charleston passed by its officers on the 24th day of March, 1896.' * * * In construing this ordinance, it becomes important to into the intention, purpose

Personal liability. It is seldom that there exists a personal liability on the part of the taxpayer for delinquent and unpaid taxes levied upon real property. The property itself can be seized and taken for the taxes but the liability of the owner goes no further, and personal property not subject to such a tax cannot be reached unless there exists statutory authority for such a liability and for the proceedings necessary to enforce it.[166]

§ 328. Actions; questions raised.

In an action brought by a public corporation against the proper party to enforce the collection of taxes or in actions brought by a taxpayer to defeat or restrain the collection of alleged invalid taxes, all questions which go to a determination of the justice and legality of the tax may be considered.[167] These arise either from

and object of this ordinance,—what was the object of the city of Charleston in favoring certain manufactories, with an exemption from taxation, except for school purposes? Such industries were encouraged and favored as a means and for the purposes of bringing and keeping within the borders of the city capital and labor to be used and employed in the manufacture of the staples of her commerce. Now, upon the facts, we find an old abandoned plant within the city limits, never entitled to claim and, as a fact, never claiming any exemption from taxation under such ordinance. Both the Charleston Cotton Mills and the Charleston Mills were doomed to failure and both ceased operations and went out of business. While this state of affairs existed, the plaintiff purchased its plant at a forced sale, paying $100,000 for its purchase, organized and equipped a cotton mill, put blood, life and money into it, and is, presumably in a prosperous condition. This, in my judgment, is within the very letter and spirit of the ordinance and this company is just as much entitled to the exemption given in such ordinance as if it had purchased instead of this property, some old abandoned warehouse * * * now idle in the city. It is contended that this plaintiff has not increased the taxable property of the city; that the property it operates was already on the tax books, in short, that it has erected nothing. This position cannot be successfully maintained, for the reason that the premises are untrue. The plaintiff paid out at the start $100,000 for this property, that is subject to taxation. It employs hands, creates and supplies a market in trade, and, to all intents and purposes, is a new factory established within the city limits, and is entitled to the exemption as such."

[166] City of Grand Rapids v. Lake Shore & M. S. R. Co., 130 Mich. 238, 89 N. W. 932; Berry v. City of San Antonio (Tex. Civ. App.) 46 S. W. 273; McCrowell v. City of Bristol, 89 Va. 652, 16 S. E. 867.

[167] Cloutman v. Pike, 7 N. H. 209; Wright v. City of San Antonio (Tex. Civ. App.) 50 S. W. 406. The burden of proof is upon one attacking the validity of a tax.

a proposed use of the tax levy,[168] the question of whether it is in excess of the limit prescribed by law,[169] or the right of the corporation itself to levy and collect the tax.[170] That a tax levy be valid it is necessary to show at least the existence of a de facto organization[171] although the party may be estopped from ques-

[168] Pittsburgh, C., C. & St. L. R. Co. v. Harden, 137 Ind. 486, 37 N. E. 324. The collection of a railway tax cannot be enjoined because of a failure to comply with the conditions accompanying the aid when the officers having charge of the tax levy may withhold a payment of the same until a proper compliance by the railroad company wih such conditions. Meader v. Lowry, 45 Iowa, 684; Hull v. Kearney County Com'rs, 13 Neb. 539. A collection will not be enjoined of a tax levy to meet a contract obligation where the contract as executed was in excess of legal authority.

[169] Dollahon v. Whittaker, 187 Ill. 84; French v. City of Burlington, 42 Iowa, 614. "The constitutional provision is as follows: 'No municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per cent on the value of the taxable property within such corporation—to be ascertained by the last state and county tax lists previous to the incurring of such indebtedness.' * * * If the indebtedness is created for any purpose it is within the constitutional inhibition. Certainly those words include the necessary as well as convenient improvement of the streets as well as all other things deemed necessary and proper for the comfort or health of the people of the city. It matters not how, or for what purpose the indebtedness is incurred, it is prohibited unless it can be shown to be reasonably certain such indebtedness can be liquidated and paid from the ordinary current revenues of the city. And he who contracts with a city, whereby an indebtedness is created, must at his peril, take notice of the financial standing and condition of the city and whether the proposed indebtedness is in excess of the constitutional limitation. Any other rule leaves the taxpayer at the mercy of the officers of the city and contractor and would render the constitutional provision nugatory. Such a result cannot be contemplated or allowed to prevail."

State v. McLaughlin, 15 Kan. 228; Catron v. Santa Fe County Com'rs, 5 N. M. 203, 21 Pac. 60. The same question can be raised in an action brought by a taxpayer to enjoin a tax levy. Flock v. Smith, 65 N. J. Law, 224, 47 Atl. 442; Snyder v. Kantner, 190 Pa. 440; Tygart's Val. Bank v. Town of Philippi, 38 W. Va. 219.

[170] McCormac v. Robeson County Com'rs, 90 N. C. 441; Devor v. McClintock, 9 Watts & S. (Pa.) 80; Lowe v. Hardy, 7 Utah, 368, 26 Pac. 982.

[171] Hamilton v. San Diego County, 108 Cal. 273; Trumbo v. People, 75 Ill. 561. The question of the legality of a corporate organization cannot be inquired into in an action brought to restrain the collection of taxes.

Louisville & N. R. Co. v. Trustees of Elizabethtown, 23 Ky. L. R. 1169, 64 S. W. 974. After the lapse of twenty years it will be presumed

tioning the right of an organization to levy taxes.[172] The legality of the meeting at which the taxes were voted may be raised[173] and

that all the requirements of the statute were complied with in establishing a corporate organization. Holmes v. Baker, 82 Mass. (16 Gray) 259; Green Mountain Stock-Ranching Co. v. Savage, 15 Mont. 189; Grace v. City of Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158.

[172] Stamper v. Roberts, 90 Mo. 683, 3 S. W. 214. The plaintiff may be refused relief on the ground of laches. A delay of four years in raising questions affecting the regularity of the proceedings for the formation of a school district held sufficient grounds in this case to apply the rule. The court say: "It is contended by counsel that under sections 7023 and 7031 Rev. St., the voters, when assembled at the annual meeting were confined to the proposition of creating the new district out of the exact territory as described in the petition and notices; and that as they did not do so, but changed the boundary in the particulars above stated, the whole proceeding is void. According to the petition and notices it was proposed to include 164 acres of plaintiff's land in the new district. According to the change or amendment made, all of the land was not included, but only seven acres of it and it is the change thus made upon which the above contention is based. Conceding for the purposes of this case, without determining the question that the change thus made was irregular, and in excess of the power conferred, the question still remains whether, under the facts of the case, a court of equity should interpose its injunctive and restraining process. The proceedings to establish this new district occurred in April, 1880. This suit, assailing its validity, was brought in 1884. In the meantime the new district was, in fact, organized, and has remained so organized, unchallenged by plaintiff, except so far as his protest, when paying school taxes assessed against him, may be regarded as challenging it in view of these facts, and the further fact that during an interval of four years the de facto existence of the district was recognized, and parties interested have adapted themselves to the changed conditions of things, presumably, for school purposes, and incurred expenses necessarily incidental to conducting a school, we are fully justified in affirming the judgment of the Circuit Court, on the ground, if on no other that plaintiff by his laches has allowed a condition of things to exist for four years which would make it inequitable to grant the relief prayed for."

[173] Vieley v. Thompson, 44 Ill. 9. "The only law to which we have been referred under which authority to issue these bonds can be claimed is the act of 1865. By the first section of that act, the various towns of the several counties named are authorized to levy a tax of not more than three per cent on the taxable property to pay bounties to volunteers, substitutes and drafted men, who might thereafter enlist or be drafted into the army. The second section declares that, when any ten legal voters of any town shall make a request in writing, it shall be the duty of the supervisor to call a special election within five days

the doctrine of estoppel is also applicable.[174] The use, if legal, to which moneys proposed to be raised by taxation, if within the limit prescribed by law, cannot ordinarily be questioned by a taxpayer.[175] Irregularities in the preliminary proceedings, the actual

after the request, to determine whether such tax shall be levied by posting notices in three of the most public places in the town at least ten days next previous to the election. The notices are required to state the object of the election. * * * This being so before they could act, in returning the certificate to the county clerk, the law has declared, that they shall be authorized by a majority of the voters of the town. It is from the consent of the voters alone that their authority is derived; until that is had, they are powerless to act and their consent must be obtained in the mode prescribed by law, and it has required that it shall be by a vote for and against the imposition of the tax, and for the purpose of having a fair expression of the will of the taxpayers, an opportunity was intended by the law makers to be given to the voters to express their wishes. Hence, the requirement that a notice should be given by the persons and in the manner prescribed. This notice was intended to be, and is, essential to the validity of the election. It was indispensable to the legal exercise of the power of levying the tax. It was important to prevent fraud and oppression and was therefore made indispensable. Without the notice, an election could not be legally held, and without a legal election resulting in favor of the tax, no power was conferred on the town officers to levy the tax." Stowe v. Town of Stowe, 70 Vt. 609, 41 Atl. 1024.

[174] Irvin v. Gregory, 86 Ga. 605; Thatcher v. People, 98 Ill. 632. "Nevertheless, under the circumstances of this case, we do not think appellant is in a position to question the regularity or validity of the election in question or the subsequent proceedings of the directors had upon the faith of it in borrowing the money and issuing the bonds for the payment of which the tax in controversy was levied. The evidence shows that he was present and participated in the proceedings of the meeting or election held in pursuance of these notices, and which authorized the raising of the money for which the bonds in question were issued, and so far from objecting to the action of the meeting in that respect, he, in person, seconded the motion to raise the money in the manner and for the purpose we have stated. The money having been thus obtained in part, through his own instrumentality and the district to which he belonged having had the benefit of it, we hold that, under these circumstances, he is estopped from questioning the regularity or validity of what was done under the authority of those proceedings."

Attorney General v. Burrell, 31 Mich. 25; T. B. Scott Lumber Co. v. Oneida County, 72 Wis. 158, 39 N. W. 343.

[175] Dyer v. Erwin, 106 Ga. 845; Lawrence v. Trainer (Ill.) 27 N. E. 197; Town of Lemont v. Singer & T. Stone Co., 98 Ill. 94. "A court of equity is not vested with jurisdiction to conduct the affairs of a township or to supervise and con-

levy and assessment, or in tax returns[176] as well as irregularities in connection with the assessment proper, may be raised.[177] The fact of an irregularity or an informality does not necessarily, however, invalidate the tax where such irregularity or defect operates without prejudice to the taxpayer.[178]

The same subject. The validity of tax laws may also be determined in actions brought to collect or enforce tax levies. The act under which the tax is attempted to be raised or its collection enforced may be special legislation within the meaning of a constitutional provision prohibiting the passage of special or local laws,[179] or it may lack the conditions prescribed by the constitution requiring uniformity and equality of taxation, either as to the subject or the rate of taxation.[180] Other questions concerning the constitutionality of tax laws as applied to the legislation itself may be also raised. The subject of the act should be

trol the action of its officers or the people so long as they confine themselves to the powers conferred by the statute. So long as they keep within the powers conferred, they are amenable to no control by the courts. It is only when they transcend their powers that a court of chancery can intervene to restrain their action. It has no power to regulate and control their action so long as they perform no function outside of the grant of power by the General Assembly. The courts have no right to say that although the officers and people have only exercised legitimate power, the action is unwise or is not for the best interests of the people of the municipality and the act should be restrained. That belongs alone to the officers and the people. Here the tax was voted by the people and certified by the town clerk to the county clerk for extension against the taxable property of the town, as required by law. In all of this we are unable to discover anything illegal, or in the slightest degree irregular, and if it has been legally done, equity has no power to enjoin the tax."

People v. Sisson, 98 Ill. 335; Freeland v. Hastings, 92 Mass. (10 Allen) 570; Lee v. Mehew, 8 Okl. 136, 56 Pac. 1046. See, however, as holding to the contrary, Conner's Appeal, 103 Pa. 356.

[176] Hersey v. Barron County Sup'rs, 37 Wis. 75; Marsh v. Clark County Sup'rs, 42 Wis. 502; Salscheider v. City of Ft. Howard, 45 Wis. 519.

[177] Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070; Hundley v. Singleton, 23 Ky. L. R. 2006, 66 S. W. 279; City of Rockland v. Ulmer, 84 Me. 503; State v. Chicago & A. R. Co., 165 Mo. 597, 65 S. W. 989.

[178] Brady v. Burke, 90 Cal. 1; De Koven v. City of Lake View, 129 Ill. 399; Morrison v. Hershire, 32 Iowa, 276; Galbreath v. Newton, 45 Mo. App. 312.

[179] Duluth Banking Co. v. Koon, 81 Minn. 486.

[180] Gage v. Graham, 57 Ill. 144; Knowlton v. Rock County Sup'rs, 9 Wis. 410.

expressed in the title.[181] It should not include more than one subject and that contained in its title, and other principles of constitutional law may be invoked.[182] The doctrine of res adjudicata may apply to the parties concerned in such litigation.[183]

[181] City of Knoxville v. Lewis, 80 Tenn. (12 Lea) 180.

[182] State v. City of New Orleans, 42 La. Ann. 92, 7 So. 674. "The opposition of the city to the constitutionality of the act may be summarized as follows: (1) It embraces two objects; (2) it attempts to amend the city charter in a prohibited manner; (3) it is a local or special enactment which was adopted without previous publication of intention, etc.; (4) it requires the city to pay through the board of directors, a debt which it does not owe; (5) it requires the city to make an appropriation for school purposes which the city cannot be compelled to raise by a school tax. * * * The books are full of cases in which political corporations have been recognized the privilege of setting up the unconstitutionality of law under which some unwarrantable right against their revenue and property was sought to be enforced and in which the legality of such defenses has been sanctioned. When, therefore, the courts have said, in cases of that category that such corporations cannot resist legislation affecting them, they would mean, and meant only, constitutional, and in no way unconstitutional legislation for the glaring reason that to have meant and said the reverse would have been to have held that municipal corporations must in all contingencies accept, and further unconstitutional legislation which would be a monstrous proposition. * * * Here the controverted question involves the right of the legislature to dispose without warrant and in spite of constitutional inhibition, of a large portion of the city's revenue for a specific purpose, injuriously, it is claimed, to other superior purposes; in other words the power of that body to divert a part of the alimony of the city for an object for which it could not be forced to provide, which is not one of her essential wants and necessities and which in amount is larger than that which the city can concentrate to that end. In support of her resistance, the city invokes the organic law which prevents the legislature from enacting, and which has vested it with a discretion which cannot be coerced and which she had reasonably exercised. It would be strange indeed, if after the defendants have been commanded to show cause why the relief sought against them should not be granted, they could be met, when they appear in response with the objection that they have no standing in court."

[183] City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371; Stone v. Bank of Commerce, 174 U. S. 412. But if certain public officials have no authority to make contracts concerning the payment of a tax, the city will not be bound by it.

James v. City of Louisville, 19 Ky. L. R. 447, 40 S. W. 912. The rights of individuals cannot be affected by a suit to which they were not made parties. Stone v. Bank of

§ 329. Use of proper remedy by taxpayers to prevent collection of illegal taxes.

The levy and collection of taxes is ordinarily a complicated matter and involves the granting of the original authority, the assessment of property by the proper officials as a basis of taxation, the preliminary acts necessary to the actual levy, the levy and apportionment of taxes, their collection by the public officials and in the case of delinquency by the taxpayer, the enforcement by the legal remedies. That a taxpayer who deems a tax illegal raise the question he deems involved, it is necessary that this be done at the time and in the manner prescribed by law.[184] He may be given the right to appeal from the action of the assessing board or body from an erroneous or unjust assessment and failing this he may be refused the right to raise subsequently in an action brought against him by the proper authorities questions relating to the validity of the tax which the law intended should be corrected in the prior application for abatement, proceeding or appeal.[185] The use of an improper remedy or the fail-

Kentucky, 174 U. S. 799, affirming 88 Fed. 383; Taxpayers v. O'Kelly, 49 La. Ann. 1039.

[184] Morgan v. Graham, 1 Woods, 124, Fed. Cas. No. 9,801. A private suit against state officials, however, cannot be maintained by a taxpayer to prevent them from issuing bonds authorized and required to be issued.

Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1099; Guillory v. Avoyelles R. Co., 104 La. 11, 28 So. 899; Black v. Common Council of Detroit, 119 Mich. 571, 78 N. W. 660. Where a taxpayer's rights depend upon a resolution passed by the city council, laches cannot be attributed to him unless based on actual notice of the passage of such resolution. The court say: "Counsel for defendants contend that the complainants were guilty of laches in not filing their bill sooner as it appears that the common council as early as June 12th adopted a resolution ordering the controller to transfer this $5,000 to the entertainment fund and that fifteen days elapsed from that time before defendant Smith had his material on the ground and nineteen days before the bill was filed. It is not claimed that complainants had actual notice of these matters but counsel contend that the council proceedings being regularly published, this was sufficient notice. We think, however, that actual notice or knowledge of a proceeding complained of is necessary to take away the right to object thereto on the score of laches." Richter v. Merrill, 84 Mo. App. 150.

[185] Petaluma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426; Tackett v. Stevenson, 155 Ind. 407, 58 N. E. 534; Macklot v. City of Davenport, 17 Iowa, 379. Where a city council have the power to "correct or equal-

ure to use it at the right time a proper remedy will result in a defeat of his effort to set aside the tax.[186]

§ 330. Compromise of taxes.

The levy and collection of taxes is an inextinguishable and unabatable right and usually such a claim urged either by the sovereign or a delegated agency cannot be compromised. Any agreement or contract effecting such a result is incapable of enforcement.[187] If, however, the right to compromise is expressly granted by law, this rule will not apply.[188]

ize any erroneous or unjust" assessment of taxes, a court of equity cannot interfere by injunction to restrain the collection of taxes erroneously assessed where the right afforded by the charter was not invoked by the taxpayer. Howe v. City of Boston, 61 Mass. (7 Cush.) 273; School Dist. No. 6 v. Selectmen of Orford, 63 N. H. 277; State v. Cappeller, 39 Ohio St. 455.

[186] Ex parte Howard-Harrison Iron Co., 130 Ala. 185, 30 So. 400; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970; Devine v. Franks (N. J. Eq.) 47 Atl. 228; Clark v. Board of Education of Starr Tp., 44 Ohio St. 595, 9 N. E. 790; Seabury v. Howland, 15 R. I. 446, 8 Atl. 341.

[187] Stone v. Bank of Commerce, 174 U. S. 412; City of Louisville v. Louisville R. Co., 23 Ky. L. R. 390, 63 S. W. 14. There is no question as to the application of the rule stated in the text where by statutory enactment or constitutional provision a public corporation directly or indirectly is prohibited from releasing or authorizing the release either wholly or in part of the indebtedness or liability of any person to such corporation.

City of New Orleans v. New Orleans Sugar Shed Co., 35 La. Ann. 548. The rule also applies to a contract for a commutation of taxation. City of Kansas v. Hannibal & St. J. R. Co., 81 Mo. 285. See, however, to the contrary, the case of Hintrager v. Richter, 85 Iowa, 222, 52 N. W. 188.

[188] City Item Co-Operative Printing Co. v. City of New Orleans, 51 La. Ann. 713. A taxpayer may bring an action to test the validity of a compromise of delinquent taxes made by a municipal corporation of which he is a taxpayer.

Essex Public Road Board v. Skinkle, 49 N. J. Law, 641. A road board is a public quasi corporation and the legislative branch of the government, therefore, can provide for the re-adjustment of road taxes levied by it without impairing the obligation of any contract with such road board. This case further holds that considering the character of the corporation, a contract between the two would be impossible. The road board holding its powers entirely at the will of the legislature. Essex Public Road Board v. Skinkle, 49 N. J. Law, 65; City of San Antonio v. Raley (Tex. Civ. App.) 32 S. W. 180.

§ 331. Right to prescribe and collect penalties.

Where the right is given to levy and enforce the collection of taxes or license fees, the public corporation has the power to prescribe penalties that may accrue upon a failure to pay the tax or fee at the time fixed by law. A delinquent taxpayer then becomes liable either personally or through his property not only for the amount of the tax levy as originally made but, in addition, the penalties prescribed.[189] These consist either of a specific amount or of interest to be added at a certain rate with possibly an increased rate after the lapse of additional time.[190]

§ 332. Irregularities.

Ordinarily injunctions or restraining orders will not be granted

[189] Denver City R. Co. v. City of Denver, 21 Colo. 350, 41 Pac. 826, 29 L. R. A. 608; City of Burlington v. Burlington & M. R. R. Co., 41 Iowa, 134; Augustine v. Jennings, 42 Iowa, 198; Hintrager v. McElhinny, 112 Iowa, 325, 83 N. W. 1063, modifying 82 N. W. 1008; State v. Consolidated V. Min. Co., 16 Nev. 432; City of San Antonio v. Raley (Tex. Civ. App.) 32 S. W. 180. The right to prescribe a penalty for neglect to pay taxes promptly must be expressly given a subordinate corporation. City of Seattle v. Whittlesey, 17 Wash. 292, 49 Pac. 489. Laws of 1897, c. 71, § 118, remitting certain penalties from unpaid taxes does not apply to assessments levied for local improvements.

[190] City of New Orleans v. Fisher, 180 U. S. 185; Weber v. City of San Francisco, 1 Cal. 455; State v. Norton, 63 Minn. 497, 65 N. W. 935. "It is also claimed by the defendants that in no event should penalties be added to the assessment. Gen. St. 1894, § 1345, provides that any owner or any party interested in any piece or parcel of land against which an assessment is levied may pay the full amount, or any part, with interest thereon at the rate of eight per cent per annum to the date of payment, to the village treasurer at any time before the roll is delivered to the county treasurer, but after that the assessment roll is delivered to the county treasurer, the assessment or any part thereof as has been certified to the county auditor must be paid to the county treasurer, with interest, and subject to all penalties allowed by law; and such treasurer is required to report all such payments to the county auditor and village treasurer, giving items of assessment, interest and penalty thereon. This assessment is a special tax but the county auditor is required to put it upon the proper tax list, to be collected the same as other taxes are to be collected. The general tax law of the state also requires the county auditor to enter the amount of all special taxes in the proper column after all the tax lists are delivered to the county treasurer. It is his duty to collect all taxes upon the tax list and if they are unpaid after June 1st, a

on the application of a taxpayer because of mere irregularities, informalities or defects in the proper proceedings leading to the entering of the tax in the proper records.[191] The rule is applied so long as such irregularities or defects do not affect the justice or the validity of the tax nor of acts comitted or omitted based upon some provision of the statute which is held to be of a directory nature. It applies not only to proceedings by various bodies who act upon and in the levy and assessment of taxes, but also to all papers or documents required by law or custom to be drawn and filed by such officials or official bodies.[192]

§ 333. Enforcement of lien.

Although the lien for taxes as a rule is a prior, paramount and superior one, yet the state or its delegated agencies must, in the enforcement and collection of the taxes, proceed in the manner required by law of other lienholders of record on property upon which the state seeks to attach its superior lien.[193] The neglect to do this may result in a failure of the proceedings as to other lienholders. In the collection of taxes by action under the statute, the statutory provisions relating to practice apply to the state.

§ 334. Summary proceedings.

The power may be given a public corporation to collect a delinquent tax through what might be termed a summary proceeding, namely, the arbitrary taking of the property subject to tax upon the performance of certain acts required by law.[194] The proper-

ten per cent penalty is added, and after January 1st an additional penalty of five per cent. Taking all of the provisions of the statute into consideration the penalties added to these unpaid taxes were fully authorized by law."

[191] Le Roy v. City of New York, 4 Johns. Ch. (N. Y.) 352.

[192] Hoover v. People, 171 Ill. 182; People v. Chicago & N. W. R. Co., 183 Ill. 311. A certificate required by school law, art. 8, § 2, Laws 1889, p. 316, must be signed by the proper officials and at the proper time; if this is not done it cannot be the basis of a legal special tax levy for school purposes. Mussey v. White, 3 Me. (3 Greenl.) 290; State v. Edwards, 162 Mo. 660, 63 S. W. 388.

[193] City of Newport v. Masonic Temple Ass'n, 20 Ky. L. R. 266, 45 S. W. 881, 46 S. W. 697; Smith v. Gatewood, 3 S. C. 333.

[194] Merriam v. Moody's Ex'rs, 25 Iowa, 163. The power to tax real property does not necessarily imply

ty owner not having the same rights as when the state attempts to collect such delinquent taxes in an ordinary action governed by the usual rules of practice. Statutes conferring such summary power must be strictly followed since to a large degree they partake of the nature of a forfeiture.[195] In these proceedings the rule is different from that applied to the enforcement of the right under general laws. There irregularities or informalities may be cured through amendment or otherwise without defeating the right. In summary proceedings each and every act prescribed by law granting the right must be strictly done, both in the manner and at the time provided. A failure or neglect in this respect may result in a loss of the power.[196] The validity

the right to sell such property for the nonpayment of the taxes levied.

Bigger v. Ryker, 62 Kan. 482, 63 Pac. 740. An act authorizing the sale of real estate for delinquent taxes does not conflict with the constitutional provision that a person cannot be deprived of his property without his consent except by due process of law.

Edwards v. Taliafero, 34 Mich. 13; Loose v. Navarre, 95 Mich. 603, 55 N. W. 435. If the tax be void, the whole proceeding for their collection necessarily fails. Bergen v. Clarkson, 6 N. J. Law (1 Halst.) 352; Bole v. McKelvy, 189 Pa. 505. Cooley, Taxation, p. 432. "Very summary remedies have been allowed, in every age and country, for the collection by the government of its revenues. They have been considered a matter of state necessity. Without them, it might be possible for a party which had been defeated in its efforts to obtain possession of the government in the constitutional way, to cripple the government for the time being, and possibly to break it up altogether. If the state might be deprived of the resources for continuing its existence and performing its regular functions until a revenue could be collected by the processes provided for the enforcement of debts owing to individuals, it would be continually at the mercy of factions and discontented parties."

[195] Hays v. Hogan, 5 Cal. 241; Butler v. Nevin, 88 Ill. 575; City of St. Louis v. Russell, 9 Mo. 507. The grant of the power to tax does not of itself imply the right to sell property for the nonpayment of a tax levy; where, however, the grant provides for a redemption of property sold, the right to sell is then clearly implied.

Doe v. Whitlock, 1 Tyler (Vt.) 305; Lane v. James, 25 Vt. 481; City of Alexandria v. Hunter, 2 Munf. (Va.) 228. In summary proceedings nothing will be presumed in favor of the plaintiff.

[196] State v. Mayhew, 2 Gill. (Md.) 487; Collamer v. Drury, 16 Vt. 574. "The question how far a tax bill and warrant regular upon their face are a justification to the collector, is presented for adjudication. The words of the present statute are 'No collector shall be liable to any action which shall accrue in conse-

of the tax is necessarily the basis of all subsequent legal proceedings and if its character be established as invalid they will necessarily fail and tax leases, deeds or other conveyances given in execution of a summary power, will be void.[197]

These proceedings usually provide, in connection with the collection of delinquent taxes, for a sale of the property subject to the tax[198] upon the publication of a delinquent tax list; this list

quence of any mistake, mischarge or overcharge in the tax bill committed to him for collection.' This provision is substantially the same with that contained in the statute of 1797 and which has been in force ever since that time. It has never been considered in this state, that the tax bill and warrant were, of themselves, any sufficient justification to the officer. Neither the vote of the town, nor the assessment of the tax by the selectmen, is in the nature of the proceedings of a court either of general or special jurisdiction. The legality of all the previous proceedings must be shown by the collector. The 'mistake, mischarge or overcharge' alluded to in the statute cited, doubtless refer solely to the writing out the assessment, and the little mistakes which might always be liable to occur, if strict mathematical accuracy were required."

[197] Haines v. Young, 132 Cal. 512, 64 Pac. 1079. A tax deed issued upon the nonpayment of assessments for local improvements is not prima facie evidence of the validity of all preceding steps.

Ansley v. Wilson, 50 Ga. 418; Packard v. Inhabitants of New Limerick, 34 Me. 266. A town does not warrant a title to property conveyed by it under a tax deed and is not liable to the purchaser on a failure of title. Edwards v. Taliafero, 34 Mich. 13; Loose v. Navarre, 95 Mich. 603, 55 N. W. 435; City of St. Louis v. Gorman, 29 Mo. 593. A city is not estopped to claim property as its own by the action of its officers in taxing by mistake property belonging to the city which is subsequently sold upon a failure to pay the taxes levied and conveyed to third parties by the city.

Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524. The burden of showing the validity of the tax lien is upon the one seeking to enforce it. Lane v. James, 25 Vt. 481; Howe v. Barto, 12 Wash. 627. A provision in a city charter that the tax deed should be prima facie evidence of the regularity of all prior proceedings is not objectionable as prescribing a rule of evidence for the state courts. Phelps v. City of Tacoma, 15 Wash. 367; Whiton v. Rock County, 16 Wis. 44.

[198] Worthen v. Badgett, 32 Ark. 496; Shaw v. Lockett, 14 Colo. App. 413, 60 Pac. 363. Where a tract of land is partly within and partly without the jurisdiction of a taxing district, that part only within can be taxed, and in case of nonpayment of the tax levied, sold.

Deason v. Dixon, 54 Miss. 585. The land attempted to be sold must be within the jurisdiction of the taxing district, a change of boundaries will result in the loss of the right of a municipal corporation to sell lands formerly within its

should be in the form and the proceedings leading to the sale performed in the manner prescribed by the statute.[199] The form of the list, the description of the property, must be accurate,[200] and the sale must be had at the time and place fixed by law.[201]

boundaries but by the change placed outside of them.

Lockey v. Walker, 12 Mont. 577. The laws authorizing such proceedings must not be repugnant to constitutional provisions.

Landis v. Borough of Sea Isle City, 66 N. J. Law, 558, 49 Atl. 685. A public corporation may have a choice of proceedings for the collection of delinquent taxes.

Harned v. City of Camden, 66 N. J. Law, 520, 49 Atl. 1082; City of Philadelphia v. Philadelphia & R. R. Co., 1 Pa. Super. Ct. 236. Land of a railroad company beyond what is necessary for the enjoyment and exercise of a corporate franchise is subject to a tax lien and may be sold as the land of any other property owner.

[199] Scheurman v. City of Columbus, 106 Ga. 34, following Bacon v. City of Savannah, 86 Ga. 301; Matter of tax sale of lot No. 172, 42 Md. 196. A notice of sale which is not certain either as to time or place is fatally defective. Nelson v. Pierce, 6 N. H. 194.

[200] Poillon v. Borough of Rutherford, 58 N. J. Law, 113; Jordan v. Hyatt, 3 Barb. (N. Y.) 275. The undivided half of land subject to a tax cannot be sold for the payment of the taxes upon all the land.

Erschler v. Lennox, 11 App. Div. 511, 42 N. Y. Supp. 805. "Without considering the question whether the tax sale made by the common council of the city should be deemed invalid by reason of the fact of omission of the assessors to state in the assessment roll the quantity of land assessed, we are of the opinion that before the common council was authorized to sell the land of the defendant, Lucy Lennox, in consequence of her failure to pay the tax assessed against her, they were compelled to make an order of sale containing a particular description of the premises. The statute expressly provides that, before a sale, such order containing such description shall be made. It will not be doubted that the description to conform to the statute must be substantially correct. The description covering the lot of the defendant to be assessed and another larger lot which she did not own, and describing both as the premises of the defendant Lennox, was not the particular description of her lot required by the statute. The error of the common council of the city in the description of the lot of the defendant Lennox contained in the order cannot be deemed immaterial." Citing Tallman v. White, 2 N. Y. 66; Dike v. Lewis, 4 Denio (N. Y.) 237; Oakley v. Healey, 38 Hun (N. Y.) 244; In re New York Cent. & H. R. R. Co., 90 N. Y. 348; Zink v. McManus, 121 N. Y. 259; and May v. Traphagen, 139 N. Y. 478.

Grace v. City of Bonham, 26 Tex. Civ. App. 161, 63 S. W. 158. A description sufficient to identify the land and which does not mislead the owner is not defective. Potter v. Black, 15 Wash. 186.

[201] Montford v. Allen, 111 Ga. 18. An officer without authority cannot postpone a tax sale. Veit v. Graff, [illegible] d. 253; Nixon v. City of Biloxi,

Such proceedings are in the nature not only of a forfeiture but a judgment and all of the rules of law which relate to and affect the entry of judgments must be applied. Laws giving these rights are construed even more strictly than those relating to judgments, since a judgment is the result of a proceeding where all parties have been brought within the jurisdiction of a competent court. Irregularities and informalities will not be considered lightly nor will a failure to do that which the law requires although trivial in its nature be regarded as unessential or unimportant.[202] Those provisions in statutes or ordinances authorizing the seizure and sale of property for the payment of taxes permitting a redemption by the owner are liberally construed in his favor.[203]

§ 335. The payment of taxes.

The levy, collection and payment of taxes is a political and governmental act and the medium of payment may be designated. Unless special provision is made for the acceptance of certain evidences of indebtedness, a valid tender of taxes can only be made by an offer of specie or legal tender as established by the United States.[204] Tax officials cannot be compelled to accept in

76 Miss. 810; Brown v. Sharp (Miss.) 31 So. 712.

[202] Bannon v. Burnes, 39 Fed. 892. "And while the courts should treat with great respect the enactments of the legislative department of government, yet the courts which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the legislature cannot do. It cannot take the citizen's private property, even for public use, without due process of law. It cannot prescribe a method by, and the conditions on which, property may be sold for taxes and by the same act declare that when sold, the deed shall be good, although the prescribed method was not pursued and the required conditions of sale were not regarded; especially where such conditions are precedent facts essential to confer jurisdiction on the body or person undertaking to sell. * * * The city charter prescribes that certain facts shall exist to authorize the city collector to advertise and sell, as has already been stated. It is a well-established principle of law that in proceedings in invitum looking to the seizure and appropriation of private property for public uses, every fact which in its nature is jurisdictional must exist before jurisdiction attaches to the tribunal attempting the seizure and appropriation."

[203] Crawford v. Liddle, 101 Iowa, 148; Merchants' Realty Co. v. City of St. Paul, 77 Minn. 343, 79 N. W. 1040; Devine v. Franks (N. J. Eq.) 47 Atl. 228; Goodman v. Sanger, 85 Pa. 37; City of San Antonio v. Berry, 92 Tex. 319.

[204] Dickson v. Gamble, 16 Fla. 687; Richards v. Stogsdell, 21 Ind.

payment of taxes coupons cut from valid state or municipal bonds.[205] A debt due and owing from a public corporation to an individual cannot be off-set by him in payment of a portion of his taxes, nor,[206] under a constitutional provision requiring the payment of taxes in legal tender, can a contract be made between a contractor and a municipality by which a part of the contract obligation assumed on part of the municipality is to be paid by a credit on account of taxes levied or to be levied through a series of years upon property of the contractor.[207]

On the contrary, however, where the statutes provide that state, city or county warrants, as well as other evidences of indebtedness issued by a corporation to whom taxes may be due shall be a legal tender in payment of such taxes, then officials cannot refuse to accept such obligations when tendered them.[208]

To whom and when. A public corporation has the authority to designate officials to whom taxes shall be paid or certain officers may be required to accept all taxes paid with the added duty of apportioning these in the manner provided by law between the various funds or organizations entitled to some portion of them.[209] The county treasurer, to illustrate, may be empow-

74; Staley v. Columbus Tp., 36 Mich. 38; Kahl v. Love, 37 N. J. Law, 5; McLanahan v. City of Syracuse, 18 Hun (N. Y.) 259; Wagner v. Porter (Tex. Civ. App.) 56 S. W. 560.

[205] Parsons v. Slaughter, 63 Fed. 876.

[206] Trenholm v. City Council of Charleston, 3 S. C. 347.

[207] Wagner v. Porter (Tex. Civ. App.) 56 S. W. 560.

[208] Western Town-Lot Co. v. Lane, 7 S. D. 599, 65 N. W. 17, following Id., 7 S. D. 1, 62 N. W. 982.

[209] Britten v. City of Clinton, 8 Ill. App. 164; People v. Suppiger, 103 Ill. 434; Peoria & P. U. R. Co. v. People, 144 Ill. 458; City of Genesee v. Latah County, 4 Idaho, 141, 36 Pac. 701; Jefferson School Tp. v. School Town of Worthington, 5 Ind. App. 586, 32 N. E. 807. In case of an improper apportionment of taxes collected, the proper remedy is by action against the organization receiving such taxes not by mandamus against the officials as receiving such moneys. McConnell v. Hamm, 16 Kan. 228; Fremont, E. & M. V. R. Co. v. Brown County, 18 Neb. 516. Upon the organization of a new county from territory formerly embraced in another, the taxes then become payable to the treasurer of the new county. Morse v. Hitchcock County, 19 Neb. 566; Bowyer v. City of Camden, 50 N. J. Law, 87, 11 Atl. 137; Bridges v. Sullivan County Sup'rs, 27 Hun (N. Y.) 175; Multnomah County Com'rs v. State, 1 Or. 358; City of Salem v. Marion County, 25 Or. 449, 36 Pac. 163; Schuylkill County v. Com., 36 Pa. 524. The taxing district thus collecting tax levies to be apportioned between other districts and funds becomes liable to such for their quota.

ered to receive not only taxes levied for county purposes but also those imposed by the state for its support or by a municipal organization within the limits of the county the treasurer afterwards dividing between these organizations the part to which they are respectively entitled.[210] The time of payment may also be fixed[211] and an arrangement made which will authorize the payment of taxes in installments extending over a series of years or in one, two or three installments throughout the year at times most convenient and designed to render the burden of the taxpayer as light as possible by dividing the payments to be made. This rule is especially applicable to special assessments.[212]

§ 336. Their refunding.

A tax may be determined as invalid after its payment. If the taxpayer paid it under protest or duress[213] and raised the question of the legality of the tax in a proceeding within the

Com. v. City of Chester, 123 Pa. 626; Sheboygan County v. City of Sheboygan, 54 Wis. 415. Unpaid special assessments for street improvements are included within the term "unpaid taxes" as used in Rev. Stat. § 1114, relating to settlements between town and county treasurers.

[210] Peoria & P. U. R. Co. v. People, 144 Ill. 458, 33 N. E. 873.

[211] Rode v. Siebe, 119 Cal. 518, 39 L. R. A. 342; Town of Dixon v. Mayes, 72 Cal. 166, 13 Pac. 471. Where no time is fixed for the payment of municipal taxes, such a tax cannot become delinquent until a date is determined. Wheatly v. City of Covington, 74 Ky. (11 Bush) 18; City of New Orleans v. Clark, 15 La. Ann. 614; City of Rockland v. Rockland Water Co., 82 Me. 188; O'Flinn v. McInnis, 80 Miss. 125, 31 So. 584; Eustis v. City of Henrietta (Tex. Civ. App.) 37 S. W. 632. It is not unlawful for a legislature to provide that municipal taxes may become due and delinquent at a different time from general taxes.

[212] City of Brunswick v. Finney, 54 Ga. 317; Lightner v. City of Peoria, 150 Ill. 80; English v. City of Danville, 150 Ill. 92; Latham v. Village of Wilmette, 168 Ill. 153; Gage v. City of Chicago, 195 Ill. 490; Indiana Bond Co. v. Bruce, 13 Ind. App. 550, 41 N. E. 958; Talcott v. Noel, 107 Iowa, 470; In re One Hundred and Eighty-First St., 63 Hun, 629, 17 N. Y. Supp. 917; Ladd v. Gambell, 35 Or. 393; Stratton v. Oregon City, 35 Or. 409; Mall v. City of Portland, 35 Or. 89, 56 Pac. 654; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432. An owner may, however, if he desires to, pay his taxes in full at one time and not avail himself of the privilege given of a payment in installments.

[213] Hoke v. City of Atlanta, 107 Ga. 416, 33 S. E. 412. A payment made to prevent a levy on realty is not made under duress. North Carolina R. Co. v. Alamance Com'rs, 77 N. C. 4. Where a part of the tax

time required by law,[214] there is then a liability on the part of the corporation for the refunding of such taxes.[215] The right to a refund may also exist irrespective of a payment under protest in case the invalidity of the tax is subsequently determined.[216] But this right of the taxpayer may be lost, after the lapse of a certain prescribed time, through his failure to act.[217] The illegality of a tax can be based upon any of the many grounds that may render it void, either because of its being an excessive levy, the purpose for which the tax levy is used, irregular or defective pro-

paid is illegal and part valid, a refund can be required of the illegal portion. Pell v. City of New York, 31 Misc. 664, 65 N. Y. Supp. 34. A payment made after a threatened sale of property held an involuntary payment. City of Galveston v. Sydnor, 39 Tex. 236.

[214] City of Indianapolis v. Ritzinger, 21 Ind. App. 65, 56 N. E. 141; Little Rock & M. R. Co. v. Williams, 101 Tenn. 146, 46 S. W. 448; Raleigh v. Salt Lake City, 17 Utah, 130.

[215] Tippecanoe County Com'rs v. Lucas, 93 U. S. 108; Montgomery & W. P. R. Co. v. Duer, 46 Ga. 272. In an action brought to secure a refund of taxes paid, the facts showing the illegality of the tax should be fully set forth.

Grant County Com'rs v. Delaware County Com'rs, 4 Blackf. (Ind.) 256; Hemingway v. Inhabitants of Machias, 33 Me. 445; Price v. Lancaster County, 18 Neb. 199. A municipal corporation acting as a general tax collector and dividing taxes so collected among the different organizations entitled to the same is not liable to a taxpayer for a refund of taxes held invalid only to the extent of those retained by it for its own purposes.

Cavis v. Robertson, 9 N. H. 524; Sherman v. Trustees of Clifton Springs, 27 Hun (N. Y.) 390; Phelps v. City of Tacoma, 15 Wash. 367; State v. Whittlesey, 17 Wash. 447. A law requiring the refund by a municipality of void taxes held valid. Kellogg v. Winnebago County Sup'rs, 42 Wis. 97.

[216] Corbett v. Widber, 123 Cal. 154; Leonard v. City of Indianapolis, 9 Ind. App. 262, 36 N. E. 725; DePauw Plate Glass Co. v. City of Alexandria, 152 Ind. 443; Deady v. Village of Lyons, 39 App. Div. 139, 57 N. Y. Supp. 448; Little Rock & M. R. Co. v. Williams, 101 Tenn. 146; Raleigh v. Salt Lake City, 17 Utah, 130.

[217] Centre Tp. v. Marion County, 70 Ind. 562. The syllabus follows: "The fund in the hands of a county treasurer arising from a tax voted by a township to aid in the construction of a railroad, where the railroad company has forfeited all right to the same, * * * it not having been diverted into the township funds, belongs to the township, unless it has been demanded by the taxpayers of the township within two years after the passage of the act of 1872, or within two years after the forfeiture thereof by the railroad company; and such demand being matter of defense, need not be negatived in the complaint in an action by a township, against a county, to recover a tax voted by the township."

ceedings in the levy and assessment or because of the use and character of the property against which the tax is levied.[218]

II. SPECIAL ASSESSMENTS.

§ 337. Definition and explanation of the term.
338. The exercise of the power to levy.
339. Limitations upon the power.
340. Purpose for which exercised.
341. Extent of exercise.
342. Discretionary power with reference to locating limits of taxing district.
343. Property subject to local assessments.
344. The manner of determining local assessments; conversely, benefits.
345. According to frontage.
346. Assessment based upon location.
347. Levy based upon ascertained benefits.
348. What considered as benefits.
349. Levy based upon area or comparative value of property.
350. Individual liability.
351. Estoppel of taxpayer.
352. Place of assessment.
353. Acquiring jurisdiction; preliminary proceedings.
354. Same subject.
355. Execution of a contract.
356. Preliminary investigation or estimates.
357. Same subject continued.
358. Jurisdiction acquired through the introduction and passage of an ordinance.
359. Resolutions.
360. Petition by property owners.
361. Declaration of necessity.
362. Construction of the improvement.
363. Notice to property owners.
364. When given.

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[218] City of Auburn v. Union Water Power Co., 90 Me. 71, 37 Atl. 335. The facts as to the insufficiency of the call of a meeting of the city council at which a tax was levied, examined and found insufficient to render a tax illegal. Stickney v. City of Bangor, 30 Me. 404; Trim v. Inhabitants of Charleston, 41 Me. 504; Williams v. School Dist. in Lunenburg, 38 Mass. (21 Pick.) 75; Turnbull v. Alpena Tp., 74 Mich. 621, 42 N. W. 114. An irregularity not prejudicial to the person taxed is not a sufficient ground for declaring the tax illegal. City of Aurora v. Lindsay, 146 Mo. 509; State v. Montgomery County Com'rs, 31 Ohio St. 271; Wright v. City of San Antonio (Tex. Civ. App.) 50 S. W. 406.

365. How given and to whom.
366. Result of a failure to give notice.
367. Variance of proceedings from notice given.
368. Benefits the basis of assessment.
369. Presumption of validity.
370. Estoppel of public corporations.
371. Form of reports, assessment rolls and other necessary papers.
372. Opportunity for investigation and examination.
373. The right of correction and review.
374. Parties to appeal proceedings.
375. Review by the courts.
376. Review by other bodies.
377. The right of appeal or review; manner and time of exercise.
378. Conclusiveness of decision.
379. Review and correction.
380. What questions raised on appeal and review.
381. Estoppel of property owner.
382. The same subject; propositions negatively stated.
383. Right of appeal as based on omission to tax other property.
384. Excessive assessment.
385. Judicial confirmation of an assessment roll.
386. Reassessment or supplemental assessment.
387. Curative legislation.
388. Collateral attack.
389. Lien and priority of special assessments.
390. The same subject continued.
391. Collection of special assessments.
392. Manner and amount of collection.
393. Same subject; summary proceedings.
394. Time of collection.
395. The rights of a property owner.
396. Personal liability.
397. Recovery of invalid assessments.

§ 337. Definition and explanation of the term.

The word taxation in its proper sense is a generic one and designates that power governmental and political in its nature which enables a government to levy and collect enforced contributions for its support. Ordinarily, the term is understood as referring to general taxes levied upon real and personal property, the moneys derived used to maintain and support the public and general expenses of the government. In the proper use of the word it includes, however, that species of taxation termed "Local or special assessments." The authorities are agreed that

these are valid because imposed through the exercise of the taxing power.[219] There exists, however, a clear, well defined and well established difference in the basis for the levy of the two. A levy of taxes, as the word is commonly used, is based upon a governmental necessity irrespective of the immediate or personal return or benefit to the individual paying the tax. So long as the taxes levied are uniform and equal and conform to other constitutional restrictions or limitations in their levy and collection, they will be considered legal.[220] The idea of uniformity and equality being based and depending upon the amount of taxes levied as proportioned to the actual value of the property upon which levied; such valuation of the property being determined by its character and use. The idea of benefits received does not in theory enter into a determination of the legality of the tax.[221] A special or local assessment, however, involves the idea of an immediate and special benefit as a basis for its levy, and the doctrine is well established that there can be a levy or imposition of special assessments or taxes only in proportion to the benefits specially, actually and physically received by the property taxed as will be seen upon an examination of the authorities considered in succeeding sections.[222] The determination of the extent of benefits received and the manner of ascertaining them whether based upon frontage, propinquity or the reception of a special benefit, are questions of legislative expediency. The legislative body of each state possesses the right to determine these questions, subject only to pertinent restrictions or provisions found in organic law.[223] This principle is firmly

[219] Board of Councilmen of Frankfort v. Scott, 19 Ky. L. R. 1068, 42 S. W. 104; City of Richmond v. Gibson, 20 Ky. L. R. 358, 46 S. W. 702; Hughes v. Carl, 21 Ky. L. R. 6, 50 S. W. 852; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738.

[220] Emery v. San Francisco Gas Co., 28 Cal. 345; Hines v. City of Leavenworth, 3 Kan. 186; In re City of New York, 11 Johns. (N. Y.) 77.

[221] Hagar v. Yolo County Sup'rs, 47 Cal. 222; Perkins v. Inhabitants of Milford, 59 Me. 315. See, also, §§ 300 et seq., supra.

[222] See authorities cited in the next following notes: Zehnder v. Barber Asphalt Pav. Co., 106 Fed. 103; Kansas City, P. & G. R. Co. v. Water-works Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248; Thomas v. Gain, 35 Mich. 155; Richmond & A. R. Co. v. Lynchburg, 81 Va. 473; Soule v. City of Seattle, 6 Wash. 315; Germond v. City of Tacoma, 6 Wash. 365; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248.

[223] French v. Barber Asphalt Pav.

Co., 181 U. S. 324. This case, both in the briefs filed by the counsel for the respective parties and the opinion itself, contains an exhaustive citation and analysis of the authorities upon the question suggested in the text as well as others relative to an authorization by the legislature for the apportionment of the entire cost of a street pavement upon abutting lots according to their frontage and without any preliminary hearing as to benefits. In view of the fact that the reports of the supreme court of the United States are in the hands of everyone interested in this question, these authorities will not be repeated here. In its opinion in this case by Mr. Justice Shiras the court said in part: "In Mattingly v. District of Columbia, 97 U. S. 687, 692, 24 Law. Ed. 1098, 1100, there was called in question the validity of the act of Congress June 19, 1878 (20 Stat. 166, c. 309), entitled 'An act to provide for the revision and correction of assessments for special improvements in the District of Columbia and for other purposes,' and it was said by this court, through Mr. Justice Strong: 'It may be that the burden laid upon the property of the complainants is onerous. Special assessments for special road or street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer an open question.'

"In Kelly v. City of Pittsburgh, 104 U. S. 78, 26 Law. Ed. 658, it was urged that land which the owner had not laid off into town lots, but occupied for agricultural purposes, and through which no streets are run or used, cannot be, even by the legislature, subjected to the taxes of a city,—the water tax, the gas tax, the street tax, and others of similar character. The reason for this was said to be that such taxes are for the benefit of those in a city who own property within the limits of such improvements, and who use or might use them if they choose, while he reaps no such benefit. * * *

"The tax in question was assessed and the proper officers were proceeding to collect it in this way. The distinct ground on which this provision of the Constitution of the United States is invoked is that as the land in question is, and always has been, used as farm land, for agricultural purposes only, subjecting it to taxation for ordinary city purposes deprives the plaintiff in error of his property without due process of law. It is alleged, and probably with truth, that the estimate of the value of the land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. We have so often decided that we cannot review and correct the errors and mistakes of the state tribunals on that subject that it is only necessary to refer to those decisions, without a restatement of the argument on which they rest.

"In Spencer v. Merchant, 125 U. S. 345, a judgment of the court of appeals of the state of New York, upholding the validity of an assessment upon lands to cover the expense of a local improvement, was brought to this court for review

established and the further one that a special assessment to be valid must not be levied in substantial excess of the benefits con-

upon the allegation that the state statute was unconstitutional. In the opinion of this court, delivered by Mr. Justice Gray, the following extract was given from the opinion of the court of appeals:

'The act of 1881 determines absolutely and conclusively the amount of the tax to be raised, and the property to be assessed, and upon which is to be apportioned. Each of these things was in the power of the legislature, whose action cannot be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners; but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review.

'In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either, like other taxes, upon property generally, or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should, therefore, bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the legislature has the power to determine by the statute imposing the tax, what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committees or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction.' * * *

"This array of authority was confronted, in the courts below, with the decision of this court in the case of Norwood v. Baker, 172 U. S. 269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement cannot be assessed against abutting property according to frontage, unless the law under which the improvement is made provides for a preliminary hearing as to the benefits to be derived by the property to be assessed.

"But we agree with the Supreme

ferred by the local improvement for the making of which the tax is levied.[224] Where the legislature fixes a liability for local

court of Missouri in its view that such is not the necessary legal import of the decision in Norwood v. Baker, 172 U. S. 269. That was a case where, by a village ordinance apparently aimed at a single person a portion of whose property was condemned for a street, the entire cost of opening the street, including not only the full amount paid for the strip condemned, but the cost and expenses of the condemnation proceedings, was thrown upon the abutting property of the person whose land was condemned. This appeared, both to the court below and a majority of the judges of this court, to be an abuse of the law, an act of confiscation, and not a valid exercise of the taxing power.

"That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in Parsons v. District of Columbia, 170 U. S. 45, and in Spencer v. Merchant, 125 U. S. 345, 357."

Town of Tonawanda v. Lyon, 181 U. S. 389; Cass Farm Co. v. City of Detroit, 181 U. S. 396, affirming 124 Mich. 433, 83 N. W. 108; City of Detroit v. Parker, 181 U. S. 399, reversing Parker v. City of Detroit, 103 Fed. 357; Goodrich v. City of Detroit, 184 U. S. 432. In White v. City of Tacoma, 109 Fed. 32, it is held that where local assessments made in accordance with the front-foot rule practically confiscate the property against which they are directed contrary to the 14th amendment of the Constitution of the United States, courts should declare them void.

Kelly v. Luning, 76 Cal. 309, 18 Pac. 335. A legislature has no right, however, after the commencement of work on a local improvement to change the method of making assessments to pay its cost imposing a liability under the new method on property which did not exist at the time the work was commenced.

English v. City of Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158; Bacon v. City of Savannah, 86 Ga. 301; Murphy v. People, 120 Ill. 234, 11 N. E. 202; City of Peoria v. Kidder, 26 Ill. 351; Job v. City of Alton, 189 Ill. 256; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Brooks v. City of Baltimore, 48 Md. 265; Nickerson v. City of Boston, 131 Mass. 306; Inhabitants of Leominster v. Conant, 139 Mass. 384; Carpenter v. City of St. Paul, 23 Minn. 232; City of St. Joseph v. Anthony, 30 Mo. 537; State v. Dodge County Com'rs, 8 Neb. 124; Hoetzel v. East Orange, 50 N. J. Law, 354, 12 Atl. 911; Wilson v. Inhabitants of Trenton, 55 N. J. Law, 220, 26 Atl. 83; J. & A. McKechnie Brewing Co. v. Trustees of Canandaigua, 162 N. Y. 631, 57 N. E. 1113, affirming 15 App. Div. 139, 44 N. Y. Supp. 317; People v. Pitt, 169 N. Y. 521, 58 L. R. A. 372.

Webster v. City of Fargo, 9 N. D. 208, 56 L. R. A. 156. The benefit received by the making of a local improvement is not necessarily measured by its increase in marketable value therefrom.

assessments on abutting property, it will be presumed it has determined that the cost of the local improvement will not exceed

Rolph v. City of Fargo, 7 N. D. 640; Hill v. Higdon, 5 Ohio St. 243. It is competent for the legislature to authorize municipal corporations to levy special assessments for local improvements upon real estate peculiarly and specially benefited and in proportion to such benefit.

Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Maloy v. Marietta, 11 Ohio St. 636; Bonsall v. Town of Lebanon, 19 Ohio, 418; Cleveland v. Tripp, 13 R. I. 50; Johnson v. City of Milwaukee, 40 Wis. 315.

[224] Norwood v. Baker, 172 U. S. 269. In its opinion in this case the court say: "It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment." Further in the same case the court also said: "The decree does not prevent the village, if it has or obtains power to that end, from proceeding to make an assessment in conformity with the view indicated in this opinion; namely: That while abutting property may be specially assessed on account of the expense attending the opening of a public street in front of it, such assessment must be measured or limited by the special benefits accruing to it, that is, by benefits that are not shared by the general public; and that taxation of the abutting property for any substantial excess of such expense over special benefits will, to the extent of such excess, be a taking of private property for public use without compensation." See, also, the authorities cited and discussed in this case as well as in the case of French v. Barber Asphalt Pav. Co., 181 U. S. 324, including dissenting opinion.

Loeb v. Columbia Tp., 91 Fed. 37; Fay v. City of Springfield, 94 Fed. 409; Charles v. City of Marion, 98 Fed. 166; Cowley v. City of Spokane, 99 Fed. 840; White v. City of Tacoma, 109 Fed. 32.

Davidson v. Wight, 16 App. D. C. 371. An act which provides arbi-

trarily a minimum assessment without considering the question of special benefits is unconstitutional and void. The assessment cannot exceed the special benefit which has accrued to it from the public improvement adjacent to it. Kelly v. Chadwick, 104 La. 719, 29 So. 295; City of Atlanta v. Hamlein, 96 Ga. 381. A special assessment to the extent of $721 upon a lot valued at the highest estimate at $260 held prima facie invalid.

Bedard v. Hall, 44 Ill. 91; Greeley v. People, 60 Ill. 19; Newman v. City of Chicago, 153 Ill. 469; Byram v. Marion County Com'rs, 145 Ind. 240, 44 N. E. 357, 33 L. R. A. 476; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; McKee v. Town of Pendleton, 154 Ind. 652; Wray v. Fry, 158 Ind. 92, 62 N. E. 1004.

Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. The court held in this case that the front-foot rule applied although the local assessment exceeded the benefits received from the construction of the local improvement. Keith v. City of Boston, 120 Mass. 108; City of Boston v. Boston & A. R. Co., 170 Mass. 95.

Sears v. City of Boston, 173 Mass. 71, 43 L. R. A. 834. The special assessment in this case was levied to meet the cost of watering streets and the court said: "It is now established by the highest judicial authority that such assessments cannot be so laid upon any estate as to be in substantial excess of the benefit received. The case of Norwood v. Baker, 172 U. S. 269, 43 Law. Ed. 443, 19 Sup. Ct. 187, contains an elaborate discussion of the subject, with a citation of authorities from many of the states, and holds that a local assessment for an amount in substantial excess of the benefit received is in violation of the 14th Amendment to the Constitution of the United States, in as much as it would deprive one of his property without compensation, and so without due process of law. The authority of this case is controlling in all state courts, and if it were not, it is in accordance with sound principles, and with the great weight of authority in other courts. The principles which have often been stated by this court lead to the same result. City of Boston v. Boston & A. R. Co., 170 Mass. 95, 101, 49 N. E. 95, and cases cited." In the case of Sears v. City of Boston, 173 Mass. 71, 43 L. R. A. 834; Sears v. Street Com'rs of Boston, 173 Mass. 350, Mr. Justice Knowlton said: "If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible under the Constitution of this Commonwealth and under the Constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits. * * * The fact that the charges to be determined are for the construction, maintenance, and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the charges may be determined on any grounds which the street commis-

the benefits.[225] Under any method if there is an excess of cost which may be charged against property liable over the benefits

sioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law."

Dexter v. City of Boston, 176 Mass. 247. The court here said: "It is now settled law in this court as it is in the Supreme court of the United States and in many other courts that after the construction of a public improvement, a local assessment for the cost of it cannot be laid upon real estate in substantial excess of the benefit received by the property. Such assessments must be founded on the benefits and be proportional to the benefits."

Motz v. City of Detroit, 18 Mich. 495; Thomas v. Gain, 35 Mich. 155; Rogers v. City of St. Paul, 22 Minn. 494. "The principle of local assessments is that the special benefits which will accrue to a property owner from a proposed local improvement will be, at least, equal to the tax assessed upon his property on account of such improvement." The court also held in this case that "taxation exceeding special benefits" would, therefore, be invalid.

State v. Robert P. Lewis Co., 82 Minn. 390, 86 N. W. 611, 53 L. R. A. 421. Sp. Laws Minn. 1885, c. 110, §§ 26, 27, is constitutional not taking property without due process of law and without just compensation. Reversing 82 Minn. 390, 85 N. W. 207. This act, the City charter of St. Paul, provides for an assessment of ten cents per lineal foot of frontage against all lots in front of which water pipes are laid.

Simpson v. Kansas City, 46 Kan. 638, 26 Pac. 721. The cost of the improvement as a whole should be considered and the proportionate part according to the measure adopted assessed upon property subject to the assessment for the payment of its construction. It is improper to assess against abutting property the cost of the construction of the improvement for that particular part in front of such abutting property.

New Brunswick Rubber Co. v. New Brunswick Sewer Com'rs, 38 N. J. Law, 190; People v. City of Brooklyn, 23 Barb. (N. Y.) 166; Dyker Meadow Land & Imp. Co. v. Cook, 3 App. Div. 164, 38 N. Y. Supp. 222. The legislature has the power to exempt property from the payment not only of general taxes but also of special assessments. Stebbins v. Kay, 51 Hun (N. Y.) 589; Walsh v. Barron, 61 Ohio St. 15; City of Dayton v. Bauman, 66 Ohio St. 379, 64 N. E. 433; Hutcheson v. Storrie, 92 Tex. 688.

[225] Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649. This case, as well as the one mentioned above, supra, held that under lawful authority, the action of a city council levying a special tax on property is conclusive that it has been benefited to the extent of the assessment. Davis v. City of Litchfield, 155 Ill.

received, such excess must be provided for from the general corporate revenues,[226] and it is also within the province of legislative discretion to provide that an arbitrary proportion of the cost shall be borne by the general revenues and a part of it by private property liable in the manner fixed;[227] but the assessment levied upon property under any basis cannot exceed the cost of the improvement.[228]

384; Sigler v. Fuller, 34 N. J. Law, 227; In re Roberts, 81 N. Y. 62; Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Schenley v. Com., 36 Pa. 29.

[226] St. John v. City of East St. Louis, 50 Ill. 92; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; Hoboken Land & Imp. Co. v. City of Hoboken, 36 N. J. Law, 291; Frevert v. City of Bayonne, 63 N. J. Law, 202, 42 Atl. 773; In re Beechwood Ave, 194 Pa. 86. The fact that property will also pay its portion of the general taxes under such a rule in addition to the special assessments levied does not render the special assessments illegal.

[227] City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; City of Galesburg v. Searles, 114 Ill. 217; Watson v. City of Chicago, 115 Ill. 78; City of Sterling v. Galt, 117 Ill. 11; City of Jacksonville v. Hamill, 178 Ill. 235. Birket v. City of Peoria, 185 Ill. 369, citing Bigelow v. City of Chicago, 90 Ill. 49, and Fagan v. City of Chicago, 84 Ill. 227.

Garden City v. Trigg, 57 Kan. 632, 47 Pac. 524. A stipulation for the same result will also be held valid. Maddux v. City of Newport, 12 Ky. L. R. 657, 14 S. W. 957; Cassidy v. City of Covington, 12 Ky. L. R. 980, 16 S. W. 93; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; Kelly v. Chadwick, 104 La. 719, 29 So. 295; Alberger v. City of Baltimore, 64 Md. 1; Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642. But if such arbitrary amount as assessed on abutting property owners is unreliable and disproportionate as compared by benefits, such legislation may be held invalid. Copeland v. City of Springfield, 166 Mass. 498; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218; In re Opening of One Hundred & Sixty-Seventh St., 68 Hun, 158, 22 N. Y. Supp. 604; In re Turfler, 44 Barb. (N. Y.) 46; People v. Molloy, 161 N. Y. 621, 55 N. E. 1099, affirming 35 App. Div. 136, 54 N. Y. Supp. 1084; Hilliard v. City of Asheville, 118 N. C. 845; Kensington Com'rs v. Keith, 2 Pa. 218; Allen v. City of Galveston, 51 Tex. 302. Legislation, however, which does not take into consideration the benefits to be received by the property holder is unconstitutional. City of El Paso v. Mundy, 85 Tex. 316; City of Parkersburg v. Tavenner, 42 W. Va. 486.

[228] Davis v. City of Litchfield, 145 Ill. 313, 33 N. E. 888, 21 L. R. A. 563. The rule is applied here that an ordinance based upon the principle of charging abutting property with the cost of the improvement immediately fronting is illegal as imposing the burden unequally and without consideration of the question of benefits received.

Jackson v. Smith, 120 Ind. 520; Lorden v. Coffey, 178 Mass. 489, 60

The justice of this method of taxation is universally conceded. At one time the attempt was made to establish the right to make a local assessment as an exercise of the police power rather than the power of taxation but this has been abandoned; there is no doubt but that the right to levy special assessments is a part of the power of taxation.[229] All the principles which control the

N. E. 124. St. of Mass. 1892, c. 418, § 8, which provides that the cost of a local improvement shall be a lien upon the land without personal liability is void since the benefit may be less than the cost, the act further providing that the cost should be assessed proportionately against the property receiving benefits.

Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228. If there is a surplus in excess of the cost of moneys collected from assessments, it shall be apportioned and repaid on demand to those originally contributing it. An action in assumpsit by a taxpayer will lie against the city to recover the amount to which he is entitled.

State v. Pillsbury, 82 Minn. 359. The authorities fully collated and reviewed in this case. Ex parte City of Albany, 23 Wend. (N. Y.) 277. An assessment based upon benefits is valid though it exceed the actual cost of constructing the local improvement adjacent.

Spangler v. City of Cleveland, 35 Ohio St. 469; City of Dallas v. Emerson (Tex. Civ. App.) 36 S. W. 304; Yesler v. City of Seattle, 1 Wash. St. 308; City of Seattle v. Yesler, 1 Wash. T. 571; State v. City of Portage, 12 Wis. 562. But see Parsons v. District of Columbia, 170 U. S. 45, which holds a special assessment in excess of the cost of the improvement valid when it is the purpose in levying such assessment to pay not only the original cost of the improvement but also to create and maintain a fund for its repair.

[229] In Keese v. City of Denver, 10 Colo. 112, it is held, however, that a local assessment levied according to the front-foot rule for the building of a sewer is a valid exercise of the police power. In City of Peoria v. Kidder, 26 Ill. 351, and City of Chicago v. Larned, 34 Ill. 203, it is held that assessments for street improvements are not taxes within the meaning of the Illinois constitution in force at that time and could only be made through the exercise of the power of eminent domain.

Bradley v. McAtee, 70 Ky. (7 Bush) 667; Motz v. City of Detroit, 18 Mich. 495; McComb v. Bell, 2 Minn. 295 (Gil. 256). The making of a local assessment to pay the cost of an improvement is an exercise of the power of taxation, not that of eminent domain. Striker v. Kelly, 7 Hill (N. Y.) 9; Brewster v. City of Syracuse, 19 N. Y. 116; J. & A. McKechnie Brewing Co. v. Village of Canandaigua, 162 N. Y. 631, 57 N. E. 1113, affirming 15 App. Div. 139, 44 N. Y. Supp. 317; In re Opening of Whitlock Ave., 51 App. Div. 436, 64 N. Y. Supp. 717; City of Raleigh v. Peace, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330. Merriman, C. J., and Davis, J., dissenting.

King v. City of Portland, 2 Or. 146; In re Vacation of Centre St., 115 Pa. 247, 8 Atl. 56; Allen v. Drew, 44 Vt. 174. The court in this case

making, the levy or the collection of special assessments, are those which control and regulate the making, levying and collecting of governmental taxes; and constitutional provisions also apply.[230] That constitutional limitation requiring all taxes to be uniform and equal applies equally to the making of local assessments; but uniformity and equality as applied to general taxation involves the idea of valuation. The legality of a local assessment as determined by this same principle of uniformity and equality depends upon the relative benefit received by the property assessed.[231] There are many local improvements such as

said that the levy of local assessments for the building of sewers, sidewalks, drains and other local improvements and the apportionment of the expense in a ratio of the benefits received was an exercise of the right of taxation inherent in every sovereign state. It was not a taking of private property for public use under the right of eminent domain.

[230] Noonan v. City of Stillwater, 33 Minn. 198.

[231] The following cases consider constitutional or other provisions relative to uniformity and equality of taxation as applied to local assessments. An examination of them proves the rule stated in the text; even those which hold that such constitutional provisions do not apply to local assessments sustain the principle that they must be levied in an equal and uniform manner in proportion to the benefits received. People v. Lynch, 51 Cal. 15; Violett v. City Council of Alexandria, 92 Va. 561, 31 L. R. A. 382; Bedard v. Hall, 44 Ill. 91; Hundley v. Lincoln Park Com'rs, 67 Ill. 559; Gilcrest v. McCartney, 97 Iowa, 138, 66 N. W. 103; Hines v. City of Leavenworth, 3 Kan. 186; Holzhauer v. City of Newport, 94 Ky. 396; Gosnell v. City of Louisville, 20 Ky. L. R. 519, 46 S. W. 722; Sears v. Street Com'rs of Boston, 173 Mass. 350, 53 N. E. 876; Jones v. Water Com'rs of Detroit, 34 Mich. 273; In re Willis Ave., 56 Mich. 244; State v. St. Louis County Dist. Ct., 66 Minn. 161; Adams v. Lindell, 5 Mo. App. 197, 72 Mo. 198; McGuire v. Brockman, 58 Mo. App. 307; Farrar v. City of St. Louis, 80 Mo. 379; Kittle v. Shervin, 11 Neb. 65.

Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511. But special assessments are not taxes within the meaning of the organic act declaring that all property shall be taxed in proportion to its value. Ladd v. Gambell, 35 Or. 393; Appeal of Protestant Orphan Asylum, 111 Pa. 135; Winona & St. P. R. Co. v. City of Watertown, 1 S. D. 46; Mauldin v. City Council of Greenville, 42 S. C. 293, 27 L. R. A. 284; Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024.

In Taylor v. Boyd, 63 Tex. 533, it is held that assessments for local improvements are not taxes within the constitutional provision requiring regularity and uniformity. City of Norfolk v. Chamberlain, 89 Va. 196; City of Spokane Falls v. Browne, 3 Wash. St. 84; Hansen v. Hammer, 15 Wash. 315.

The following cases hold constitu-

the construction and improvement of highways, the laying of water mains and sewers which result in a benefit or advantage to the community at large, yet that benefit or advantage is remote in its character and trivial in its extent. The immediate advantage and benefit resulting from the construction of such improvement accrues to the property immediately adjacent or adjoining it. That the property thus specially benefited should meet the burden created is everywhere conceded.[232]

tional provisions that all taxes shall be equal and uniform do not apply to assessments for local improvements: Burnett v. City of Sacramento, 12 Cal. 76; Emery v. San Francisco Gas Co., 28 Cal. 345; City of Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135; Edgerton v. Town of Green Cove Springs, 19 Fla. 140; Speer v. City of Athens, 85 Ga. 49, 9 L. R. A. 402; Murphy v. People, 120 Ill. 234; Reinken v. Fuehring, 130 Ind. 382, 15 L. R. A. 624; Warren v. Henly, 31 Iowa, 31; Hines v. City of Leavenworth, 3 Kan. 186; Ottawa County Com'rs v. Nelson, 19 Kan. 234; City of New Orleans v. Elliott, 10 La. Ann. 59; In re City of New Orleans, 20 La. Ann. 497; State v. St. Louis County Dist. Ct., 61 Minn. 542; Daily v. Swope, 47 Miss. 367; Cain v. Davie County Com'rs, 86 N. C. 8; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Hilliard v. City of Asheville, 118 N. C. 845; Bonsall v. Town of Lebanon, 19 Ohio, 418; Gest v. City of Cincinnati, 26 Ohio St. 275; King v. City of Portland, 2 Or. 146; Cook v. Port of Portland, 20 Or. 580, 13 L. R. A. 533; Huidekoper v. City of Meadville, 83 Pa. 156; Shoemaker v. City of Harrisburg, 122 Pa. 285; City of Chester v. Black, 132 Pa. 568, 6 L. R. A. 802; Beaumont v. Wilkes-Barre City, 142 Pa. 198; Bishop v. Tripp, 15 R. I. 466; Washington v. City of Nashville, 31 Tenn. (1 Swan) 177; Roundtree v. City of Galveston, 42 Tex. 612; Taylor v. Boyd, 63 Tex. 533; Richmond & A. R. Co. v. City of Lynchburg, 81 Va. 473; Violett v. City Council of Alexandria, 92 Va. 561; Austin v. City of Seattle, 2 Wash. St. 667; City of Spokane Falls v. Browne, 3 Wash. St. 84; Lumsden v. Cross, 10 Wis. 282; Bond v. City of Kenosha, 17 Wis. 284.

[232] City of Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198; Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466; In re City of New Orleans, 20 La. Ann. 497; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 (Gil. 424).

Rogers v. City of St. Paul, 22 Minn. 494. In this case the court in its opinion by Berry, J., defined local improvements in the following language:

"By common usage, especially as evidenced by the practice of courts and text writers, the term 'local improvements' is employed as signifying improvements made in a particular locality by which the real property adjoining or near such locality is specially benefited. * * * The fact that the street to be improved is the most public thoroughfare in the city does not prevent

In addition to this reason there also exists another which courts have given as of equal weight in sustaining the principle that property benefited should pay the cost of a local improvement. The cost of all public improvements is paid through the levy and collection of taxes of one species or another. In the absence of a limitation upon the tax rate, in case this principle did not apply, there would exist beyond question the inclination on the part of public officials to engage in the construction of extravagant unnecessary and costly improvements to be paid by general taxation of property more or less remote from the place where such improvements are constructed.[233] If the principle of general taxation were permitted to pay the cost of local improvements, it would result in a large increase of the burden of taxation on taxpayers. The personal payment of a tax by an individual tends to restrict him in an expenditure of public moneys and the fact that the construction of expensive and unnecessary improvements increases largely the tax which the public official personally pays makes him conservative in such matters.[234]

§ 338. The exercise of the power to levy.

Since the levy of special assessments is a species of taxation, it follows that the right to exercise the power by a public corporation must be granted by the sovereign. The grant of power as in the case of ordinary taxation must be expressly given in clear and unmistakable terms and cannot be implied from a general grant of power to a corporation.[235] There cannot be implied,

the improvement from being 'local'; but the local character of the improvement depends upon the special benefit which will result to the real property adjoining or near the locality in which the improvement is to be made."

In re Report of Com'rs, 49 N. J. Law, 488, 10 Atl. 363. A change in ownership of land subject to local assessment does not defeat the right of a state to subsequently authorize assessments and reassessments. Watrous v. City of Elizabeth, 40 N. J. Law, 278. Commissioners of assessment in apportioning the tax should take into consideration all the property benefited although some may be exempt from assessment.

[233] Municipality No. 2 v. Dunn, 10 La. Ann. 57; Lockwood v. City of St. Louis, 24 Mo. 20.

[234] Municipality No. 2 v. Dunn, 10 La. Ann. 57.

[235] O'Brien v. Wheelock, 95 Fed. 883. Under the Ill. Const. of 1870, art. 9, § 9, providing that "The general assembly may vest the corporate authorities of cities, towns and

from a general-welfare clause so often found in municipal charters, a power to levy special assessments for the making of local

villages with power to make local improvements by special assessment or by special taxation of contiguous property or otherwise," the legislature is prohibited from conferring power to make special assessments except upon the authorities of "cities, towns and villages" and an act providing for the construction and protection of ditches, drains, levees and other works and authorizing the cost to be assessed on property benefited by juries appointed by county courts, is in violation of the constitutional provision, and assessments made in pursuance to its terms are not enforceable.

Murphy v. City of Wilmington, 6 Houst. (Del.) 108; City Council of Augusta v. Murphey, 79 Ga. 101, 3 S. E. 326; McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858. Under constitution of Ill. art. 4, § 31, as amended in 1878, cities and villages have the power to construct and maintain, by means of special assessments, drains and pumping works for drainage purposes. City of Chicago v. Weber, 94 Ill. App. 561. The exercise of the power is discretionary with the municipal corporation and after proceedings have been commenced, but before they are completed, they can be abandoned.

Lawrence v. People, 188 Ill. 407, 58 N. E. 991. The adoption, under authority of law, by a city, of that portion of the statutes relating to the making of municipal improvements, carries with it the adoption of all subsequent amendments to such statutes. Webster v. People, 98 Ill. 343; City of Fairfield v. Ratcliff, 20 Iowa, 396; McNamara v. Estes, 22 Iowa, 246; Burnes v. City Council of Atchison, 2 Kan. 454; Hydes v. Joyes, 67 Ky. (4 Bush) 464, 96 Am. Dec. 311; Bradley v. McAtee, 70 Ky. (7 Bush) 667.

Hood v. Town of Lebanon, 12 Ky. L. R. 813, 15 S. W. 516. The improvements contemplated must be useful and reasonable in their character. City of Annapolis v. Harwood, 32 Md. 471; Steckert v. City of East Saginaw, 22 Mich. 104; Brady v. Hayward, 114 Mich. 326; City of Greenville v. Harvie, 79 Miss. 754, 31 So. 425.

State v. Ramsey County Dist. Ct., 80 Minn. 293, 83 N. W. 183. The improvement must, however, be actually made for which the assessment is levied. Hurford v. City of Omaha, 4 Neb. 336. In Dodge County v. Acom, 61 Neb. 376, 85 N. W. 292, it was held, however, that under Const. art. 9, § 6, the legislature could confer upon counties the power to make local improvements by special assessments upon property benefited although the language of the section cited provides that "the legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment or by special taxation of property benefited."

Watrous v. City of Elizabeth, 40 N. J. Law, 278; Long Branch Police, Sanitary & Imp. Commission v. Dobbins, 61 N. J. Law, 659, 40 Atl. 599; Moran v. City of Troy, 9 Hun (N. Y.) 540; Meech v. City of Buffalo, 29 N. Y. 198; City of Wil-

improvements.[236] Neither can it be implied from the ordinary grant of power to levy taxes,[237] nor from the power to make local or public improvements.[238]

(a) The power a continuing one. The power, when once granted, until repealed, is considered a continuing one, the right to exercise which is not lost either by its non use, excessive use, or by the making of a specific local improvement.[239] The law recognizes the fact that municipal conditions are constantly changing and street improvements which may be adequate at one time may become inadequate at a later period because of an increase in population or radically changed business and economic conditions. In such a case, although the power may have been one exercised in a specific instance, this fact will not prevent the ex-

mington v. Yopp, 71 N. C. 76; In re Morewood Ave., 159 Pa. 20; Lee v. Town of Mellette, 15 S. D. 586, 90 N. W. 855.

Alford v. City of Dallas (Tex. Civ. App.) 35 S. W. 816. After a city has paid the cost of a local improvement out of its general fund, it cannot then levy a special assessment upon property benefited.

Storrie v. Woessner (Tex. Civ. App.) 47 S. W. 837; Hansen v. Hammer, 15 Wash. 315. The grant of the power by the legislature under constitutional authority to subordinate governmental agents is not necessarily exclusive or does not deprive it of the right to grant the same power to other subordinate agencies. Pickering v. Ball, 19 Wash. 185; State v. City of Ashland, 71 Wis. 502, 37 N. W. 809.

[236] Lott v. Ross, 38 Ala. 156; City of Savannah v. Hartridge, 8 Ga. 23; Town of New Iberia v. Weeks, 104 La. 489, 29 So. 252; Winston Com'rs v. Taylor, 99 N. C. 210; Green v. Ward, 82 Va. 324.

[237] Hitchcock v. City of Galveston, 96 U. S. 341; First Presbyterian Church v. City of Ft. Wayne, 36 Ind. 338; Appeal of Powers, 29 Mich. 504.

[238] Bucknall v. Story, 36 Cal. 67; City of Augusta v. Dunbar, 50 Ga. 387; Wright v. City of Chicago, 20 Ill. 252; Gridley v. City of Bloomington, 88 Ill. 555; City of Fairfield v. Ratcliff, 20 Iowa, 396; City of Annapolis v. Harwood, 32 Md. 471.

[239] Pardridge v. Village of Hyde Park, 131 Ill. 537; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551. Where a city has made a local improvement and provided for its payment from the general fund, its power to provide for such payment is exhausted and it cannot thereafter make an assessment upon property owners benefited by this improvement. Wilkins v. City of Detroit, 46 Mich. 120; Budge v. City of Grand Forks, 1 N. D. 309, 47 N. W. 390; 10 L. R. A. 165. Where one assessment has been made upon property, its right is lost to again assess such property for its portion of the cost of making the same improvement. Alcorn v. City of Philadelphia, 112 Pa. 494.

ercise again by the municipality of the power to make a local improvement to meet the changed condition.[240] This rule, however, does not usually apply to the reconstruction of a local improvement before it has become worn out or rendered unsuitable for use by changed condition.[241]

(b) Cannot be delegated. When granted the power by the sovereign, a subordinate agent cannot delegate this right to other officials or bodies. Its exercise involves the performance of acts requiring judgment and discretion and the universal rule applies

[240] Hurt v. City of Atlanta, 100 Ga. 274; Dickinson v. City of Detroit, 111 Mich. 480; Robertson v. City of Omaha, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534; Denise v. Village of Fairport, 11 Misc. 199, 32 N. Y. Supp. 97. The relaying of a sewer pipe nine inches in diameter by one fifteen inches in diameter is not considered an ordinary repair but the construction of a new sewer, the expense of which can be charged to property benefited.

Tilden v. City of New York, 56 Barb. (N. Y.) 340; People v. City of Buffalo, 166 N. Y. 604, 59 N. E. 1128, affirming 52 App. Div. 157, 65 N. Y. Supp. 163. The rule includes repaving of a street. Ladd v. City of Portland, 32 Or. 271, 51 Pac. 654; City of Philadelphia v. Yewdall, 190 Pa. 412. In this case it was, however, held that after a street had been paved under a subsequent widening, the cost of paving such increased width could not be assessed against abutting property owners. Mauldin v. City Council of Greenville, 53 S. C. 285, 43 L. R. A. 101.

[241] Koons v. Lucas, 52 Iowa, 177; City of Louisville v. Tyler, 23 Ky. L. R. 827, 64 S. W. 415; Louisville & N. R. Co. v. Nehan, 23 Ky. L. R. 889, 64 S. W. 457; Heman v. Ring, 85 Mo. App. 231; Jelliff v. City of Newark, 49 N. J. Law, 239, 12 Atl. 770. Rule does not apply to repaving with an improved pavement. City of Erie v. Russell, 148 Pa. 384, 23 Atl. 1102; Hammett v. City of Philadelphia, 65 Pa. 146; City of Philadelphia v. Henry, 161 Pa. 38; Drummond v. City of Eau Claire, 79 Wis. 97, 48 N. W. 244, following Hall v. Chippewa Falls, 47 Wis. 267. The rule stated in the text does not apply to the expense of regrading a street which can be charged against abutting property despite the fact that such property has already borne the expense of street grading. Adams v. City of Beloit, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441. It was held in this case that the cost of repaving a street that has once been improved may be assessed to abutting property under Rev. St. of 1898, c. 40a, § 175. Winnebago Furniture Mfg. Co. v. Fond du Lac County, 113 Wis. 72, 88 N. W. 1018. Where a city charter provides that special assessments shall not be levied on abutting property which has paid for a former improvement, a landowner who with others petitioned for repaving with a certain material is not estopped to contest his liability for the cost of paving with a different material.

that the performance of such acts cannot be delegated to another by one possessing the right to exercise them.[242]

§ 339. Limitations upon the power.

Aside from the suggested limitation that the power to levy special assessments is a delegated one, there are found restrictions and limitations upon the right to exercise it either in particular municipal charters,[243] general statutory provisions[244] or state constitutions.[245] The general principle also applies in connection with this subject of limitations that since the power to be exercised must be expressly granted or must exist through necessary implication, its exercise is limited as to manner and time and place to the phraseology used in the grant.[246] The au-

[242] In re Hearn, 96 N. Y. 378; Whyte v. City of Nashville, 32 Tenn. (2 Swan) 364. But the rule does not extend to mere matters of detail or forbid business being transacted in the manner usual to legislative bodies. Bartram v. City of Bridgeport, 55 Conn. 122; Ray v. City of Jeffersonville, 90 Ind. 567; People v. Lohnas, 54 Hun (N. Y.) 604.

[243] City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 (Gil. 424); Nash v. City of St. Paul, 23 Minn. 132; Dousman v. City of St. Paul, 23 Minn. 394; People v. City of Brooklyn, 23 Barb. (N. Y.) 166; Pier v. City of Fond du Lac, 38 Wis. 470.

[244] In re Palmer, 31 How. Pr. (N. Y.) 42; Cherington v. City of Columbus, 50 Ohio St. 475.

[245] Lombard v. West Chicago Park Com'rs, 181 U. S. 33. A special assessment made pursuant to legislative authority to pay for a completed local improvement, a previous assessment for the payment of which was held illegal, is not in violation of any right given by the constitution of the United States, amendment, art. 14.

City of Springfield v. Baker, 56 Mo. App. 637. That section of a bill of rights which prohibits the taking of private property for public use without compensation has no application to the levy of assessments for local improvements.

City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330. A constitutional provision limiting the exercise of the power of taxation by cities does not apply to special assessments for local improvements.

Storrie v. Woessner (Tex.) 47 S. W. 837. The grant of authority for levying local assessments does not conflict with constitution, art. 3, § 56, forbidding the passage of any local or special law.

[246] Smith v. Cofran, 34 Cal. 310; McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858. A trivial, immaterial error will not, however, affect the validity of such proceedings.

City of Henderson v. Lambert, 77 Ky. (14 Bush) 24; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345. Municipal authorities, the court

thority may include a limitation upon its exercise expressed either as a maximum amount[247] or rate per-cent[248] which can be levied

held in this case, must conform to the strict letter of the law in exercising power conferred authorizing them to make local assessments.

Adams v. Bay City, 78 Mich. 211, 44 N. W. 138; City of Westport v. Mastin, 62 Mo. App. 647; Equitable Trust Co. v. O'Brien, 55 Neb. 735; Medland v. Linton, 60 Neb. 249, 82 N. W. 866. The court in this case held that the record must show affirmatively a compliance with all essential conditions to a valid exercise of the taxing power. Facts omitted will not be presumed.

Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; People v. City of Utica, 58 How. Pr. (N. Y.) 136; Delaware & H. Canal Co. v. City of Buffalo, 167 N. Y. 589, 60 N. E. 1119. Where there is a failure to follow statutory provisions, an abutter cannot assail an assessment on his property without showing an injury through such failure, affirming 39 App. Div. 333, 56 N. Y. Supp. 976.

Hopkins v. Mason, 61 Barb. (N. Y.) 469. A statute authorizing an assessment for street improvements is in derogation of individual rights and must be strictly construed and rigorously observed.

Merritt v. Portchester, 71 N. Y. 309. A statute providing that assessment commissioners shall take an oath to "faithfully and fully discharge the duties" is not complied with by each of said commissioners taking an oath to perform the duties, "to the best of his ability." The court in this case said in part that whatever steps the legislature prescribed to be taken in connection with the expense of local improvements must be strictly pursued and any of them cannot be declared by the courts to be merely directory or immaterial.

Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435. Laws granting municipalities power to levy local assessments should be strictly construed against the exercise of the power and in favor of the property owner.

[247] Warren v. Postel, 99 Cal. 294; Benton v. Inhabitants of Brookline, 151 Mass. 250, 23 N. E. 846; City of Detroit v. Chapin, 112 Mich. 588, 71 N. W. 149, 42 L. R. A. 638. Where the principle of benefits obtains, an arbitrary assessment will be void. Foster v. Boston Park Com'rs, 131 Mass. 225; In re Walter, 75 N. Y. 354, reversing 14 Hun, 148. The limitation in this case to an assessment not exceeding "in any one case one-half the assessed value of the premises." City of Waco v. Chamberlain, 92 Tex. 207, 47 S. W. 527, reversing (Tex. Civ. App.) 45 S. W. 191.

[248] Kreling v. Muller, 86 Cal. 465; Dittoe v. City of Davenport, 74 Iowa, 66, 36 N. W. 895. The statutory limitation applying to the rate of taxation does not affect a sewerage tax, the cost of which is paid by an application of the "frontage rule."

Sears v. City of Worcester, 180 Mass. 274, 62 N. E. 269; State v. Judges of District Ct., 51 Minn. 539, 53 N. W. 800, 55 N. W. 122. Where a charter provides that seventy-five per cent. of the amount required for a street improvement shall be as-

and collected to pay the cost of a given improvement or the limitation may consist of a provision that the power shall not be exercised except at stated intervals of time.[249]

§ 340. Purpose for which exercised.

Since the rule is well established that general taxes cannot be levied or imposed to pay the cost of a specific local improvement,[250] the converse of this rule is also well established that local assessments or taxes cannot be levied or imposed to pay for the cost of construction or of making an improvement of a general character or one which results in a general benefit and advantage not only to the individual whose property is adjacent to or near but also to an equal extent to that individual whose property may be situated at the remotest distance from the improvement.[251]

sessed "in proportion as near as may be" to the benefit resulting to the property or in proportion to the frontage, an assessment is void based upon an arbitrary rule taking into account only the proximity of lots to the street without regard to other conditions.

Heman v. Wolff, 33 Mo. App. 200; In re City of New York, 46 App. Div. 52, 61 N. Y. Supp. 437; In re Opening of Edgecomb Road, 36 Misc. 119, 72 N. Y. Supp. 1073; Hilliard v. City of Asheville, 118 N. C. 845; Hilliard v. City of Asheville, 118 N. C. 845; Findlay v. Frey, 51 Ohio St. 390, 38 N. E. 114; Pretzinger v. Sunderland, 63 Ohio St. 132, 57 N. E. 1097; Birdseye v. Village of Clyde, 61 Ohio St. 27; Walsh v. Barron, 61 Ohio St. 15; Hays v. City of Cincinnati, 62 Ohio St. 116.

[249] Earl v. Board of Improvement of Morrilton, 70 Ark. 211, 67 S. W. 312. If there is a deficiency, however, in the special tax levied for the making of a certain improvement under Sand. & H. Dig., § 5366, a second levy may be made. Fiacre v. Jersey City, 34 N. J. Law, 277; City of Erie v. Griswold, 184 Pa. 435. The right to exempt property from such assessments which has already paid a paving tax may be left to the discretion of the city authorities.

[250] Wolfe v. McHargue, 88 Ky. 251, 10 S. W. 809; City of Wilmington v. Yopp, 71 N. C. 76; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Murtaugh v. City of Paterson, 45 N. J. Law, 267; Rhinelander v. City of New York, 24 How. Pr. (N. Y.) 304.

[251] City of Chicago v. Law, 144 Ill. 569, 33 N. E. 855. The power to make a local improvement by special assessment does not grant authority to levy such a tax for the purpose of widening the Chicago River. The improvement of an unnavigable stream for the benefit of commerce not being a local improvement but one resulting in the general benefit and advantage of the whole community.

City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412; Illinois Cent.

A local assessment, therefore, is only valid or legal when levied to pay the cost of a local improvement in its restricted sense.

(a) What not considered local improvements. Applying the rule thus given above, courts have held that a local tax or assessment cannot be levied for the construction of a court house,[252] public market,[253] public school house,[254] or other buildings of a

R. Co. v. City of Decatur, 154 Ill. 173. The power to make a local improvement carries with it the implied power to declare what are local improvements by the municipal authorities; however, their decision in this respect cannot be arbitrarily made, not in good faith or without reference to benefits derived from the construction of the improvement.

Village of Morgan Park v. Wiswall, 155 Ill. 262. Where the right is granted to make local improvements, the municipal authorities have the power though not a conclusive one to declare what improvements are local. Hewes v. Glos, 170 Ill. 436. The determination of whether a certain improvement is local or general in its nature is for the corporate authorities to decide. A decision, however, is subject to review by the courts.

Conger v. Graham, 11 Ky. L. R. 12, 11 S. W. 467. The improvement of a county road must be paid for by the whole county. Louisville Steam Forge Co. v. Mehler, 23 Ky. L. R. 1335, 64 S. W. 396, 652. The increased cost of an improvement by the construction of a street under railroad tracks cannot be charged upon abutting property. City of Baltimore v. Hanson, 61 Md. 462. A declaration in the ordinance providing for the opening of a street that it is for the general public benefit or convenience necessitates the payment of the cost of the improvement from the general funds.

Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; Sears v. Street Com'rs of Boston, 180 Mass. 274, 62 N. E. 397; Rogers v. City of St. Paul, 22 Minn. 494; State v. Ramsey County Dist. Ct., 33 Minn. 295. The fact that the improvement also benefits property not in the ward of a city where the local improvement is made does not destroy its character as such. All local improvements necessarily result in a benefit, though to a slight extent, to all property unless very remotely situated from the locality of the improvement.

Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862. A special assessment is illegal when levied for the purpose of abating a nuisance created by the municipality upon the property assessed to pay for its removal. Deady v. Village of Lyons, 39 App. Div. 139, 57 N. Y. Supp. 448; Ellwood v. City of Rochester, 122 N. Y. 229; In re Crawford's Estate, 14 Phila. (Pa.) 323; In re Washington Ave., 69 Pa. 352; Weeks v. City of Milwaukee, 10 Wis. 242; Miller v. City of Milwaukee, 14 Wis. 642. The construction of a break water is not a local improvement.

[252] McLean County v. City of Bloomington, 106 Ill. 209; Adams County v. City of Quincy, 130 Ill. 566.

[253] In Massachusetts the rule

similar character, or a plant for supplying water[255] and light[256] to the entire municipality, or the construction and repair of large sewers,[257] or water mains[258] designated as the main arteries of a general system.

(b) What regarded as local improvements. On the contrary, the opening,[259] paving or macadamizing,[260] grading,[261] curbing

seems to be otherwise. Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71; Peterson v. City of New York, 4 E. D. Smith (N. Y.) 413.

[254] Education is a public purpose and as such all the instrumentalities necessary to promote it should be paid for by general taxation. Vanover v. Davis, 27 Ga. 354; Public School Com'rs v. Allegany County Com'rs, 20 Md. 449.

[255] McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858. The cost of operating a pumping plant for drainage purposes cannot be made by local assessments. Village of Morgan Park v. Wiswall, 155 Ill. 262; Hughes v. City of Momence, 163 Ill. 535; Hewes v. Glos, 170 Ill. 436; In re Protestant Episcopal Public School, 40 How. Pr. (N. Y.) 198; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

[256] Ewart v. Village of Western Springs, 180 Ill. 318. The cost of that portion of an electric light plant which is immediately used for the lighting of streets is properly chargeable against property benefited. But see, however, the case of Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646, 38 L. R. A. 157.

[257] Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003. That part of the cost of a general sewer which exceeds the cost of a local sewer must be paid by the owners of all the property benefited, the equivalent cost of a local sewer can be charged to abutting owners. City of Boston v. Shaw, 42 Mass. (1 Metc.) 130; Sears v. Street Com'rs of Boston, 173 Mass. 350, 53 N. E. 876. The construction and management of a general sewerage system for an entire city should be raised by general taxation rather than special assessments.

Ayer v. City of Somerville, 143 Mass. 585; Sherwood v. City of Duluth, 40 Minn. 22; Hill v. Swingley, 159 Mo. 45, 60 S. W. 114. The character of the sewer as a public or district one is determined by its location and use as well as by its dimensions and the materials of which constructed. McClosky v. Chamberlin, 37 N. J. Law, 388; Haag v. City of Mt. Vernon, 41 App. Div. 366, 58 N. Y. Supp. 581; City of Toledo v. Brown, 2 Ohio, N. P. 45; Harrisburg v. Cummings, 6 Pa. Dist. R. 437; Witman v. City of Reading, 169 Pa. 375; In re Park Ave. Sewers, 169 Pa. 433.

[258] Parsons v. District of Columbia, 170 U. S. 45. Where the statutory authority, however, is for the levy of an assessment to pay the cost of laying water mains and to raise a fund for keeping the system in repair, an assessment which exceeds the actual cost of laying the mains is not invalid. Swain v. City of Philadelphia (Pa.) 13 Atl. 545.

[259] Lent v. Tillson, 72 Cal. 404; People v. Village of Hyde Park, 117 Ill. 462; Sears v. Street Com'rs of

and guttering,[262] sprinkling[263] or general improvement[264] of streets and highways, the running of water pipes and mains,[265] or placing

Boston, 180 Mass. 274, 62 N. E. 397; Fairchild v. City of St. Paul, 46 Minn. 540. The cost of land for the opening of a street where a fee is taken is a local improvement for which local assessments can be levied. Aldridge v. Essex Public Road Board, 46 N. J. Law, 126; Smith v. City of Toledo, 24 Ohio St. 126. Under Swan & S. St. 834, a street extension is not necessarily a street improvement.

[260] Alameda Macadamizing Co. v. Williams, 70 Cal. 534, 12 Pac. 530; Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901; Enos v. City of Springfield, 113 Ill. 65; Lowe v. White County Com'rs, 156 Ind. 163, 59 N. E. 466; Maybin v. City of Biloxi, 77 Miss. 673, 28 So. 566. A general tax levied on all the taxable property of the city for the purpose of paving one of its streets in the business portion of a town is not invalid since, as the court say: "The improvement resulting in the convenience and advantage of all the citizens, it was proper that it should be a common charge on all." Hutchinson v. City of Pittsburg, 72 Pa. 320.

[261] Wilcoxon v. City of San Luis Obispo, 101 Cal. 508, 35 Pac. 988. The authority for the widening of a street cannot include its grading and graveling. City of Baltimore v. Eschbach, 18 Md. 276; State v. Ramsey County Dist. Ct., 33 Minn. 295; Ogden v. City of Hudson, 29 N. J. Law (5 Dutch.) 104; Vanatta v. City of Morristown, 34 N. J. Law, 445; Brenn v. City of Troy, 60 Barb. (N. Y.) 417; Borough of Steelton v. Booser, 162 Pa. 630, 29 Atl. 654. Authority for grading, etc., of a street does not authorize the levy of a special assessment to pay for the cost of building or repairing a retaining wall to sustain the street grade. This must be paid for from the general funds.

Mason v. City of Sioux Falls, 2 S. D. 640, 51 N. W. 770. The cost of curbing cannot be included under authority for grading a street. City of Vancouver v. Wintler, 8 Wash. 378. Where property is assessed for the grading of a street which in this case consists of lowering the street lines, property fronting on the street to which the material excavated is taken cannot be assessed for filling the street.

[262] McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010; Ryan v. Altschul, 103 Cal. 174, 37 Pac. 339; Job v. People, 193 Ill. 609. The power to construct sidewalks by special taxes on abutting property confers no power for the curbing of the street.

McNamara v. Estes, 22 Iowa, 246. The authority to macadamize a street includes the right to levy a special assessment for "trimming" and "guttering." City of Louisville v. Tyler, 111 Ky. 588, 64 S. W. 415, 65 S. W. 125; Robins v. New Brunswick St. & Sewer Com'rs, 44 N. J. Law, 116; City of Philadelphia v. Meighan, 159 Pa. 495.

[263] Reinken v. Fuehring, 130 Ind. 382, 30 N. E. 414, 15 L. R. A. 624. This case holds that sweeping a street as well as sprinkling it is a local improvement to be paid by the levy of a special assessment. Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375. Assessments for such purposes must be based upon the doctrine of benefits. Trustees

of Phillips Academy v. Inhabitants of Andover, 175 Mass. 118, 48 L. R. A. 550.

State v. Reis, 38 Minn. 371. The court in its opinion by Mitchell, J., said in part: "The principal question in this case is whether sprinkling a street is a 'local improvement' within the meaning of section one, article nine of the constitution for which an assessment may be levied upon the property fronting upon the street without regard to its cash valuation. * * * Sprinkling a street renders the property fronting on it more desirable and hence more valuable for occupancy,—a benefit not shared in by other property. The relator's main contention, however, is that street sprinkling is not an 'improvement,' within the meaning of this section of the constitution, because it lacks the element of permanence; that its results are transient; that, to constitute an improvement, there must be some work or structure, such as a pavement, sidewalk, or the like, that will remain after the labor is performed, and permanently enhance the value of the property. But, if permanence or durability is to be the test, how long must the beneficial results last in order to constitute an improvement? It certainly will not be claimed that the work must be eternal in duration, or imperishable in character. We are unable to see any difference in principle between the work of street sprinkling, the results of which, unless repeated, last but a day, and the construction of a block pavement or wooden sidewalk, which wears out or decays, and has to be rebuilt, every few years. When a pavement or sidewalk has worn out, the future value of the property is not enhanced by it, any more than it is by street sprinkling when that ceases. Neither do we see that it makes any difference whether the substance applied to the surface of the street is wood, which has to be renewed every few years, or water, which has to be applied daily. Each benefits the adjacent property as long as it lasts and no longer. It is not the agency used, or its comparative durability, but the result accomplished, which must determine whether a work is an improvement in the sense in which that word is here used. The only essential elements of a 'local improvement' are those which the term itself implies, viz., that it shall benefit the property on which the cost is assessed in a manner local in its nature, and not enjoyed by property generally in the city. If it does this,—rendering the property more attractive and comfortable, and hence more valuable for use, —then it is an improvement. That the regular and systematic sprinkling of a street has this effect upon the property fronting on it is a matter of common knowledge. This construction is fully warranted by the definitions of the word 'improvement' given by lexicographers. It has been defined as 'that by which the value of anything is increased, its excellence enhanced, or the like;' or 'an amelioration of the condition of property affected by the expenditure of labor or money, for the purpose of rendering it useful for other purposes than those for which it was originally used, or more useful for the same purposes.'"

In the recent case of Maydwell v. City of Louisville, 25 Ky. L. R.

1062, 76 S. W. 1091, it was held that the levying of a tax for the sprinkling of city streets was not unconstitutional as being levied for a purpose not public in its character. The court say: "It cannot be doubted at this day, that whatever is necessary for the preservation of the public health and safety is a public purpose, within the meaning of section 171 of the Constitution. For the purpose of furnishing the citizens with pure water, waterworks may be established, and public wells dug and maintained. That the public highways may, without peril, be traveled at night, they may be lighted at the public expense. That the people may have convenient and wholesome places for resort, public parks may be established and kept. For the education of the young, public schools are conducted. For the support of the indigent aged, almshouses are provided. For the reformation of vicious young, reformatories are maintained. For the relief of the sick, hospitals are provided. For the protection of the public health, nuisances are abated, streets and sewers are flushed and cleaned. As a protection against conflagration, fire departments are established; and as a safeguard for life and property, police departments are organized. It cannot be successfully denied that the dust upon the streets of large cities is a fruitful source of disease, as well as of annoyance, to the citizens. The same principle which authorizes the streets to be cleaned for the purpose of preventing noisome odors and epidemics of disease authorizes them to be sprinkled." But see City of Chicago v. Blair, 149 Ill. 310, 24 L. R. A. 412, where it is held that street sprinkling under Illinois Statutes is not a local improvement the cost of which can be charged against the property benefited. See, also, New York Life Ins. Co. v. Prest, 71 Fed. 815, where the court, after citing with approval the Illinois case above cited and quoting from its opinion says: "Under such ordinances, streets are sprinkled in front of vacant lots on which are neither house nor any 'living creature.' It could hardly be said, with reason, that running a sprinkling cart now and then in front of such a lot adds to its market value. Nor is there, in such occasional 'laying of the dust,' any semblance of permanency. It is as evanescent as the early and the later dew, and, in my judgment, it is no more within the power of a municipality thus to create liens on the citizen's property, than to hire a 'rain maker' to vex the skies for refreshing showers, and charge the lots adjacent to the raindrops with the cost thereof. As the sprinkling of the public highways of a city like the cleaning thereof, contributes much to the comfort and enjoyment of the public, its cost should be made a general, and not a special burden."

Kansas City v. O'Connor, 82 Mo. App. 655. A city cannot impose a special assessment on abutting property for sprinkling a street. The court said in part that the benefit received was too "ephemeral, and intangible to be denominated an improvement to the property" or to constitute a local improvement.

[264] City of Bridgeport v. Giddings, 43 Conn. 304; Butz v. Kerr, 123 Ill. 659, 14 N. E. 671, following People v. La Salle County Sup'rs, 111 Ill. 527; Shannon v. Village of Hinsdale, 180 Ill. 202; Yeakel v. City of

of hydrants, construction of viaducts,[266] local sewers,[267] ditches or drains,[268] or the running of sewer pipes,[269] the construction or re-

Lafayette, 48 Ind. 116; Cook v. Slocum, 27 Minn. 509. Widening and straightening a street is a local improvement within art. 9, § 1, Minnesota constitution.

State v. Ensign, 54 Minn. 372. A bridge constructed for the purpose of avoiding a grade crossing over railroad tracks is a local improvement the cost of which can be defrayed by special assessments upon property benefited. See, also, Kelly v. City of Minneapolis, 57 Minn. 294, 26 L. R. A. 92, as holding that an agreement between the city and railroad company in regard to the construction of viaducts to avoid grade crossings does not relieve the owners of property benefited by a change of street grade from their liability for special assessments based upon benefits received by the construction of the viaduct.

Sperry v. Flygare, 80 Minn. 325, 83 N. W. 177, 49 L. R. A. 757. A rural highway is not a local improvement and local assessments cannot, therefore, be imposed on abutting property to pay for its construction or improvement.

Morse v. City of West-Port, 110 Mo. 502, 19 S. W. 831; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432; Tifft v. City of Buffalo, 82 N. Y. 204; Barker v. State, 18 Ohio, 514. Under a special charter provision, a tax for the improvement of a street may be levied upon all the lands embraced within the corporate limits. Berlin Iron-Bridge Co. v. City of San Antonio (Tex. Civ. App.) 50 S. W. 408. A bridge spanning a river where it crosses a city street is regarded as a street improvement.

[265] Palmer v. City of Danville, 154 Ill. 156; Hughes v. City of Momence, 163 Ill. 535; Hewes v. Glos, 170 Ill. 436; Landon v. City of Syracuse, 163 N. Y. 562, 57 N. E. 1114. Where a water pipe or connection is put in by order of the common council without authority or request of the owners, it will not be considered, however, as an improvement but one which must be paid for from the general funds, following Alvord v. City of Syracuse, 163 N. Y. 158; City of Philadelphia v. Union Burial Ground Soc., 178 Pa. 533; Smith v. City of Seattle, 25 Wash. 300, 65 Pac. 612.

[266] Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962; City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366. A railroad bridge across a street cannot be paid for by special taxation.

[267] Appeal of Hunter, 71 Conn. 189; English v. City of Wilmington, 2 Marv. (Del.) 63, 37 Atl. 158; McChesney v. Village of Hyde Park (Ill.) 28 N. E. 1102; Payne v. Village of South Springfield, 161 Ill. 285, 44 N. E. 105; Mason v. City of Chicago, 178 Ill. 499; Hall v. Street Com'rs of Boston, 177 Mass. 434, 59 N. E. 68; Peck v. City of Grand Rapids, 125 Mich. 416, 84 N. W. 614. Under a charter provision authorizing proceedings for grading and graveling a street, the city cannot construct a sewer. Heman v. Schulte, 166 Mo. 409, 66 S. W. 163. The question of benefits received cannot be raised in a collateral attack. Schlapfer v. Town of Union, 53 N. J. Law, 67, 20 Atl. 894; De Witt v. City of Elizabeth, 56 N. J.

pair of sidewalks,[270] the establishment of park ways, public grounds or parks,[271] the construction of safe harbors, landings,

Law, 119, 27 Atl. 801; Post v. City of Passaic, 56 N. J. Law, 421, 28 Atl. 553; People v. City of Buffalo, 54 App. Div. 629, 66 N. Y. Supp. 1139, following 39 App. Div. 654, 57 N. Y. Supp. 1144; People v. Village of Yonkers, 39 Barb. (N. Y.) 266; Jones v. Holzapfel, 11 Okl. 405, 68 Pac. 511; Woodhouse v. City of Burlington, 47 Vt. 300.

[268] Peake v. City of New Orleans, 139 U. S. 342, 377; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33; McChesney v. Village of Hyde Park, 151 Ill. 634, 37 N. E. 858; Hatch v. Pottawattamie Co., 43 Iowa, 442; Davidson v. City of New Orleans, 34 La. Ann. 170. Where it is shown that the property was actually injured by the alleged drainage, the special assessment cannot be collected. Davies v. City of New Orleans, 40 La. Ann. 806; Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; Gray v. Board of Aldermen of Boston, 139 Mass. 328; People v. Saginaw County Sup'rs, 26 Mich. 22. The court here held that the power to tax is plenary, but taxation implies public interest, and in cases involving assessments it also implies proceedings in pais in some of which the taxpayers have a right to take part and be heard; the particular drainage legislation, viz., act of March 23, 1871, was held void because of a disregard of such principles. State v. Henry, 28 Wash. 38, 68 Pac. 368.

[269] Cone v. City of Hartford, 28 Conn. 363; Hungerford v. City of Hartford, 39 Conn. 279; McChesney v. Village of Hyde Park (Ill.) 28 N. E. 1102.

[270] White v. People, 94 Ill. 604; People v. Yancey, 167 Ill. 255; Village of Western Springs v. Hill, 177 Ill. 634; People v. Field, 197 Ill. 568. A grass plot on each side of a walk cannot be sodded and maintained by special assessments on abutting property under the legislative authority to construct sidewalks. City of Des Moines v. Stephenson, 19 Iowa, 507; Sloan v. Beebe, 24 Kan. 343; Dickinson v. City Council of Worcester, 138 Mass. 555. The expense of grading for a sidewalk cannot be charged against abutters under authority for the levy of an assessment to pay the cost of "paving a sidewalk."

Kemper v. King, 11 Mo. App. 116; Inhabitants of Butler v. Robinson, 75 Mo. 192; Flint v. Webb, 25 Minn. 93; Grant v. Bartholomew, 58 Neb. 839; Sigler v. Fuller, 34 N. J. Law, 227; Wright v. Briggs, 2 Hill (N. Y.) 77; Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459; Folmsbee v. City of Amsterdam, 142 N. Y. 118. If items are included in a local assessment not assessable on the property, it will render void the entire assessment.

In Mauldin v. City Council of Greenville, 53 S. C. 285, 43 L. R. A. 101, it is held that special assessments cannot be levied for the improvement of city sidewalks under Const. art. 10, § 5, which requires all property to be taxed uniformly and further requiring that all taxation by municipal corporations shall be for municipal purposes. Lufkin v. City of Galveston, 58 Tex. 545.

[271] Wilson v. Lambert, 168 U. S. 611; Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; Heller v. Garden City, 58 Kan. 263,

wharves and docks,[272] have each been considered local improvements of such a character that the cost of their construction or making should be assessed against the property benefited in proportion to the benefits received. The general rule in regard to the construction of all the improvements noted above in the absence of special charter or statutory provisions is that the original cost of such improvement must be borne by local assessments levied upon property benefited; after such original construction the cost of making the usual and necessary repairs must, however, be paid from the general corporate funds or revenues.[273] The power to construct local and public improvements outside of the corporate limits in the absence of an express legislative grant is

48 Pac. 841. A city may levy special assessments for the planting and maintenance of shade trees on its public streets. West Chicago Park Com'rs v. Farber, 171 Ill. 146; Chicago Title & Trust Co. v. Town of Lake View, 187 Ill. 622; Davies v. City of New Orleans, 40 La. Ann. 806; Foster v. Boston Park Com'rs, 131 Mass. 225; Id., 133 Mass. 321; State v. Brill, 58 Minn. 152; State v. St. Louis County Dist. Ct., 66 Minn. 161, 68 N. W. 860; State v. Ramsey County Dist. Ct., 75 Minn. 292, 77 N. W. 968; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; In re Beechwood Ave., 194 Pa. 86.

[272] Webb v. City of Demopolis, 95 Ala. 116, 21 L. R. A. 62; City of San Pedro v. Southern Pac. R. Co., 101 Cal. 333; City of Chicago v. Rumsey, 87 Ill. 348 (river tunnel); Ligare v. City of Chicago, 139 Ill. 46; Snyder v. Town of Rockport, 6 Ind. 237; Shepherd v. Municipality No. 3, 6 Rob. (La.) 349; Town of St. Martinsville v. The Mary Lewis, 32 La. Ann. 1293; Com. v. Tucker, 19 Mass. (2 Pick.) 44; City of Galveston v. Menard, 23 Tex. 349; Backus v. City of Detroit, 49 Mich. 110; City of Hannibal v. Winchell, 54 Mo. 172; Marshall v. Guion, 11 N. Y. (1 Kern.) 461; Miller v. City of Milwaukee, 14 Wis. 642. Breakwater. But the following authorities deny the power in respect to the particular improvement suggested: Town of Newport v. Batesville & B. R. Co., 58 Ark. 270 (levee); Spengler v. Trowbridge, 62 Miss. 46 (harbor).

[273] City of New Haven v. Whitney, 36 Conn. 373. The macadamizing of a street held not a public improvement but a "maintaining" of the street to be paid for from the general fund. See McChesney v. Village of Hyde Park, 151 Ill. 634; Crane v. West Chicago Park Com'rs, 153 Ill. 348, 26 L. R. A. 311; Bullitt v. Selvage, 20 Ky. L. R. 599, 47 S. W. 255; Holzhauer v. City of Newport, 94 Ky. 396; Robertson v. City of Omaha, 55 Neb. 718, 76 N. W. 442, 44 L. R. A. 534; Wilson v. Inhabitants of Trenton, 61 N. J. Law, 599, 40 Atl. 575, 44 L. R. A. 540; In re Smith, 99 N. Y. 424. Increasing the width of a sidewalk is a "repavement" within the meaning of that term as found in laws relating to sidewalks in New York City. Borough of Steelton v. Booser, 162 Pa. 630.

universally denied. The rule applies to the opening of a street, the repairing of a highway, the grading of an avenue, or the construction of a bridge.[274]

§ 341. Extent of exercise.

The power to construct a local improvement, when it exists, can be exercised to any extent within its full limit as granted; the extent being dependent upon the discretion of the officials to whom is delegated this duty.[275] One-half the lateral width of a street may therefore be paved where the authority exists to make such improvement, the cost to be paid by the front foot or running foot assessment.[276] Improvements to be properly chargeable against the property benefited must be in or upon a highway legally laid out or dedicated.[277]

[274] Municipality No. 1 v. Young, 5 La. Ann. 362; City of Baltimore v. Porter, 18 Md. 284; City of Cambridge v. Railroad Com'rs, 153 Mass. 161. But see the following cases where either an express grant existed or the power was held as implied from peculiar conditions or circumstances: Cochran v. Village of Park Ridge, 138 Ill. 295, following Shreve v. Town of Cicero, 129 Ill. 226; Callon v. City of Jacksonville, 147 Ill. 113; Dively v. City of Cedar Falls, 27 Iowa, 227; City of Coldwater v. Tucker, 36 Mich. 474; In re East Syracuse, 20 Abb. N. C. (N. Y.) 131.

[275] Dickerson v. Franklin, 112 Ind. 178. The use to which property is put is immaterial so long as the land is of such a character as may make it susceptible to the benefit to be derived from the construction of a local improvement.

Hall v. Street Com'rs of Boston, 177 Mass. 434, 59 N. E. 68. The power to levy special assessments can be exercised to pay the cost of a local improvement already constructed.

Mayall v. City of St. Paul, 30 Minn. 294, followed in Armstrong v. City of St. Paul, 30 Minn. 299, which holds that Minnesota Sp. Laws 1874, relating to local improvements and special assessments do not authorize the making of two separate and distinct public improvements as an entirety; the proceedings, authorization and construction of which must be considered and made separately.

[276] Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co., 24 Ind. App. 114, 54 N. E. 1076.

[277] City of Meriden v. Camp, 46 Conn. 284; Holliday v. City of Atlanta, 96 Ga. 377; Village of Hyde Park v. Borden, 94 Ill. 26; Holmes v. Village of Hyde Park, 121 Ill. 128; Bodley v. Finley's Ex'r, 23 Ky. L. R. 851, 64 S. W. 439; De Grilleau v. Frawley, 48 La. Ann. 184. A private way does not fall under the operation of act No. 20 of 1882, § 37, relative to paving.

Pierce v. Franklin County Com'rs, 63 Me. 252; City of Baltimore v. Hook, 62 Md. 371; Masonic Bldg.

Discretionary power of municipal authorities to make improvements. Unless some statutory restriction exists where the power to make local or public improvements has been granted to a subordinate public agency, such power is deemed of a discretionary character and the action of the municipal authorities in its reasonable exercise or non-exercise is not subject to control by the courts or open to judicial review.[278] Courts will not, therefore, ordinarily interfere in the ordering of a local improvement on the ground that it is unnecessary or unreasonable or that officers are not acting in good faith.[279] This official discretion may include not only the time of making the improvement but also its extent and nature,[280] and the material for construction.[281]

Ass'n v. Brownell, 164 Mass. 306; Detroit, M & T. R. Co. v. City of Detroit, 49 Mich. 47; Hennessy v. City of St. Paul, 44 Minn. 306; State v. Dean, 23 N. J. Law (3 Zab.) 335; Copcutt v. City of Yonkers, 59 Hun, 212, 13 N. Y. Supp. 452, judgment affirmed 128 N. Y. 669; Heiple v. City of East Portland, 13 Or. 97; Coxe v. City of Philadelphia, 47 Pa. 9; Reed v. City of Erie, 79 Pa. 346; City of Philadelphia v. Ball, 147 Pa. 243; City of Philadelphia v. Thomas' Heirs, 152 Pa. 494; Bishop v. Tripp, 15 R. I. 466. But see the following cases either denying the rule or holding that where the municipality may acquire in the future the public way, the invalidity of a local assessment cannot be raised by the property owner. Hunerberg v. Village of Hyde Park, 130 Ill. 156; Leman v. City of Lake View, 131 Ill. 388; Cochran v. Village of Park Ridge, 138 Ill. 295; Maywood Co. v. Village of Maywood, 140 Ill. 216; Donovan v. Coles, 33 Mo. App. 161; Parker v. City of New Brunswick, 30 N. J. Law, 395; Jersey City v. Howeth, 30 N. J. Law, 521; People v. Common Council of Rochester, 5 Lans. (N. Y.) 142; In re McGown, 18 Hun (N. Y.) 434; Richards v. City of Cincinnati, 31 Ohio St. 506; Darlington v. Com., 41 Pa. 63.

[278] Harney v. Benson, 113 Cal. 314; English v. City of Danville, 150 Ill. 92; Church v. People, 179 Ill. 205; Shannon v. Village of Hinsdale, 180 Ill. 202; Skinker v. Heman, 64 Mo. App. 441; Estes v. Owen, 90 Mo. 113; Barber Asphalt Pav. Co. v. French, 158 Mo. 534, 54 L. R. A. 492; Taintor v. Town of Morristown, 33 N. J. Law, 57.

[279] Bacon v. City of Savannah, 105 Ga. 62; Chicago N. W. R. Co. v. Town of Cicero, 154 Ill. 656; City of Chicago v. Nichols, 177 Ill. 97; City of Elkhart v. Wickwire, 121 Ind. 331; In re City of Cedar Rapids, 85 Iowa, 39; Miller v. Webster City, 94 Iowa, 162; Carr v. Dooley, 122 Mass. 255; City of Detroit v. Beecher, 75 Mich. 454, 4 L. R. A. 813; Morse v. City of Westport, 110 Mo. 502; Id., 136 Mo. 276; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673; Oil City v. Oil City Boiler Works, 152 Pa. 348.

[280] Lightner v. City of Peoria, 150 Ill. 80; Murphy v. City of Peoria, 119 Ill. 509; Brown v. Barstow, 87 Iowa, 344; Boston & M. R. Co. v. City of Lawrence, 84 Mass. (2 Allen) 107;

§ 342. Discretionary power with reference to locating limits of taxing district.

Where statutory or constitutional authority exists for the making of local assessments, a discretion is usually vested in the municipal authorities to divide their territory into such taxation districts for the construction of local improvements as seem advisable[282] and the exercise of a sound discretion by them will not

Dunker v. Stiefel, 57 Mo. App. 379; In re Protestant Episcopal Public School, 40 How. Pr. (N. Y.) 198; Id., 47 N. Y. 556; State v. City of Portage, 12 Wis. 562.

[281] Cram v. City of Chicago, 138 Ill. 506; Cunningham v. City of Peoria, 157 Ill. 499; Shannon v. Village of Hinsdale, 180 Ill. 202; Burlington & M. R. R. Co. v. Spearman, 12 Iowa, 112; Gunning Gravel & Pav. Co. v. City of New Orleans, 45 La. Ann. 911; City of Grand Rapids v. Board of Public Works, 87 Mich. 113; Id., 99 Mich. 392; Shimmons v. City of Saginaw, 104 Mich. 511; City of Schenectady v. Union College, 144 N. Y. 241, 26 L. R. A. 614; City of Philadelphia v. Evans, 139 Pa. 483; Benson v. Village of Waukesha, 74 Wis. 31. See, also, in addition to the cases cited in the last four preceding notes, the following construing generally the discretionary power of municipal authorities in the making of local improvements and the levying of special taxes for the payment of their cost of construction. In re Market St., 49 Cal. 546; City of Meriden v. Camp, 46 Conn. 284; Weld v. People, 149 Ill. 257; McChesney v. City of Chicago, 152 Ill. 543; City of Baltimore v. Scharf, 54 Md. 499; Slocum v. Selectmen of Brookline, 163 Mass. 23; Gibson v. Kayser's Ex'rs, 16 Mo. App. 404; Ritterskamp v. Stifel, 59 Mo. App. 510; State v. Corrigan Consol. St. R. Co., 85 Mo. 263; Jelliff v. City of Newark, 48 N. J. Law, 101; In re Cullen, 119 N. Y. 628; Appeal of Harper, 109 Pa. 9; Alford v. Dallis (Tex. Civ. App.) 35 S. W. 816.

[282] Goodrich v. City of Detroit, 184 U. S. 432; City of Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198; Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; Bradford v. City of Pontiac, 165 Ill. 612; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605; Louisville Steam Forge Co. v. Anderson, 22 Ky. L. R. 397, 57 S. W. 617; Hoyt v. City of East Saginaw, 19 Mich. 39; Trowbridge v. City of Detroit, 99 Mich. 443, 58 N. W. 368. A municipality may enlarge an assessment district when it deems that the property thus included is benefited by the local improvement.

Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Mitchell v. City of Negaunee, 113 Mich. 359, 71 N. W. 646. It is within the discretion of the legislature to establish city limits and taxing districts and to authorize the levy of assessments for the purpose of establishing a public electric light plant. City of Kalamazoo v. Francoise, 115 Mich. 554, 73 N. W. 801; Deerfield Tp. v. Harper, 115 Mich. 678, 74 N. W. 207; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich.

be interfered with by the courts.[283] That the legislature of a state under constitutional authority may exercise the same discretion and power is axiomatic.[284]

By whatever authority the taxing district is established, however, it must be accurately defined. This is necessary in order to determine what property is subject to the assessment and how such assessments are to be apportioned or divided according to the benefits.[285] On the establishment of such a local assessment

564; Uhrig v. City of St. Louis, 44 Mo. 458; Shimmons v. City of Saginaw, 104 Mich. 511; City of Kalamazoo v. Francoise, 115 Mich. 554; City of Kansas v. Baird, 98 Mo. 215. It does not necessarily follow, however, that all property within such district will be benefited and therefore subject to assessment. Where the "benefits received" rule obtains, property not benefited although within the assessment district will not be subject to taxation.

City of St. Louis v. Brown, 155 Mo. 545; Jelliff v. City of Newark, 49 N. J. Law, 239, 12 Atl. 770; People v. City of Buffalo, 30 App. Div. 654, 57 N. Y. Supp. 1144, reversing 52 N. Y. Supp. 689; Gest v. City of Cincinnati, 26 Ohio St. 275; Woodhouse v. City of Burlington, 47 Vt. 301.

[283] Matthews v. Kimball, 70 Ark. 451, 66 S. W. 651, 69 S. W. 547. When a city council establishes a local improvement district, the presumption follows that the property therein will be benefited by the improvement for which the district is created. This presumption can be rebutted by evidence to the contrary.

Primm v. City of Belleville, 59 Ill. 142. Where the municipal authorities in the exercise of an assumed legislative authority exempt property from taxation or divide the city into districts in such a manner as to violate constitutional principles of equality and uniformity in the levy of special assessments, their action will be set aside as unconstitutional.

Preston v. Rudd, 84 Ky. 150; Hanscom v. City of Omaha, 11 Neb. 37. In levying assessments upon property within such a district, the authorities cannot ignore arbitrarily the question of special benefits to specific property. Kountze v. City of Omaha, 63 Neb. 52, 88 N. W. 117; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494. An entire municipality may be treated as one taxing district and the cost of a sewerage system assessed on all lands within its limits.

[284] Davidson v. City of New Orleans, 96 U. S. 97; Spencer v. Merchant, 125 U. S. 345; Bauman v. Ross, 167 U. S. 548; Parsons v. Dist. of Columbia, 170 U. S. 45; Williams v. Eggleston, 170 U. S. 304, 311. The court said in this case: "Neither can it be stated that if the state constitution does not prohibit, the legislature, speaking generally, may create a new taxing district determining what territory shall belong to such district and what property shall be considered as benefited by a proposed improvement." Webster v. City of Fargo, 181 U. S. 394; Livingston v. City of New York, 8 Wend. (N. Y.) 85.

[285] Montgomery Ave. Case, 54 Cal.

or taxing district only property within its limits will be subject to the levy of local assessments for paying the cost of its local improvements. Its taxing jurisdiction, in other words, does not extend beyond its limits and applies conversely only to property within its limits for improvements made within the district.[286]

§ 343. Property subject to local assessments.

The difference in the theories and principles sustaining the imposition of local assessments distinguished from taxation, as the word is commonly understood, leads to a radical difference

580; New Brunswick Rubber Co. v. New Brunswick St. Com'rs, 38 N. J. Law, 190. "It is not sufficient that the legislative act merely declares that the cost, or a part of the cost, of the improvement, shall be assessed upon the lots drained by the sewers to be built. It must as well establish some rule, some definite scheme, within constitutional limits for the apportionment of the tax upon the lands on which such special burthen is imposed. An act of the legislature directing a tax for a local improvement to be imposed upon particular lands, to be legal or effectual, must consist of something more than a mere authorization to assess a sum of money, the cost of a local improvement, upon the designated property—the act must determine the mode of distributing the burthen; the property out of which the tax is to be made must be designated, and some certain standard of assessments established; it cannot properly be left by the legislature to the discretion of others to fix the method."

[286] Minnesota & M. Land & Imp. Co. v. City of Billings (C. C. A.) 111 Fed. 972. Such district may include the entire city. City of Ottawa v. Macy, 20 Ill. 413; McChesney v. Village of Hyde Park (Ill.) 28 N. E. 1102; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505. Such district must have been created before a special assessment for the construction of a sewer will be held valid.

Willard v. Albertson, 23 Ind. App. 164; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; Pearson v. Zable, 78 Ky. 170; City of Independence v. Gates, 110 Mo. 374, 19 S. W. 728; In re City of Amsterdam, 55 Hun, 270, 8 N. Y. Supp. 234; Le Roy v. City of New York, 20 Johns. (N. Y.) 430.

Matter of Ward, 52 N. Y. 395. Where, however, there is a provision restricting assessments to "the adjoining property" by which it is meant contiguous to the local improvement, not that merely adjacent; the municipal authorities have no power to create an assessment district which would make property not contiguous subject to a local assessment. Farrington v. City of Mt. Vernon, 166 N. Y. 233; Spring Garden v. Wistar, 18 Pa. 195; Pacific Sheet Metal Works v. Roeder, 26 Wash. 183, 66 Pac. 428.

in determining the validity of local assessments levied upon specific property. The basis of a local assessment is a benefit or advantage peculiarly received by it from the making of the local improvement and in amount supposed to be equal to the local assessment levied upon it for the purpose of paying in part the cost of such improvement. Property which cannot by reason of its location or use be benefited to any extent through the making of a local improvement cannot be legally assessed for the making of such improvement.[287] The question of the exemption of property from local assessment may arise in connection with the construction of a statutory or contract exemption, its use, the character or ownership of property, or prior taxation for or construction of the same improvement either by the municipality or owner.[288]

[287] City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33. A special assessment may be levied upon Pueblo lands of a city susceptible to cultivation when irrigated, for the purpose of constructing an irrigation ditch under act of March 7th, 1887.

City of McKeesport v. Soles, 178 Pa. 363. The question, however, is determined by the facts in each particular case if there is a substantial advantage or benefit derived by property suburban in its character it can still be assessed for local improvements made on streets adjoining or fronting it.

[288] Park Ecclesiastical Soc. v. City of Hartford, 47 Conn. 89. Where lands will receive, however, a benefit from the construction of the new improvement, they can be assessed for their portion according to the method authorized by the statute.

Sargent v. City of New Haven, 62 Conn. 510; West Chicago Park Com'rs v. Metropolitan West Side El. R. Co., 182 Ill. 246, 55 N. E. 344; Sweet v. West Chicago Park Com'rs, 177 Ill. 492; Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281; Holloran v. Morman, 27 Ind. App. 309, 59 N. E. 869.

City of Burlington v. Palmer, 67 Iowa, 681. The cost of relaying pavement necessitated by the construction of a sewer must be charged to the cost of the sewer, not upon abutting property.

Miller v. Hagemann, 114 Iowa, 195, 86 N. W. 281. An exemption granted though it be valid, is conferred as a matter of public policy and it cannot become a contract right which the legislature is precluded from impairing by subsequent legislation.

Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386. A city may pay the cost of a local improvement in front of property practically valueless from its general fund and by so doing not affect the validity of assessments abutting against other property for their proportionate cost of the work.

Gleason v. Barnett, 22 Ky. L. R. 1660, 61 S. W. 20; City of Louisville v. Tyler, 23 Ky. L. R. 827, 64 S. W. 415; Sears v. Boston St. Com'rs, 173

(a) Statutory exemptions. The maintenance of private schools, seminaries, colleges, or other institutions of learning; hospitals for the care of the sick and institutions for the care and training of the unfortunate; churches and buildings used by religious bodies for the maintenance of their institutional work; is considered a benefit and advantage to society at large and, therefore, to some extent, an aid to government. For this reason it is usual by statutory or constitutional provision to exempt the property of such institutions or organizations from public or general taxation. Such exemptions are usually for a limited period, are construed strictly and, it is well established, do not relieve these organizations or such property from the payment of special assessments. Their property receives from the construction of local improvements an equal advantage and benefit with other property similarly situated with respect to the improvement and it is but just that it bear its share of the cost.[289]

Mass. 350, 53 N. E. 876; Deerfield Tp. v. Harper, 115 Mich. 678, 74 N. W. 207; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713; Davis v. City of Newark, 54 N. J. Law, 595; In re Welsh, 30 Hun (N. Y.) 372; In re East Eighteenth St., 142 N. Y. 645, 37 N. E. 568, affirming 75 Hun, 603, 27 N. Y. Supp. 591; Archer v. City of Mt. Vernon, 63 App. Div. 286, 71 N. Y. Supp. 571; Wewell v. City of Cincinnati, 45 Ohio St. 407, 15 N. E. 196. Ford v. City of Toledo, 64 Ohio St. 92, 59 N. E. 779, construing Ohio Rev. St. § 2380, exempting property from assessment for the construction of a sewer when not in need of local drainage.

City of Harrisburg v. Funk, 200 Pa. 348, 49 Atl. 992. The ordinary repairs made to a highway will not be considered an original improvement so as to exempt abutting property from liability for paving.

City of Philadelphia v. Gowen, 202 Pa. 453, 52 Atl. 3; Wistar v. City of Philadelphia, 111 Pa. 604. The rule applies where the owner has made an improvement at his own expense of the proper materials and in the proper manner as required by ordinance of the city or the rules of its engineering department.

City of Philadelphia v. Odd Fellows' Hall Ass'n, 168 Pa. 105. The construction of a private sewer will not relieve property from assessment for a public sewer subsequently built although the latter was used by the property owner. Leake v. City of Philadelphia, 171 Pa. 125; City of Erie v. Griswold, 184 Pa. 435; City of Philadelphia v. Yewdall, 190 Pa. 412; In re Lincoln Ave., 193 Pa. 435; City of Scranton v. Sturges, 202 Pa. 182; Boyden v. Village of Brattleboro, 65 Vt. 504. Property cannot be assessed twice to pay for the same improvement.

[289] See cases cited under the next following note. See, also, District of Columbia v. Sisters of Visitation of

A state or municipal organization may also, by law, exempt from taxation manufacturing industries or other private enter-

Washington, 15 App. D. C. 300. The exemption, however, may be absolute and the property relieved from the payment of local assessments as well as general taxes; such exemption, however, must be clearly and unmistakably granted. An act exempting certain property from "any and all taxes or assessments national or municipal or county" held to confer such exemption.

30 Cent. Law J. 282, article by D. H. Pingrey; City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 12 L. R. A. 852, overruling Trustees of First M. E. Church v. City of Atlanta, 76 Ga. 181; City of Ottawa v. Free Church, 20 Ill. 423; McLean County v. City of Bloomington, 106 Ill. 209; University of Chicago v. People, 118 Ill. 565; Adams County v. City of Quincy, 130 Ill. 566; Thorn v. West Chicago Park Com'rs, 130 Ill. 594; First Presbyterian Church v. City of Ft. Wayne, 36 Ind. 338. Church property may be exempted from certain assessments, however, because there is no means to provide for ascertaining "its value."

Todd v. City of Atchison, 9 Kan. App. 251; Zable v. Orphans' Home, 92 Ky. 89, 13 L. R. A. 668; Kilgus v. Trustees of Orphanage of Good Shepherd, 94 Ky. 439; Boston Asylum & Farm School v. Boston St. Com'rs, 180 Mass. 485, 62 N. E. 961. A charter provision that a corporation may hold real estate and personal property free from taxation does not exempt its property from a liability for special assessments for street improvements.

Harvard College v. City of Boston, 104 Mass. 470; Washburn Memorial Orphan Asylum v. State, 73 Minn. 343, 76 N. W. 204; Lockwood v. City of St. Louis, 24 Mo. 20; City of Beatrice v. Brethren Church, 41 Neb. 358; State v. Robertson, 24 N. J. Law (4 Zab.) 504; Cooper Hospital v. City of Camden, 68 N. J. Law, 208, 52 Atl. 210. A hospital is not subject to an assessment for benefits derived from municipal improvements under a charter provision to the effect that its property and effects shall not be subject to any tax or assessment. A constitutional amendment adopted subsequently to such charter does not repeal the exemption.

Hudson County Catholic Protectory v. Kearney Tp., 56 N. J. Law, 385. A charter provision that the property of the corporation shall be exempt from the imposition of "any tax or assessment" applies to taxation for local improvements as well as for purposes of general revenue, following Protestant Foster Home Soc. v. City of Newark, 36 N. J. Law, 478; Harlem Presbyterian Church v. City of New York, 5 Hun (N. Y.) 442.

In re City of New York, 11 Johns. (N. Y.) 77. "The word 'taxes' means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word 'talliage,' 2 Inst. 232; and Lord Holt in Carth. 438, gives the same definition in substance of the word 'tax.' The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was

prises from the construction and establishment of which the corporate organization is supposed to receive a special benefit

extended to the real estate of any minister not exceeding in value $1,500. But to pay for the opening of a street in the ratio of the 'benefit or advantage' derived from it is no burden. It is no talliage or tax within the meaning of the exemption, and has no claim upon the public benevolence. Why should not the real estate of a minister as well as of other persons pay for such an improvement in proportion as it is benefited? There is no inconvenience or hardship in it and the maxim of law that qui sentit commodum debet sentire onus, is perfectly consistent with the interests and dictates of science and religion."

In re Williams & Anthony Streets, 19 Wend. (N. Y.) 678; Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506. The cemetery was by law exempt from all public taxes, rates and assessments; this exemption was held not to include a paving assessment. Folger, Judge, in the opinion says: "We think that the current of the authorities in this state and in some of the sister states runs to this result: that public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him towards the expense of carrying on the government, either directly, and, in general, that of the whole commonwealth, or more mediately and particularly through the intervention of municipal corporations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality to effect some work of local convenience, which in its results is of peculiar advantage and importance to the property, especially assessed for the expense of it, are not public but are local and private so far as this statute is concerned."

Tucker v. City of Utica, 95 App. Div. 173, 54 N. Y. Supp. 855. Property purchased with pension money is not exempt from assessments for local improvements. In re Second Ave. M. E. Church, 66 N. Y. 395; In re St. Joseph's Asylum, 69 N. Y. 353; In re Hebrew Benev. Orphan Asylum Soc., 70 N. Y. 476; In re Tremont Baptist Church, 66 Misc. 590, 73 N. Y. Supp. 1075. A valid exemption from such taxation may, however, be made for a limited period.

Roosevelt Hospital v. City of New York, 84 N. Y. 108; Monroe County v. City of Rochester, 154 N. Y. 570; Engstad v. Grand Forks County, 10 N. D. 54, 84 N. W. 577. Section 176 of the constitution of North Dakota which provides "that the legislative assembly shall by a general law exempt from taxation property used exclusively for schools, religious, cemetery or church purposes," is not self-executing.

City of Lima v. Lima Cemetery Ass'n, 42 Ohio St. 128; City of Philadelphia v. Contributors to Pennsylvania Hospital, 143 Pa. 367. The courts in this case held that a charitable organization exempted from all taxation, by law, was still subject to local assessment for the pur-

equal to, at least, the prospective taxes which might be derived from taxation of their property; the same rule as suggested above in respect to special assessments applies to this class of industries.[290] In some states, homesteads or certain specifically enumerated property is not subject to forced sale under any process of law; this exemption does not usually apply to local assessments,[291] and it can be said to be a general rule that as all exemptions are in derogation of a common right they are to be construed strictly and not allowed except when given in the clearest language.[292]

pose of keeping in repair the public streets and highways fronting upon its property; this liability being based upon or in the nature of a police regulation not an exercise of the taxing power.

City of Philadelphia v. Sheridan, 148 Pa. 532; City of Erie v. Y. M. C. A. Ass'n, 151 Pa. 168; In re College St., 8 R. I. 474; Yates v. City of Milwaukee, 92 Wis. 352, 66 N. W. 248. The rule applied to land leased or owned by a state agricultural society. Wisconsin Industrial School v. Clark County, 103 Wis. 651. See, also, Cooley, Taxation, pp. 207 et seq., where many cases are cited sustaining the principle above given.

[290] City of Tampa v. Kaunitz, 39 Fla. 683. A city has no power to grant exemption from taxation directly or indirectly or in any form. Lancaster v. Clayton, 86 Ky. 373. A municipal corporation has no power to confer an exemption from taxation upon a hotel the keeping of which, though for the public use, was not "a public service" under Kentucky bill of rights, § 1.

City of Middlesboro v. New South Brewing & Ice Co., 108 Ky. 351, 56 S. W. 427; Com. v. Burnside & C. R. R. Co., 95 Ky. 60; City of Portland v. Portland Water Co., 67 Me. 135; Frederick Elec. Light & Power Co. v. Frederick City, 84 Md. 599; People v. Cummings, 53 App. Div. 36, 65 N. Y. Supp. 581; Id., 166 N. Y. 110; McTwiggan v. Hunter, 19 R. I. 265, 33 Atl. 5, 29 L. R. A. 526. A gift of property may be the basis of exemption.

[291] Perine v. Forbush, 97 Cal. 305; Atchison, T. & S. F. R. Co. v. Peterson, 5 Kan. App. 103; Todd v. City of Atchison, 9 Kan. App. 251, 59 Pac. 676. The exemption of a homestead from authorized sale under any process of law does not exempt it from sale for the payment of delinquent taxes or special assessments. Nevin v. Allen, 15 Ky. L. R. 836, 26 S. W. 180; Bordages v. Higgins (Tex.) 19 S. W. 446; Allen v. City of Galveston, 51 Tex. 302; Lufkin v. City of Galveston, 58 Tex. 549.

[292] Orange & A. R. Co. v. City Council of Alexandria, 17 Grat. (Va.) 176. All exemptions from taxation are to be construed strictly. See, also, City of Louisville v. Nevin, 73 Ky. (10 Bush) 549; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 So. 200, 317, 28 So. 956; Mack v. Jones, 21 N. H. (1 Fost.) 393.

Crawford v. Burrell Tp., 53 Pa. 219. "Taxation is an act of sovereignty to be performed, so far as

(b) Contract exemptions. The reason for holding that statutory exemptions from taxation do not apply to local assessments would also hold as to property exempt from general taxation under a contract or special grant of exemption.[293]

(c) Exemption from local assessment because of use by common carriers. The one idea underlying the validity of a local assessment is, benefits received by the property from the making of a local improvement. It is clear, therefore, that if property is so situated, either because of its physical location or use, as to be incapable of receiving a benefit by the construction of a local improvement, local assessments cannot be levied upon it. Property which ordinarily comes within this exemption is that

it conveniently can be with justice and equality to all. Exemptions, no matter how meritorious the cause, are of grace and must be strictly construed." Weeks v. City of Milwaukee, 10 Wis. 242; Cooley, Taxation, p. 205.

[293] City of Covington v. Com. of Kentucky, 173 U. S. 231, 19 Sup. Ct. 383; Wells v. City of Savannah, 181 U. S. 531; Lake St. El. R. Co. v. City of Chicago, 183 Ill. 75, 47 L. R. A. 624; Maine Water Co. v. City of Waterville, 93 Me. 586, 45 Atl. 830. But a contract exempting a water company from special taxation as a part consideration for the use of its water by the city will be enforced.

Inhabitants of Dover v. Maine Water Co., 90 Me. 180; Towne v. City Council of Newton, 169 Mass. 240. Such a contract, however, when based upon a substantial consideration may be enforced and its execution will not invalidate a general assessment.

Coit v. City of Grand Rapids, 115 Mich. 493, 73 N. W. 811. A contract exemption releasing a property owner from special assessment made for the purpose of extending a sewer through his land can be enforced when based upon a gift of the right of way for the improvement.

State v. District Ct. of Fourth Judicial Dist., 83 Minn. 170, 86 N. W. 15; Vrana v. City of St. Louis, 164 Mo. 146, 64 S. W. 180. A stipulation exempting from special assessments specific property accompanying the dedication of land to public use cannot be enforced.

State v. Hannibal & St. J. R. Co., 75 Mo. 208; City of St. Joseph v. Crowther, 142 Mo. 155. A gift or grant of land to the city for street purposes will not justify the assessment at the rate of one per cent. per lot, such assessment effecting the exemption of the property.

Buess v. Town of West Hoboken, 51 N. J. Law, 267, 17 Atl. 110; J. & A. McKechnie Brewing Co. v. Village of Canandaigua, 15 App. Div. 139, 44 N. Y. Supp. 317. A contract exemption from special assessments because of a gift of right of way for the local improvement can be enforced. City of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. 522; City of Dallas v. Dallas Consol. Elec. St. R. Co., 95 Tex. 268, 66 S. W. 835.

belonging to and used by railroad corporations or common carriers in the transaction of that part of their business in which the public does not participate or as to which it is not necessary that the public should have direct access to their properties. The difficulty, lack of feasibility, and inadvisability as a matter of public policy, of enforcing a tax lien against a portion of railroad property or right of way is also a reason of equal weight.[294]

[294] McVerry v. Boyd, 89 Cal. 304; Schmidt v. Market St. & W. G. R. Co., 90 Cal. 37; New York & N. H. R. Co. v. City of New Haven, 42 Conn. 279. In this case, however, it was held that the property of a railroad company in front of a passenger station and along whose track the street had been improved by the city was not liable to be assessed for any part of the expense either because of the increased value of the land or on the ground that the station was rendered more accessible.

Farmers' Loan & Trust Co. v. Borough of Ansonia, 61 Conn. 76; Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962. A leasehold right in trackage is not subject to special assessment for local improvements.

City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451, 26 N. E. 366. Railroad property receives no benefit from the widening of a street where it possesses a track and therefore cannot be assessed for any part of the cost. Chicago, R. I. & P. R. Co. v. City of Chicago, 139 Ill. 573, 28 N. E. 1108; Neustadt v. Illinois Cent. R. Co., 31 Ill. 484. But see, however, the case of Illinois Cent. R. Co. v. City of Decatur, 147 U. S. 190, as holding that the property of the Ill. Cent. R. Co. is subject to taxation for local improvements. Illinois Cent. R. Co. v. City of Mattoon, 141 Ill. 32; Rich v. City of Chicago, 152 Ill. 18. The possibility that the neighborhood will increase in population is not a "benefit" such as to render railroad land liable to its portion of the cost of a sewer.

City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148. Where railroad property is subject to assessments it can be sold for their nonpayment in the same manner as lands delinquent for state and county taxes. Village of River Forest v. Chicago & N. W. R. Co., 197 Ill. 344. There can be no assessment where the property is used as a right of way merely and will not be benefited by the proposed improvement.

Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co., 24 Ind. App. 114, 54 N. E. 1076; Chicago, R. I. & P. R. Co. v. City of Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763; Atchison, T. & S. F. R. Co. v. Peterson, 5 Kan. App. 103, 48 Pac. 877. The question is one, however, for the exclusive determination of the legislature. Bakewell v. Police Jury, 20 La. Ann. 334. The burden is upon the party claiming an exemption.

City of Boston v. Boston & A. R. Co., 170 Mass. 95, 49 N. E. 95. Property used for railroad purposes is already devoted to a public use. Detroit, G. H. & M. R. Co. v. City of Grand Rapids, 106 Mich. 13, 28 L. R. A. 793. The road bed of a railroad

On the other hand, property which is not so used or of this character is clearly subject both to taxation and the levy of local assessments. The same rule has been applied by the courts in many cases in construing the word "taxation" as used in grants of exemption. That phrase being interpreted as not including assessments for local municipal improvements, it not being taxation within the common acceptation of that term.[295]

company cannot be locally assessed where the basis of such assessment is the principle of benefits received.

Auditor General v. Duluth, S. S. & A. R. Co., 116 Mich. 122, 74 N. W. 505; First Division of St. Paul & P. R. Co. v. City of St. Paul, 21 Minn. 526; City of St. Paul v. St. Paul & S. C. R. Co., 23 Minn. 469; State v. Ramsey County Dist. Ct., 68 Minn. 242; Morris & E. R. Co. v. Jersey City, 36 N. J. Law, 56; Winona & St. P. R. Co. v. City of Watertown, 1 S. D. 46; Chicago, M. & St. P. R. Co. v. City of Milwaukee, 89 Wis. 506, 28 L. R. A. 249.

Sweaney v. Kansas City R. Co., 54 Mo. App. 265; McCutcheon v. Pacific R. Co., 72 Mo. App. 271; New Jersey Midland R. Co. v. Jersey City, 42 N. J. Law, 97. Under § 9 of the act of 1873, p. 112, providing for the taxation of railroad property, if such property is benefited by a local improvement, it is subject to a special assessment for its proportionate cost of such improvement. In re West Shore & O. Terminal Co. (N. J. Law) 49 A. 543; In re Pennsylvania R. Co. (N. J. Law) 49 Atl. 543. The rule applies to land leased by the railroad company and used for railroad purposes.

People v. Gilon, 126 N. Y. 147, 27 N. E. 282; People v. Adams, 88 Hun, 122, 34 N. Y. Supp. 579. A railroad cannot be arbitrarily assessed an amount sufficient to construct bridges over its tracks at street corners. In re Com'rs of Public Parks, 47 Hun (N. Y.) 302; Conway v. City of Rochester, 24 App. Div. 489, 49 N. Y. Supp. 244; City of Allegheny v. Western Pa. R. Co., 138 Pa. 375, 21 Atl. 763. The roadbed of a railroad company is conclusively presumed not to be benefited by the construction of a local improvement and therefore, it is not subject to assessment for any proportion of the cost. Junction R. Co. v. City of Philadelphia, 88 Pa. 424; City of Erie v. Piece of Land Fronting on State St., 175 Pa. 523; Columbia & P. S. R. Co. v. Chilberg, 6 Wash. 612; Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435; Chicago, M. & St. P. R. Co. v. City of Milwaukee, 89 Wis. 506, 28 L. R. A. 249.

[295] Illinois Cent. R. Co. v. City of Decatur, 147 U. S. 190, 37 L. Ed. 132. The following is the syllabus in this case:

"1. A special tax for a local improvement is not within the exemption from taxation granted to the Illinois Central Railroad Company by section 22 of the Act of 1851.

"2. Between general taxes for the support of the government, and special taxes for local improvement, there is a broad distinction.

"3. An exemption from taxation is to be taken as an exemption simply from the burden of ordinary tax-

And, further, in some states all property used by common carriers including their right of way, yards and other grounds of

es, taxes proper, and does not relieve from the obligation to pay special assessments.

"4. The cost of a local improvement is charged upon the contiguous property upon the theory that it is benefited thereby."

The court say in part in the opinion by Mr. Justice Brewer:

"Between taxes, or general taxes as they are sometimes called by way of distinction, which are the exactions placed upon the citizen for the support of the government, paid to the state as a state, the consideration of which is protection by the state, and special taxes or special assessments, which are imposed upon property within a limited area for the payment for a local improvement, supposed to enhance the value of all property within that area, there is a broad and clear line of distinction, although both of them are properly called taxes, and the proceedings for their collection are by the same officers and by substantially similar methods. Taxes proper, or general taxes, proceed upon the theory that the existence of government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property, and the promotion of those various schemes which have for their object the welfare of all. 'The public revenues are a portion that each subject gives of his property in order to secure or enjoy the remainder.' Montesquieu, Spirit of Laws, bk. 13, c. 1; Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U. S. (20 Wall.) 655, 664; Opinions of Judges, 58 Me. 591; Hanson v. Vernon, 27 Iowa, 28, 47; Judd v. Driver, 1 Kan. 455, 462; Philadelphia Ass'n for Relief of Disabled Firemen v. Wood, 39 Pa. 73, 82; Exchange Bank of Columbus v. Hines, 3 Ohio St. 1, 10.

"On the other hand, special assessments or special taxes proceed upon the theory that when a local improvement enhances the value of neighboring property that property should pay for the improvement. In Wright v. City of Boston, 63 Mass. (9 Cush.) 233, 241, Chief Justice Shaw said: 'When certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made, providing that, under suitable and equitable regulations, those common interests shall be so managed, that those who enjoy the benefits shall equally bear the burden.' In McGonigle v. City of Allegheny, 44 Pa. 118, 121, is this declaration: 'All these municipal taxes for improvement of streets, rest, for their final reason, upon the enhancement of private properties.' In Litchfield v. Vernon, 41 N. Y. 123, 133, it was stated that the principle is, 'that the territory subjected thereto would be benefited by the work and change in question.' * * * These distinctions have been recognized and stated by the courts of almost every state in the Union, and a collection of the cases may be found in

the character just noted, is subject to local assessment; the idea being that since such property might be put to a use by which

any of the leading text-books on taxation. Founded on this distinction is a rule of very general acceptance—that an exemption from taxation is to be taken as an exemption simply from the burden of ordinary taxes, taxes proper, and does not relieve from the obligation to pay special assessments. * * * This rule of exemption has been applied in cases where the language granting the exemption has been broad and comprehensive. Thus in City of Baltimore v. Green Mount Cemetery Proprietors, 7 Md. 517, the exemption was from 'any tax or public imposition whatever,' and it was held not to relieve from the obligation to pay for the paving of the street in front. In Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506, the exemption was from 'all public taxes, rates and assessments,' and it was held not to discharge from liability for a paving assessment. A like rule was held in City of Paterson v. Society for Establishing Useful Manufactures, 24 N. J. Law (4 Zab.) 385, where the exemption was from 'taxes, charges, and impositions.' And in City of Bridgeport v. New York & N. H. R. Co., 36 Conn. 255, the railroad company was held liable for a street assessment, although it paid a sum of money to the state which, by its charter, was to be 'in lieu of all other taxes.' Indeed the rule has been so frequently enforced that, as a general proposition, it may be considered as thoroughly established in this country. It is unnecessary to refer to the cases generally. It may be well, however, to notice those from Illinois. In Trustees of Illinois & M. Canal v. City of Chicago, 12 Ill. 403, 406, decided in the lower court at May term, 1849, and before the passage of the act creating the contract relied upon, and by the Supreme Court at the June term, 1851, the exemption was 'from taxation of every description by and under the laws of this state,' and it was held that that did not include an assessment made to defray the expense of opening a street. It was observed: 'In our opinion the exemption must be held to apply only to taxes levied for state, county, and municipal purposes. A tax is imposed for some general or public object. * * * The assessment in question has none of the distinctive features of a tax; it is imposed for a special purpose, and not for a general or public object.' See, also, City of Chicago v. Colby, 20 Ill. 614; City of Peoria v. Kidder, 26 Ill. 351; Town of Pleasant v. Kost, 29 Ill. 490, 494; Illinois Cent. R. Co. v. East Lake Fork S. D. Dist. Com'rs, 129 Ill. 417. Nor is this a mere arbitrary distinction created by the courts, but one resting on strong and obvious reasons. A grant of exemption is never to be considered as a mere gratuity—a simple gift from the legislature. No such intent to throw away the revenues of the state, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the state would otherwise be under obligations to do. A

it receives benefit from the local improvement, it would be inequitable to other property fronting on or adjacent to such im-

college or an academy, furnishes education to the young, which it is a part of the state's duty to furnish. The state is bound to provide highways for its citizens, and a railroad company in part discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and the material prosperity increased; churches and charitable institutions, because they tend to a better order of society. Or it may be that a sum, in gross or annual instalments, is received in lieu of taxes. But in every case there is the implied fact of some consideration passing for the grant of exemption. But those considerations as a rule pass to the public generally, and do not work the enhancement of the value of any particular area of property. So when the consideration is received by the public as a whole, the exemption should be and is of that which otherwise would pass to such public, to wit, general taxes."

New York, N. H. & H. R. Co. v. City of New Britain, 49 Conn. 40; Chicago & N. W. R. Co. v. People, 120 Ill. 104, 11 N. E. 418; Chicago, R. I. & P. R. Co. v. City of Chicago, 139 Ill. 573, 28 N. E. 1108. The question of whether certain railroad property is benefited by the construction of a local improvement is a question of fact for a jury to determine.

Illinois Cent. R. Co. v. City of Chicago, 141 Ill. 509, 30 N. E. 1036. It may be a question of fact for a jury to determine whether railroad property used for a particular purpose will be benefited by the construction of a local improvement.

Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, affirmed 147 U. S. 190, 154 Ill. 173; Illinois Cent. R. Co. v. City of Mattoon, 141 Ill. 32; Chicago Terminal Transfer Co. v. City of Chicago, 178 Ill. 429; Northern Ind. R. Co. v. Connelly, 10 Ohio St. 159; City of Ludlow v. Trustees of Cincinnati So. R. Co., 78 Ky. 357; City of Shreveport v. Prescott, 51 La. Ann. 1895, 46 L. R. A. 193; City of Boston v. Boston & A. R. Co., 170 Mass. 95; Lake Shore & M. S. R. Co. v. City of Grand Rapids, 102 Mich. 374, 29 L. R. A. 195; State v. Ramsey County Dist. Ct., 68 Minn. 242; New Jersey R. & Transp. Co. v. City of Newark, 27 N. J. Law (3 Dutch.) 185; Camden & A. R. Co. v. Atlantic City, 58 N. J. Law, 316, 33 Atl. 198; New Jersey Midland R. Co. v. Jersey City, 42 N. J. Law, 97.

Morris & E. R. Co. v. Jersey City, 64 N. J. Law, 151, 44 Atl. 938. City lots owned by a railroad outside of its right of way and not used for railroad purposes are subject to special assessments though such lots were purchased anticipating their use at some future time for strictly railroad purposes. City of Philadelphia v. Philadelphia & R. R. Co., 1 Pa. Super. Ct. 236. Only that portion of railroad property which is indispensable to the construction of the road and used for railroad purposes is exempt from local assessments.

Borough of Mt. Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 11

provement to make it bear the whole burden of its cost,[296] and it is also quite commonly held that where the right of way of a street railway company occupies the street, such right of way or franchise can be made to bear its portion of the cost of a local improvement. The liability in such cases is usually limited to the ground between or to that portion of the street immediately abutting on the railroad tracks.[297]

L. R. A. 520. Land occupied by a railroad company for depot grounds and lumber yard is subject to taxation for local improvements although its right of way and roadbed are not.

Chicago, M. & St. P. R. Co. v. City of Milwaukee, 89 Wis. 506, 28 L. R. A. 249. If the benefits from street improvements to portions of railroad property not used for railroad purposes are direct, immediate and certain, it will be liable for its portion of the cost. If, however, such property cannot be benefited by a street improvement, it cannot be assessed.

[296] Appeal of North Beach & M. R. Co., 32 Cal. 499; Illinois Cent. R. Co. v. City of Mattoon, 141 Ill. 32, 30 N. E. 773, following Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 1 L. R. A. 613. The latter case on appeal to the Supreme Court of the United States was affirmed in 147 U. S. 190, the claim being made by the Illinois Cent. R. Co. that its railroad property was exempt from local assessments under act of February 10th, 1851, § 22, which provided that in consideration of the payment to the state of seven per cent. of its gross earnings yearly, its property should be exempted from "all taxation of every kind."

Rich v. City of Chicago, 152 Ill. 18; Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649; Illinois Cent. R. Co. v. City of Kankakee, 164 Ill. 608; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148; Illinois Cent. R. Co. v. People, 170 Ill. 224. Under act of April 15th, 1875, § 1, unplatted railroad right of way may be assessed for the construction of an abutting sidewalk. Pittsburgh, C., C. & St. L. R. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Dunlieth & D. Bridge Co. v. City of Dubuque, 32 Iowa, 427; Atchison, T. & St. P. Ry. Co. v. Peterson, 5 Kan. App. 103, 48 Pac. 877; Atchison, T. & S. F. R. Co. v. Peterson, 58 Kan. 818, 51 Pac. 290, affirming 5 Kan. App. 103, 48 Pac. 877; City of Ludlow v. Cincinnati So. R. Co., 78 Ky. 357; Adams v. Yazoo & M. V. R. Co., 75 Miss. 275, 22 So. 824. There may be an absolute exemption from taxation for a limited period, however.

City of Nevada v. Eddy, 123 Mo. 546, 27 S. W. 471. Land used by a railroad company for depot and yard purposes is not exempt from special taxes for street improvements.

Morris & E. R. Co. v. City of Jersey City, 64 N. J. Law, 148, 44 Atl. 937. The liability for special assessments may, however, be a question of fact, especially when the assessment is based upon the principle of benefits received.

[297] Barber Asphalt Pav. Co. v. City of Denver (C. C. A.) 72 Fed. 336. In case the street railway company fails to pay its tax, there is an obli-

(d) Property exempt because of its location. Again the public corporation may include within its limits property other

gation resting on the city to pay for the improvements. McVerry v. Boyd, 89 Cal. 304; Schmidt v. Market St. & W. G. R. Co., 90 Cal. 37, 27 Pac. 61; Appeal of North Beach & M. R. Co., 32 Cal. 499; City of New Haven v. Fair Haven & W. R. Co., 38 Conn. 422; Farmers' Loan & Trust Co. v. Borough of Ansonia, 61 Conn. 76; Kuehner v. City of Freeport, 143 Ill. 92, 33 N. E. 372, 17 L. R. A. 774; Little v. City of Chicago, 46 Ill. App. 534; Parmelee v. City of Chicago, 60 Ill. 267; Chicago City R. Co. v. City of Chicago, 90 Ill. 573. But see, however, Peru & I. R. Co. v. Hanna, 68 Ind. 562; West Chicago Park Com'rs v. Metropolitan West Side El. R. Co., 182 Ill. 246, 55 N. E. 344. An assessment must, however, be based upon the principle of benefits received by the property. Bell v. City of Alton, 152 Ill. 170; Cicero & P. St. R. Co. v. City of Chicago, 176 Ill. 501; Lake St. El. R. Co. v. City of Chicago, 183 Ill. 75, 47 L. R. A. 624. An elevated road is liable to special assessments for improvements made on the street below.

Sawyer v. City of Chicago, 183 Ill. 57. A removal by a street railway company of its tracks from a street upon which a sewer has been constructed does not effect a release of its liability for its proportionate part of the cost of such sewer or furnish evidence sufficient to cause a forfeiture of its franchise or right to use that particular street.

Bickerdike v. City of Chicago, 185 Ill. 280; South Chicago City R. Co. v. City of Chicago, 196 Ill. 490; State v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041; Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co., 24 Ind. App. 114, 54 N. E. 1076. A railroad right of way which lies wholly within the limits of the street is not "abutting" property so as to make it liable to local assessments, but its right of way, of this character, is subject to such assessment.

City of New Orleans v. St. Charles St. R. Co., 28 La. Ann. 497; City of Shreveport v. Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193. The extent of the liability on the part of the street railroad company is strictly a matter of proof depending upon the proportionate space occupied by the company's tracks.

City of Shreveport v. Shreveport Belt R. Co., 104 La. 260. An agreement between a street railway company and the municipal authorities cannot be sustained where its effect is to reduce the liability of the railroad company for local assessments levied to pay the cost of local improvements below that which legally arises under the statutes imposing such a liability.

Davies v. City of Saginaw, 87 Mich. 439. The presumption exists that the company is not liable for more than the cost of the improvement and maintenance of the street between its tracks. Wolfort v. City of St. Louis, 115 Mo. 139; Johnson v. Duer, 115 Mo. 366; Lincoln St. R. Co. v. City of Lincoln (Neb.) 84 N. W. 802; Paterson & H. R. R. Co. v. City of Passaic, 54 N. J. Law, 340; North Jersey St. R. Co. v. Jersey City, 68 N. J. Law, 140, 52 Atl. 300. Laws of 1895, c. 217, do not author-

than that noted which, because of its location or use, does not or cannot receive the benefit of a local improvement.[298] To

ize an assessment against a street railroad company for paving the street.

Paterson & H. R. R. Co. v. City of Passaic, 54 N. J. Law, 340; Gilmore v. City of Utica, 55 Hun (N. Y.) 514. An assessment imposing upon abutting owners the entire cost of a street improvement including that portion between the tracks of a street railway company will be held illegal when a charter provision, mandatory in its terms, requires this to be done by the railway company.

Gilmore v. City of Utica, 131 N. Y. 26. Where such liability rests upon a railway company, the fact that an assessment is made does not, however, invalidate an assessment for repaving a street assigning one-third of the cost to the city at large and two-thirds on abutting owners. City of Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. 522; City of Erie v. Land on Eighteenth St., 171 Pa. 610; Houston City St. R. Co. v. Storrie (Tex. Civ. App.) 44 S. W. 693, reversing 92 Tex. 129, 46 S. W. 796; Storrie v. Cortes, 90 Tex. 283, 35 L. R. A. 666; Milwaukee Elec. R. & Light Co. v. City of Milwaukee, 95 Wis. 42; City of New Whatcom v. Bellingham Bay & B. C. R. Co., 16 Wash. 137. See, to the contrary, the following cases: South Park Com'rs v. Chicago, B. & Q. R. Co., 107 Ill. 105; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; Davis v. City of Newark, 54 N. J. Law, 144, 23 Atl. 276; Dean v. City of Paterson, 67 N. J. Law, 199, 50 Atl. 620; North Jersey St. R. Co. v. Jersey City, 68 N. J. Law, 140, 52 Atl. 300; People v. Gilon, 126 N. Y. 147, reversing 58 Hun, 76, 11 N. Y. Supp. 439; Conway v. City of Rochester, 24 App. Div. 489, 49 N. Y. Supp. 244. The tracks and franchises of a street railway corporation are not benefited by the improvement of the street on which they are located and therefore, they cannot be assessed for any part of its cost. O'Reilley v. City of Kingston, 114 N. Y. 439; City of Philadelphia v. Bowman, 175 Pa. 91; Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435.

[298] Hayward v. People, 145 Ill. 55, 33 N. E. 885; Sanitary Dist. of Chicago v. City of Joliet, 189 Ill. 270. Where the market value of lots is increased by a sewer they are subject to special assessment. City of Ft. Scott v. Kaufman, 44 Kan. 137, 24 Pac. 64; McGrew v. Stewart, 51 Kan. 185, 32 Pac. 896. Abutting property upon a highway included within the limits of a city of the first class is subject, after annexation, to special assessments under the front-foot rule. McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438; City of Lebanon v. Bevill, 18 Ky. L. R. 924, 38 S. W. 872; Lewis v. Schmidt, 19 Ky. L. R. 1315, 43 S. W. 433. An assessment may be levied on the property of a turnpike abutting the street where the county has assented to the improvement.

Town of Central Covington v. Park, 21 Ky. L. R. 1847, 56 S. W. 650; Brown v. City of Fitchburg, 128 Mass. 282; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800. Only the owners of property which would be exempt from special assessment by

illustrate, land which is remotely situated from the business center of a municipality, upon which no buildings are erected and

reason of its location or of the fact that it receives no special benefits can raise the question of the validity of the special assessment on such grounds. Owners of Ground v. City of Albany, 15 Wend. (N. Y.) 374. Land used for a water reservoir held not subject to assessment in the same proportion as other property.

Heiple v. City of East Portland, 13 Or. 97. The mere change of a road from county to city control without annexation does not make property abutting such road subject to that rule of assessment which applies to city property only. City of Philadelphia v. Sheridan, 148 Pa. 532, 24 Atl. 80. The question of use is generally one of fact for a jury to determine.

City of McKeesport v. Soles, 178 Pa. 363. The question is determined by the facts in each particular case; if there is a substantial advantage or benefit derived by property suburban in its character it can still be assessed for local improvements made on streets adjoining or fronting it. Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692. See, also, the following special Pennsylvania cases. Stewart v. City of Philadelphia (Pa.) 7 Atl. 192. The following charge to the jury was affirmed by a divided court: "The real test is not whether the property in question could properly be called either rural or suburban but whether the work done was required or justified by the locality of the property and character of the surrounding improvements." Forse v. City of Pittsburgh, 118 Pa. 458, 12 Atl. 366; Seely v. City of Pittsburgh, 82 Pa. 360; Craig v. City of Philadelphia, 89 Pa. 265. In Pennsylvania the legislation of 1866 and 1870 which authorizes abutting property to be assessed for local improvements, however just, is unconstitutional as applied to rural or suburban districts. City of Philadelphia v. Rule, 93 Pa. 15; City of Scranton v. Pennsylvania Coal Co., 105 Pa. 445; Keith v. City of Philadelphia, 126 Pa. 575; City of Scranton v. Bush, 160 Pa. 499. Abutting lots in the suburban portion of a city may be assessed for the cost of grading either according to benefits or frontage but in the rural portion according to benefits only. The following cases consider claimed exemptions from assessments for the local improvements noted because of the character or the use of the property for which the exemption is claimed.

Sewers: Appeal of Hunter, 71 Conn. 189. The potential use of a sewer adjoining property is a sufficient benefit to justify the assessments upon the property. Harney v. Benson, 113 Cal. 314, 45 Pac. 687. The untimely construction of a sewer in respect to its use will not relieve property that may receive a special benefit from such construction from local assessments. City of Atlanta v. Gabbett, 93 Ga. 266. A strip of land not available for any use is not suitable for the building of a sewer. Edwards v. City of Chicago, 140 Ill. 440, 30 N. E. 350. Farming lands three miles away from an underground sewer cannot be specially assessed for any portion of the work. Rich v. City of Chicago, 152 Ill. 18. Land which may, for its drainage, use eventually a

proposed sewer is assessable for its portion of the cost according to benefits received although it does not abut upon the street in which the sewer is to be constructed. Heman v. Allen, 156 Mo. 534. An original exemption from special assessment for the construction of a sewer can be removed by a subsequent change of conditions. The judgment in this case was afterwards affirmed by the supreme court of the United States in Shumate v. Heman, 181 U. S. 402. Brown's Estate v. Town of Union, 62 N. J. Law, 142, 40 Atl. 632. Unimproved lands within the city limits are subject to a sewerage tax levied for the construction of an adjacent sewer. McKee Land & Imp. Co. v. Williams, 63 App. Div. 553, 71 N. Y. Supp. 1141, affirming 51 N. Y. Supp. 399. The court in this case held that unoccupied lands laid out for city lots could be assessed for the construction of a trunk sewer although the benefits were purely speculative. Ford v. City of Toledo, 64 Ohio St. 92, 59 N. E. 779. Vacant lots adjacent to a sewer accessible by them for sewerage purposes are not exempt from the local assessment levied to pay the cost of its construction. The special benefit which they derive from this improvement it was held is sufficient to sustain an assessment made on the basis of benefits.

Unplatted or farming lands: Taber v. Grafmiller, 109 Ind. 206, 9 N. E. 721. Farming land though within the limits of a city is liable to assessments for street improvements. Leeper v. City of South Bend, 106 Ind. 375. Under Ind. Rev. St. § 3261, unplatted, unimproved lands within city limits are subject to the same extent to such special assessments as affect them in common with other city property. Farwell v. Des Moines Brick Mfg. Co., 97 Iowa, 286, 66 N. W. 176, 35 L. R. A. 63. Acts of 23d Gen. Assemb. c. 1, § 3, provides that lands not made into lots and used in good faith for agricultural purposes though within the limits of a city shall not be taxable for city purposes. Special grading and paving assessments are not taxes within the meaning of this law and such land may be subject to them. The question of good faith may also determine the liability of such land not only for special assessments but also for general municipal taxes. Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532. A statute exempting agricultural lands within the city limits from paying taxes "for city purposes" does not apply to special assessments for street paving. Medland v. Linton, 60 Neb. 249, 82 N. W. 866. An unplatted tract of land within the city limits will be subject to taxation for local improvements. City of Philadelphia v. Gorgas, 180 Pa. 296. The question as to whether certain property is farm land or a city lot and hence chargeable with municipal improvements is a question of fact for a jury to determine upon its proper submission by the court.

Cemeteries: Bloomington Cemetery Ass'n v. People, 139 Ill. 16. In Illinois, however, it is held that property used for cemetery purposes is subject to assessments for local improvements. In re Albany St., 11 Wend. (N. Y.) 149. Oakland Cemetery v. City of Yonkers, 63 App. Div. 448, 71 N. Y. Supp. 783. Property used for cemetery purposes will be by law exempt from taxation for local improvements. Batterman v. City of New York, 65 App. Div. 576,

which is not platted, it has been held cannot be assessed for the laying of a water main.[299]

(e) Public property; when exempt. The public ownership of property may again give rise to an exemption from local assessments. In some states, public property by law or policy is made exempt from local taxation or assessment.[300] In other

73 N. Y. Supp. 44. Although lands used for cemetery purposes may be exempt from special assessments, they are not relieved from an assessment for waterworks, such a tax not being either "public taxes or assessments" under the exemption statutes. People v. Fitch, 87 Hun (N. Y.) 391; Lima v. Lima Cemetery Ass'n, 42 Ohio St. 128. An incorporated cemetery is not exempt from assessment for local improvements under a statute exempting it from taxation. In re West End Ave. Sewer, 30 Pittsb. Leg. J. (N. S.) 63. The land of a county cemetery used for burial purposes is not liable for a local assessment for the construction of a sewer. Olive Cemetery Co. v. City of Philadelphia, 93 Pa. 129. The property of a cemetery association exempt from special assessment for the construction of a sewer. City of New Castle v. Stone Church Graveyard, 172 Pa. 86. City of Philadelphia v. Union Burial Ground Soc., 178 Pa. 533. An exemption from taxation of places of burial under constitution, art. 9, § 1, it is held in this case applies only to taxation for general purposes not to special assessments for local improvements.

[299] State v. Robert P. Lewis Co., 72 Minn. 87, 75 N. W. 108, 42 L. R. A. 639. The word "lot" as used in Sp. Laws 1885, c. 110, § 26, providing for the levy of special assessments "upon each and every lot" in front of which water mains are laid, is synonymous with the word "tract" and its size is immaterial so long as the condition exists.

[300] School Dist. of Ft. Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418. Property belonging to a school district but not used for school purposes is subject to assessment for local improvements. Ahern v. Board of Imp. Dist. No. 3, 69 Ark. 68, 61 S. W. 575; People v. Austin, 47 Cal. 353; Witter v. Mission School Dist., 121 Cal. 350, 53 Pac. 905. An exemption may apply only to land as used for school purposes.

State v. City of Hartford, 50 Conn. 89; In re City of Mt. Vernon, 147 Ill. 359, 23 L. R. A. 807. Constitution, art. 4, § 26, provides that "the state of Illinois shall never be made defendant in any court of law or equity." This exempts all property of the state by implication from special taxation levied to pay for local improvements. To make such a tax valid, notice must be given to property owners and such notice given to the state would in effect make it a party defendant to such proceedings.

West Chicago Park Com'rs v. City of Chicago, 152 Ill. 392; Sutton v. School City of Montpelier, 28 Ind. App. 315, 62 N. E. 710; Polk County Sav. Bank v. State, 69 Iowa, 24; City of Louisville v. Leatherman, 99 Ky. 213; City of Louisville v. McNaughten, 19 Ky. L. R. 1695, 44 S. W. 380. Under the principle that

states, it is liable to assessment for local improvements to the same extent as private property similarly situated.[301] The ob-

one governmental agency cannot be required to pay for the care and support of another, the property of a reform school held not subject to assessment for local improvements.

City of Louisville v. Hexagon Tile Walk Co., 103 Ky. 552, 45 S. W. 667; Louisville & N. R. Co. v. Nehan, 23 Ky. L. R. 889, 64 S. W. 457. The fact that public property is leased to a private corporation and the city derives a revenue therefrom does not make it liable for local assessments.

Baltimore County Com'rs v. Maryland Hospital for Insane, 62 Md. 127; Inhabitants of Worcester County v. City of Worcester, 116 Mass. 193; City of Big Rapids v. Mecosta County Sup'rs, 99 Mich. 351. The power given a city council to determine what portion of the cost of a local improvement shall be paid by local assessments on property benefited does not, by implication, authorize the assessment of public property belonging to a county and used for public purposes.

City of Clinton v. Henry County, 115 Mo. 557; City of St. Louis v. Brown, 155 Mo. 545; Von Steen v. City of Beatrice, 36 Neb. 421, 54 N. W. 677; Green v. Hotaling, 44 N. J. Law, 347; Elwood v. City of Rochester, 43 Hun (N. Y.) 102; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; Smith v. City of Buffalo, 159 N. Y. 427. A public street of a city as such cannot be benefited by the construction of a local improvement and therefore cannot be assessed as property benefited by such improvement. City of Toledo v. Board of Education, 48 Ohio St. 83, 26 N. E. 403. School property not liable for assessment on street improvements.

[301] Warner v. City of New Orleans (C. C. A.) 87 Fed. 829; Board of Improvement v. School Dist., 56 Ark. 354, 16 L. R. A. 418; City of San Diego v. Linda Vista Irr. Dist., 108 Cal. 189, 35 L. R. A. 33; City of Hartford v. West Middle Dist., 45 Conn. 462; Trustees of Illinois & M. Canal v. City of Chicago, 12 Ill. 403; Higgins v. City of Chicago, 18 Ill. 276; McLean County v. City of Bloomington, 106 Ill. 209; Adams County v. City of Quincy, 130 Ill. 566; In re City of Mt. Vernon, 147 Ill. 359, 23 L. R. A. 807; Sioux City v. Independent School Dist., 55 Iowa, 150; Edwards & Walsh Const. Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006; Franklin County Com'rs v. City of Ottawa, 49 Kan. 747. Under Gen. St. 1889, c. 19, § 32, a city of the second class has the power to levy a special assessment on public property for the improvement of a street in front of a court house. State v. Recorder of Mortgages, 45 La. Ann. 566, 12 So. 880; Marquez v. City of New Orleans, 13 La. Ann. 319; Correjolles v. Succession of Foucher, 26 La. Ann. 362; St. Louis Public Schools v. City of St. Louis, 26 Mo. 468; City of Clinton v. Henry County, 115 Mo. 557; Ross v. City of New York, 3 Wend. (N. Y.) 333; In re Turfler, 44 Barb. (N. Y.) 46; In re Extension of Church St., 49 Barb. (N. Y.) 455; People v. City of Syracuse, 63 N. Y. 291; Hassan v. City of Rochester, 67 N. Y. 528; Harris County v. Boyd, 70 Tex. 237; Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603.

jections to the levy of local assessments upon public property may be briefly stated as based, first, upon the fact that such obligations although paid by the public corporation can only be met by it through the levy and collection of general taxes upon all property within the jurisdiction, and second, that delinquent assessments are usually collected through the enforcement of a tax lien upon property liable; this as against public property would be against public policy.[302] On the other hand, the argument in sustaining the principle that public property should share its proportion of the cost of a local improvement is that if private property were compelled to pay the entire cost, it would result in the levy of an excessive tax upon it which, in many cases, might be an amount equal or even in excess of the value of the property.[303] The cost of improving public property cannot be assessed on abutting land.[304]

§ 344. The manner of determining local assessments; conversely, benefits.

In a preceding section,[305] the suggestion has been made that the manner of determining the amount of local assessments particular property shall pay is one of legislative expediency.[306]

[302] Town of West Hartford v. Hartford Water Com'rs, 44 Conn. 360. The principle that the product of one taxation ought not to be made the subject of another was applied in this case and land purchased by municipal authorities for reservoir purposes was held not subject to general taxation or the levy of special assessments for the construction of local improvements in its vicinity. City of St. Louis v. Brown, 155 Mo. 545; Dowdney v. City of New York, 54 N. Y. 186.

[303] City of New Orleans v. Warner, 175 U. S. 120, modifying decree in (C. C. A.) 81 Fed. 645; School Dist. of Ft. Smith v. Board of Improvement, 65 Ark. 343; City of Clinton v. Henry County, 115 Mo. 557.

[304] Bennett v. Seibert, 10 Ind. App. 369, 35 N. E. 35, 37 N. E. 1071; City of Harrisburg v. Shepler, 190 Pa. 374.

[305] See § 337.

[306] Shoemaker v. United States, 147 U. S. 282; Cass Farm Co. v. City of Detroit, 181 U. S. 396, affirming 124 Mich. 433, 83 N. W. 108; City of Detroit v. Parker, 181 U. S. 399, reversing Parker v. City of Detroit, 103 Fed. 357; King v. City of Portland, 184 U. S. 61, affirming 38 Or. 402, 55 L. R. A. 812; Carson v. Brockton Sewerage Commission, 182 U. S. 398, 21 Sup. Ct. 860; Hadley v. Dague, 130 Cal. 207; Ahern v. Board of Imp. Dist. No. 3, 69 Ark. 68, 61 S. W. 575; Craw v. Village of Tolono, 96 Ill. 255; Douglas v. Craig, 4 Kan. App. 99, 46 Pac. 197; Kelly v. Chadwick, 104 La. 719, 29 So.

If reference is made to this question in organic law, the provisions or recommendations there found will control.[307] And where, by such organic law, statutory provision or local ordinance, the method of apportioning a local assessment is fixed, an assessment according to some other rule or method will be fatally defective.[308] The usual constitutional provision, howev-

295. Where a legislative body has fixed a standard for the levy of special assessments, the judiciary cannot substitute their own standard based upon actual benefits received as measured by established values.

Kelly v. Chadwick, 104 La. 719; Hoyt v. City of East Saginaw, 19 Mich. 39. "The legislature of Michigan has power to authorize municipal corporations to assess the whole or any part of the expenses of local improvements upon the property deemed to be particularly and especially benefited thereby, in proportion to the benefit received, if in the judgment of the legislature that rule of apportionment is most just and equitable. There is nothing in the constitution which expressly prohibits this, and nothing in the nature of the power of taxation which is unconstitutional with it. The legislature may, moreover, empower the common council to judge what property is specially benefited by the improvement and define the taxing district accordingly. As the question in such case is one which can only properly and intelligently be decided upon personal inspection of the improvement and the manner in which it will affect the neighboring property, naturally a proper course is to report to some local tribunal."

Uhrig v. City of St. Louis, 44 Mo. 458; Wilson v. Inhabitants of Trenton, 55 N. J. Law, 220, 26 Atl. 83; Matter of Van Antwerp, 56 N. Y. 261; In re Amberson Ave. 179 Pa. 634. The legislature may ratify an assessment levied under a void act. Cruikshanks v. City Council of Charleston, 1 McCord (S. C.) 360; Woodhouse v. City of Burlington, 47 Vt. 301; City of Spokane v. Browne, 8 Wash. 317. The legislature may change the method of determining the amount of local improvements properly chargeable to specific property after the making of a local improvement and before the payment of the assessment has been completed. A property owner has no vested right in a particular method but the legislature cannot arbitrarily change the amount and time of payment of such assessments. Cooley, Taxation (2d Ed.) pp. 622, 646.

307 City of Pueblo v. Robinson, 12 Colo. 593; Hurford v. City of Omaha, 4 Neb. 336; State v. Dodge County Com'rs, 8 Neb. 124; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602; Reynolds v. City of Paterson, 48 N. J. Law, 435. Local assessments based on the lineal frontage instead of the value of land as assessed would be invalid under N. J. Const. art. 4, § 7.

308 Ware v. City of Jerseyville, 158 Ill. 234; Gleason v. Barnett, 20 Ky. L. R. 1694, 50 S. W. 67. If a contrary mode is merely recommended, it does not render an assessment invalid. McKeesport Borough v. Busch, 166 Pa. 46.

er, is one to be found in connection with a statement of the rules regulating and controlling the levy and imposition of taxes, prescribing the general principles which shall apply and giving perhaps to the legislature a discretion as to the method or the manner of the imposition and levy of special assessments. The phraseology used in the constitution of the state of Minnesota is that usually employed.[309] "Provided that the legislature may by general law or special act, authorize municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements, or both, without regard to a cash valuation, and in such a manner as the legislature may prescribe." Where such legislative discretion is given, laws passed authorizing the levy of special assessments according to the methods usually employed based, however, upon a benefit received by the property, are constitutional.[310] It is useless at this time when the principle is so well established to give at length reasons for or against what has been discussed by the courts of every state in the Union. So long as the fundamental idea underlying a valid and legal levy of special assessments is not ignored, namely, the doctrine of benefits received, such legislation will be held constitutional.[311]

[309] Minn. Const. art. 9, § 1.

[310] Lent v. Tillson, 72 Cal. 404; Fagan v. City of Chicago, 84 Ill. 227. Where the method for paying for local improvements is given by the legislature to municipal authorities, the courts have no power to interfere with the exercise of its discretion.

Carpenter v. City of St. Paul, 23 Minn. 232. The decision of a city council that certain property is benefited by a local improvement and should therefore be assessed for its proper proportion of the cost is not ordinarily reviewable in the courts. Neither is evidence to disprove benefits admissible, following Rogers v. City of St. Paul, 22 Minn. 494.

[311] See, also, cases cited under § 337. Fay v. City of Springfield, 94 Fed. 409. An act which authorizes the levy of special assessments for the making of a local improvement based upon a special benefit to the property against which the assessment is made, if it does not afford the property owner an opportunity to question the existence of such benefit, is unconstitutional as taking private property without the payment of just compensation.

City of Peoria v. Kidder, 26 Ill. 351; Falch v. People, 99 Ill. 137; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; McKee v. Town of Pendleton, 154 Ind. 652; Town of Bellevue v. Peacock, 11 Ky. L. R. 702, 12 S. W. 1042; Fidelity Trust & Safety Vault Co. v. Voris' Ex'rs, 22 Ky. L. R. 1873, 61 S. W. 474; Abraham v. City of Louisville

The legislature cannot, however, change the method of determining the liability of property for special assessments after they have been levied to pay the cost of a local improvement authorized,[312] neither can it change the extent to which property shall be liable for local assessments after this has been determined by the ordering or construction of a local improvement,[313] the principle being that the system for determining the liability of property for special assessments in vogue at the time a local improvement is ordered determines the manner and extent of its liability for the construction of that particular improvement.[314]

§ 345. According to frontage.

The method which is ordinarily adopted is what may be termed the "frontage rule."[315] The property fronting upon a public

23 Ky. L. R. 375, 62 S. W. 1041; Barfield v. Gleason, 23 Ky. L. R. 128, 63 S. W. 964. Such legislation is constitutional even though it makes no provision for a preliminary hearing to ascertain the extent of special benefits to each piece of property resulting from the improvement.

Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; City of St. Joseph v. Anthony, 30 Mo. 537; Jersey City v. Howeth, 30 N. J. Law, 521. The manner of apportioning a local assessment upon property will be immaterial so long as it properly distributes the cost among the owners of the property benefited.

Howell v. City of Buffalo, 37 N. Y. 267; Hill v. Higdon, 5 Ohio St. 243. It is competent for the legislature to authorize municipal corporations to levy special assessments for local improvements upon real estate peculiarly and specially benefited and in proportion to such benefit.

Northern Indiana R. Co. v. Connelly, 10 Ohio St. 159; Maloy v. City of Marietta, 11 Ohio St. 636; Bonsall v. Town of Lebanon, 19 Ohio, 418; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673; City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128; Wilson v. City of Seattle, 2 Wash. St. 543; Bond v. City of Kenosha, 17 Wis. 284; Meggett v. City of Eau Claire, 81 Wis. 326, 51 N. W. 566.

[312] Keith v. City of Philadelphia, 126 Pa. 575.

[313] Niklaus v. Conkling, 118 Ind. 289.

[314] McPike v. City of Alton, 187 Ill. 62; Crawfordsville Music Hall Ass'n v. Clements, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752; City of Cincinnati v. Seasongood, 46 Ohio St. 296, 21 N. E. 630. The rule also applies to municipal ordinances relative to the levy of local assessments. Douglass v. City of Cincinnati, 29 Ohio St. 165; Borough of New Brighton v. Biddell, 201 Pa. 96, 50 Atl. 989.

[315] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Arndt v. City of Cullman, 132 Ala. 540, 31 So. 478;

local improvement is assessed to the extent of its frontage and according to the benefits derived from such improvement, its

Hart v. Gavem, 12 Cal. 476; Diggins v. Brown, 76 Cal. 318; McDonald v. Conniff, 99 Cal. 386; Diggins v. Hartshorne, 108 Cal. 154; San Diego Inv. Co. v. Shaw, 129 Cal. 273. The liability of abutting property applies only to the cost of the improvement to the center of the street. Wilbur v. City of Springfield, 123 Ill. 395; Green v. City of Springfield, 130 Ill. 515; Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741; Payne v. Village of South Springfield, 161 Ill. 285; Job v. City of Alton, 189 Ill. 256; City of New Albany v. Cook, 29 Ind. 220. Holding Indiana special session acts of 1865, c. 30 constitutional in its provisions for the assessment of the cost of local improvements upon abutting property. Taylor v. City of Crawfordsville, 155 Ind. 403, 58 N. E. 490; Kirkland v. Board of Public Works, 142 Ind. 123; Hackworth v. City of Ottumwa, 114 Iowa, 467, 87 N. W. 424; Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7.

In Kentucky prior to the adoption in 1891 of § 174 of the present constitution, lands used exclusively for agricultural purposes although within the limits of a municipal organization were not subject to taxation for municipal purposes, unless it could be shown as a fact that such lands were capable of and did receive some of the benefits supposed to be derived from municipal organization. The section referred to, however, abrogated this rule and since its adoption in the year named, all lands of whatever character within the limits of a city are subject to taxation for municipal purposes. Cases decided in Kentucky before vol. 92 of the Kentucky reports and vol. 17 of the S. W. Reporter follow the old rule and later decisions the new one.

Com. v. Bank of Commerce (Ky.) 81 S. W. 679; Malchus v. District of Highlands, 67 Ky. (4 Bush) 547. Joyes v. Shadburn, 11 Ky. L. R. 892, 13 S. W. 361. Cost of grading apportioned according to the front-foot rule. Com. v. Louisville & N. R. Co., 20 Ky. L. R. 351, 46 S. W. 206; Shuck v. City of Lebanon, 21 Ky. L. R. 969, 53 S. W. 655; Ryan v. Central City, 21 Ky. L. R. 1070, 54 S. W. 2; City of Augusta v. Taylor, 23 Ky. L. R. 1647, 65 S. W. 837; Louisville & N. R. Co. v. Orr, 91 Ky. 109; Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251; City of Baltimore v. Brick Co., 80 Md. 458; Scott County v. Hinds, 50 Minn. 204; City of St. Louis v. Lane, 110 Mo. 254, 19 S. W. 533. The benefits resulting from the opening of an alley presumably accrue to the owners only of the property in the block in which the alley is opened.

Adams v. Green, 74 Mo. App. 125; Sheehan v. Owen, 82 Mo. 458; Thornton v. City of Clinton, 148 Mo. 648. The assessment rate cannot be so high that its payment by one property owner will pay the cost of the improvement, thus providing against the contingency that other lot owners will fail to pay the tax. Raymond v. Borough of Rutherford, 56 N. J. Law, 340, 29 Atl. 156. The front-foot rule is not necessarily inconsistent with the principle that land should be assessed only in proportion to benefits received. Speer

frontage being the best measure or standard for ascertaining the benefits.[316] Under this method the cost of making the improve-

v. City of Passaic, 38 N. J. Law, 168; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Jaeger v. Burr, 36 Ohio St. 164. At any rate the assessment must be uniform upon all property assessed. Findlay v. Frey, 51 Ohio St. 390; Hand v. Fellows, 168 Pa. 456, 23 Atl. 1126. The legislature may give the municipal authorities the choice of methods. City of Scranton v. Koehler, 200 Pa. 126, 49 Atl. 792; Deblois v. Barker, 4 R. I. 445; Winona & St. P. R. Co. v. City of Watertown, 1 S. D. 46; Harrell v. Storrie (Tex. Civ. App.) 47 S. W. 838; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785; Davis v. City of Lynchburg, 84 Va. 861; City of Norfolk v. Ellis, 26 Grat. (Va.) 224.

City of Seattle v. Yesler, 1 Wash. T. 571. An assessment arbitrarily made for the whole cost of an improvement of an abutting street is invalid as violating the constitutional provision that assessments must be uniform and in accordance with the value of the property taxed. Dancer v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475; Johnson v. City of Milwaukee, 40 Wis. 315.

[316] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Allman v. District of Columbia, 3 App. D. C. 8. A boulevard twenty feet wide between a building and a street line does not make the lot adjoining not-abutting property so as to exempt it from an assessment for an improvement in the street fronting on such property.

Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585; In re Market St., 49 Cal. 546. The liability of abutting property depends upon the legality of the contract for the construction of the improvement. San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; Martin v. Wagner, 120 Cal. 623; Palmer v. City of Danville, 154 Ill. 156. The same principle of uniformity and equality must, however, control the levy of assessments. McKee v. Town of Pendleton, 154 Ind. 652; City of Muscatine v. Chicago, R. I. & P. R. Co., 88 Iowa, 291, 55 N. W. 100. Where abutting owners own to the middle of the street, they are liable for the cost of paving that one-half of the street next abutting the lot lines irrespective of the condition of the other one-half.

Eagle Mfg. Co. v. City of Davenport, 101 Iowa, 493, 70 N. W. 707, 38 L. R. A. 480. The sale of a narrow strip of land from a larger tract, the strip immediately abutting upon a street undergoing improvement, will not relieve the tract of land thus made nonabutting property from its proportion of the assessment; the sale of such strip being clearly fraudulent and for the purpose of relieving the larger tract of land of its proper measure or proportion of the burden of the construction of the local improvement.

McGrew v. Kansas City, 64 Kan. 61, 67 Pac. 438. Under Gen. St. 1901, § 729, providing for an assessment when property has been divided into lots and blocks, an unplatted tract of land even though it is surrounded by streets is not regarded as a "block."

Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608. Where the cost of constructing a sidewalk varies in different blocks,

ment in or on areas at the intersection of streets, alleys or highways, is usually paid from the general revenues.[317] The question of whether certain property fronts, adjoins or abuts upon a public improvement,[318] and the depth to which accessible,[319] is

each block should be treated as a whole for the purpose of assessing its cost upon abutting property. City of Louisville v. Selvage, 21 Ky. L. R. 349, 51 S. W. 447. A gross inequality in apportioning the cost of improvement will not be allowed. Allen v. Krenning, 23 Mo. App. 561. A corner lot may be assessed for the improvement of each street though such improvements are made at the same time and are of the same character.

Jersey City v. State, 30 N. J. Law, 521; City of Cincinnati v. Batsche, 52 Ohio St. 324, 27 L. R. A. 536; Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9, 691; Ladd v. Gambell, 35 Or. 393; Winona & St. P. R. Co. v. City of Watertown, 1 S. D. 46; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785. The local assessment must be levied for the present improvement. City of New Whatcom v. Bellingham Bay & B. C. R. Co., 16 Wash. 137. But the element of benefits, however, should not be disregarded. Hayes v. Douglas County, 92 Wis. 429, 31 L. R. A. 213.

[317] Boyle v. Tibbey, 82 Cal. 11; Bacon v. City of Savannah, 86 Ga. 301; Praigg v. Western Pav. & Supply Co., 143 Ind. 358. One-half the cost of such improvements only paid by abutting property. Wolf v. City of Keokuk, 48 Iowa, 129. By ordinance, however, a portion of its cost must be paid by abutting property. City of Lawrence v. Killam, 11 Kan. 499; Boone v. Nevine, 15 Ky. L. R. 547, 23 S. W. 512. A special charter provision, however, may provide otherwise. Town of Central Covington v. Weighans, 19 Ky. L. R. 1979, 44 S. W. 985; Moale v. City of Baltimore, 61 Md. 224; City of Sedalia v. Coleman, 82 Mo. App. 560; In re Delaware & H. Canal Co., 8 N. Y. Supp. 352. Where the benefit rule obtains the cost of improving street intersections is charged upon property benefited.

City of Schenectady v. Trustees of Union College, 66 Hun, 179, 21 N. Y. Supp. 147. Property owners liable for the cost of improvements on street intersections. People v. City of Syracuse, 30 Misc. 409, 63 N. Y. Supp. 878. In computing frontage the width of intersecting streets should not be included. Conde v. City of Schenectady, 164 N. Y. 258, reversing 29 App. Div. 604, 51 N. Y. Supp. 854. Laws 1893, c. 190, renders abutting property liable for the cost of repaving street intersections, applying Schenectady City charter, § 59, adopted in 1890. Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393. Where property benefited pays the cost of the improvement, this will include the expense of improving street intersections.

[318] Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772; City of Savannah v. Weed, 96 Ga. 670; Harney v. Benson, 113 Cal. 314; City of Toledo v. Sheill, 53 Ohio St. 447, 30 L. R. A. 598; City of Springfield v. Green, 120 Ill. 269; Chicago, B. & Q. R. Co. v. South Park Com'rs, 11 Ill. App. 562. Railroad right of way which merely crosses a street cannot be re-

one of fact to be determined by an examination of each particular case.[320] The general principle, however, applies that there

garded as abutting property for the purpose of local assessment.

See, also, South Park Com'rs v. Chicago, B. & Q. R. Co., 107 Ill. 105; Wilbur v. City of Springfield, 123 Ill. 395; Byram v. Foley, 17 Ind. App. 629, 47 N. E. 351; Indianapolis & V. R. Co. v. Capitol Pav. & Const. Co., 24 Ind. App. 114, 54 N. E. 1076.

Haley v. City of Alton, 152 Ill. 113. A special assessment under the frontage rule must be based upon the cost of the improvement from which it receives the benefit. Morrison v. Hershire, 32 Iowa, 271; Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386; Meyer v. City of Covington, 103 Ky. 546, 45 S. W. 769; Anderson v. Bitzer, 20 Ky. L. R. 1450, 49 S. W. 442; Elder v. Cassilly, 21 Ky. L. R. 1274, 54 S. W. 836; Phillips' Ex'r v. Phillips' Adm'r, 81 Ky. 328; Powers v. City of Grand Rapids, 98 Mich. 393. Access to and from a bridge makes property "abutting." State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639; City of St. Louis v. Juppier (Mo.) 3 S. W. 401; Lansing v. City of Lincoln, 32 Neb. 457; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562; Brown's Estate v. Town of Union, 62 N. J. Law, 142; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; City of Toledo v. Sheill, 53 Ohio St. 447, 42 N. E. 323, 30 L. R. A. 598; Haviland v. City of Columbus, 50 Ohio St. 471; Sandrock v. City of Columbus, 51 Ohio St. 317. The location of the property at the time the assessment is made controls the question of frontage.

[319] City of Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135. An assessment on the frontage basis is not unfair where the lots abutting the improvement are of substantial and equal depth. Walker v. City of Aurora, 140 Ill. 402; City of Frankfort v. State, 128 Ind. 438, 27 N. E. 1115; Reeves v. Grottendick, 131 Ind. 107, 30 N. E. 889. Act of 1881 (Rev. St. § 3163) was repealed by act of 1885 (Rev. St. 1881, § 3163). City of Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468; Amery v. City of Keokuk, 72 Iowa, 701; Allen v. City of Davenport, 107 Iowa, 90; Niklaus v. Conkling, 118 Ind. 289; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; Schaefer v. Selvage, 19 Ky. L. R. 797, 41 S. W. 569; Bitzer v. O'Bryan, 21 Ky. L. R. 1307, 54 S. W. 951; Fidelity Trust & Safety Vault Co. v. Vorris' Ex'rs, 110 Ky. 315, 61 S. W. 474; Louisville Steam Forge Co. v. Mehler, 112 Ky. 438, 64 S. W. 396, 652; Weed v. City of Boston, 172 Mass. 28, 42 L. R. A. 642; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; State v. Robert P. Lewis Co., 72 Minn. 87, 42 L. R. A. 639; Wolfort v. City of St. Louis, 115 Mo. 139, 21 S. W. 912; Forry v. Ridge, 56 Mo. App. 615.

Long Branch Police, Sanitary & Imp. Commission v. Dobbins, 61 N. J. Law, 659, 40 Atl. 599. An assessment based on the frontage principle is not necessarily erroneous because of a lack of uniformity in the depth of abutting lots if the benefit has been fairly and judiciously assessed upon property benefited. In re Rogers Ave., 29 Abb. N. C. 361, 22 N. Y. Supp. 27; Rolph v. City of Fargo, 7 N. D. 640; Griswold v. Pelton, 34 Ohio St. 482; Bishop v. Tripp, 15 R. I. 466, 8 Atl. 692; Tripp v. City

must be an actual contact with or abutting upon the local improvement or the street on which it is constructed.[321] Conveyances of property made for the purpose of depriving tracts of land of frontage which would otherwise be subject to local assessments based upon the frontage rule are generally regarded as not made in good faith and as not relieving the property from

of Yankton, 10 S. D. 516, 74 N. W. 447. An equal special assessment based upon the frontage rule where the lots are not of a uniform depth is not necessarily repugnant to the constitutional provision requiring equality of taxation. Howell v. City of Tacoma, 3 Wash. St. 711; Griggs v. City of Tacoma, 3 Wash. St. 785; Ryan v. Town of Sumner, 17 Wash. 228, 49 Pac. 487.

[320] Farr v. West Chicago Park Com'rs, 167 Ill. 355, 46 N. E. 893; Chicago, R. I. & P. R. Co. v. City of Moline, 158 Ill. 64, following Kuehner v. City of Freeport, 143 Ill. 92, 17 L. R. A. 774, and Freeport St. R. Co. v. City of Freeport, 151 Ill. 451. A railroad right of way in a public street is "contiguous property" and subject to special taxes for local improvements upon or in that street.

[321] Johnson v. District of Columbia, 6 Mackey (D. C.) 21; Chicago, B. & Q. R. Co. v. City of Quincy, 135 Ill. 563, 27 N. E. 192. Railroad property separated only by a sidewalk from that part of a street which it is proposed to pave is "contiguous" to the proposed improvement. Brooks v. City of Chicago, 168 Ill. 60. Land lying at the end of a street just paved is subject to special assessments. McFarlane v. City of Chicago, 185 Ill. 242; Smith v. City of Des Moines, 106 Iowa, 590, 76 N. W. 836; Gilcrest v. McCartney, 97 Iowa, 138; Arnold v. City of Cambridge, 106 Mass. 352. The improvement of two streets cannot be regarded as a whole, each should be considered separately and with a view to its own special circumstances.

Scott County v. Hinds, 50 Minn. 204. In determining what is actual frontage, the official maps and plats control. Crane v. French, 50 Mo. App. 367. Under the frontage rule a tract of land which is separated from the street by a strip five feet wide will be considered fronting on abutting property. Erisman v. Chosen Freeholders of Burlington County, 64 N. J. Law, 516, 45 Atl. 998; Matter of Ward, 52 N. Y. 395; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571. Property facing upon two streets cannot be assessed as an entirety for an improvement upon one of its streets.

O'Reilley v. City of Kingston, 114 N. Y. 439; City of Cincinnati v. Batsche, 52 Ohio St. 324, 27 L. R. A. 536; 40 N. E. 21; Raymond v. City of Cleveland, 42 Ohio St. 522; City of Cincinnati v. Anderson, 52 Ohio St. 600; McCormick's Estate v. City of Harrisburg (Pa.) 18 Atl. 126. The frontage rule will be valid even though the assessment is greater than the value of the lot. In re Fifty-fourth St., 165 Pa. 8, following In re Morewood Ave., 159 Pa. 20. Property which does not abut upon a local improvement is not subject to an assessment for its proportion of the cost even where such improvement furnishes the only means of ingress and egress. In re Orkney St., 194 Pa. 425, 48 L. R. A. 274.

the local assessment which it was intended by the conveyance or transfer should be done.[322] Legislation that arbitrarily establishes the "front foot" or "frontage" rule as a basis for the levy of special assessments is not unconstitutional even when no opportunity is given for a preliminary examination of the relative benefits received by property liable and assessed.[323] The usual objections made to such legislation being that it is a taking of property without due process of law or that it does not give the one aggrieved a right of appeal to a jury,[324] or that it is taxation without representation.[325]

[322] Eagle Mfg. Co. v. City of Davenport, 101 Iowa, 493, 70 N. W. 707, 38 L. R. A. 480. The conveyance, however, is not void except for purposes of assessment; between the parties it is good. Ransom v. City of Burlington, 111 Iowa, 77, 82 N. W. 427; Gobisch v. Inhabitants of North Bergen, 37 N. J. Law, 402. In re Grant Ave., 34 Misc. 724, 70 N. Y. Supp. 1045. Land which is separated by a strip from the local improvement under the benefit rule may be still subject to its proportion of the local assessment. Mayer v. City of New York, 101 N. Y. 284.

[323] See cases cited in § 345. French v. Barber Asphalt Pav. Co., 181 U. S. 324; Charles v. City of Marion, 98 Fed. 166; Speer v. City of Athens, 85 Ga. 49, 9 L. R. A. 402; City of Galesburg v. Searles, 114 Ill. 217; State v. Reis, 38 Minn. 371; State v. District Ct. St. Louis County, 61 Minn. 542; Inhabitants of Palmyra v. Morton, 25 Mo. 593; City of St. Joseph v. O'Donoghue, 31 Mo. 345; Powell v. City of St. Joseph, 31 Mo. 347; City of St. Louis v. Clemens, 49 Mo. 552; Moran v. Lindell, 52 Mo. 229. The same rule applies to legislation making city authorities the judges of what improvements are necessary and what property is benefited. City of Moberly v. Hogan, 131 Mo. 19; Rolph v. City of Fargo, 7 N. D. 640, 42 L. R. A. 646; City of Harrisburg v. McPherran, 200 Pa. 343, 49 Atl. 988; Witman v. City of Reading, 169 Pa. 375. A difference in value per front foot does not affect the application of the rule.

[324] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Howe v. City of Cambridge, 114 Mass. 388. A statute authorizing the levy of special assessments "upon the abutters in just proportion" is not unconstitutional as not affecting the proportion in which the expense is to be assessed: this is a question of fact. Conde v. City of Schenectady, 164 N. Y. 258; Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Schroder v. Overman, 61 Ohio St. 1, 47 L. R. A. 156. It is not necessary that the records should affirmatively show that the question of benefit to the land in question was considered in levying the assessment. Dancer v. Town of Mannington, 50 W. Va. 322, 40 S. E. 475.

[325] Masonic Bldg. Ass'n v. Brownell, 164 Mass. 306. Taxpayers are represented in and by the legislature passing such legislation.

§ 346. Assessment based upon location.

Property which is benefited by the making of a public improvement may not directly front or abut upon the improvement although it may, as suggested, have received special benefits and most substantial ones from its making.[326] It is deemed inequitable that the property thus specially benefited should escape its share of the cost, and to meet this contingency the rule may be adopted that all benefited adjacent property is taxable; that the cost of making a local improvement should be paid by all property that receives a special benefit in excess of that received by the public at large. The right to levy in such a case depends upon propinquity to the public improvement,[327] and relative proximity therefore is the measure of benefit.

§ 347. Levy based upon ascertained benefits.

In other states, the doctrine is well established that all property without reference to its location whether it is near and adjacent or abutting, is liable for the local assessment or tax in the proportion that it derives a benefit from the making of the local improvement. The rule as stated is that local assessments or taxes on particular estates are permissible and legal when founded on special and particular benefits to the property and

[326] Olsson v. City of Topeka, 42 Kan. 709, 21 Pac. 219.

[327] City of Little Rock v. Katzenstein, 52 Ark. 107, 12 S. W. 198; Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656, 25 N. E. 962; West Chicago Park Com'rs v. Farber, 171 Ill. 146; Montgomery County Com'rs v. Fullen, 111 Ind. 410, 12 N. E. 298; Caldwell v. Rupert, 73 Ky. (10 Bush) 179; Stengel v. Preston, 89 Ky. 616, 13 S. W. 839; Dumesnil v. Shanks, 97 Ky. 354, 30 S. W. 654, 31 S. W. 864; Preston v. Rudd, 84 Ky. 150; Lincoln v. Street Com'rs of Boston, 176 Mass. 210.

State v. Brill, 58 Minn. 152. An arbitrary levy of special assessments upon all property within a taxing district without consideration of relative distance of property from the local improvement in this case held invalid.

McCormick v. City of Omaha, 37 Neb. 829; People v. Common Council of Kingston, 53 App. Div. 58, 65 N. Y. Supp. 590. Land 351 feet distant from a sewer and to which there is no access is not benefited by its construction and is not liable. City Council v. Pinckney, 1 Tread. Const. (S. C.) 42; Cruikshanks v. City Council of Charleston, 1 McCord (S. C.) 360; Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88.

then only to an amount not exceeding such benefits.[328] In assessing property for the payment of local improvements upon the

[328] Farrell v. West Chicago Park Com'rs, 181 U. S. 404; Voigt v. Detroit City, 184 U. S. 115. Comp. Laws Mich. 1897, § 3406, is constitutional which provides that a municipal council may assess the whole or any equitable portion of the cost of a local improvement upon benefited lands in the vicinity and limits the assessments to the benefits received.

Robert J. Boyd Pav. & Contracting Co. v. Ward (C. C. A.) 85 Fed. 27. An act which authorizes cities of the third and fourth class by vote to accept the benefits of the act determining the basis of special assessments for the construction of sewers is in contravention of that provision of the state which requires all cities of the same class "to possess the same powers." Burlington Sav. Bank v. City of Clinton, 106 Fed. 269; United States v. Edmunds, 3 Mackey (D. C.) 142; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; In re Bonds of Madera Irr. Dist., 92 Cal. 296, 14 L. R. A. 755; Taylor v. Palmer, 31 Cal. 240; In re Market St., 49 Cal. 546; City of Pueblo v. Robinson, 12 Colo. 593. Property which derives no benefit from the construction of a sewer cannot be assessed for any portion of its cost.

Clapp v. City of Hartford, 35 Conn. 66; Terry v. City of Hartford, 39 Conn. 286; Ferguson v. Borough of Stamford, 60 Conn. 432; Murphy v. City of Wilmington, 6 Houst. (Del.) 108; St. John v. City of East St. Louis, 50 Ill. 92; Greeley v. People, 60 Ill. 19; Goodrich v. City of Minonk, 62 Ill. 121; Guild v. City of Chicago, 82 Ill. 472; Warren v. City of Chicago, 118 Ill. 329. Vacant lots may be assessed for the laying of lateral service pipes for water. Barber v. City of Chicago, 152 Ill. 37. Only that portion of a large tract of land which is specially benefited by a local improvement can be assessed. Gray v. Town of Cicero, 177 Ill. 459; Williams v. Little White Lick Gravel Road Co., 1 Wils. (Ind.) 7; Montgomery County Com'rs v. Fullen (Ind.) 13 N. E. 574.

Martin v. Wills, 157 Ind. 153, 60 N. E. 1021. The act of 1889 commonly known as the "Barrett Law" is constitutional not contravening U. S. Constitution, amendment 14 providing that no person shall be deprived of his property without due process of law even though it does not provide for any preliminary hearing for the ascertainment of benefits received by the property assessed, neither is it unconstitutional as taking a person's property without just compensation. See, also, holding the same, the case of Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454.

Hendricks v. Gilchrist, 76 Ind. 369; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797. Property cannot be assessed in excess of the special benefits actually received. Warren v. Henly, 31 Iowa, 31; City of Dubuque v. Harrison, 34 Iowa, 163; City of Atchison v. Burnes' Estate, 45 Kan. 296; Moore v. City of Paola, 63 Kan. 867, 66 Pac. 1040; Gosnell v. City of Louisville, 20 Ky. L. R. 519, 46 S. W. 722; City of Augusta v. McKibben, 22 Ky. L. R. 1224, 60 S. W. 291; Stengel v. Preston, 89 Ky. 616; In re City of New Orleans, 20 La. Ann. 497; Davies v.

basis of benefits received, the municipal authorities have no right to change the legal recorded subdivisions of property. The prop-

City of New Orleans, 40 La. Ann. 806; Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375; French v. City of Lowell, 117 Mass. 363; Motz v. City of Detroit, 18 Mich. 495; Hoyt v. City of East Saginaw, 19 Mich. 39; White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564; State v. Judges of Dist. Ct. of Eleventh Judicial Dist., 51 Minn. 539.

Carpenter v. Hennepin County Com'rs, 56 Minn. 513. An assessment for benefits where no provision is made for reimbursement of damages suffered by property owners is invalid; construing Sp. Laws 1891, c. 381. State v. Brill, 58 Minn. 152. An assessment is void upon all lands within a local improvement (in this case a proposed public park) district of a uniform amount regardless of their relative distances from the park.

State v. District Ct. of Ramsey County, 75 Minn. 292, 77 N. W. 968; Smith v. City of St. Joseph, 122 Mo. 643, 27 S. W. 344; Moran v. Lindell, 52 Mo. 229. The legislature may appoint the city authorities judges of what local improvements are necessary and what property will be benefited by their construction. See, also, as holding the same, City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677, following City of St. Louis v. Ranken, 96 Mo. 497, 9 S. W. 910. Hanscom v. City of Omaha, 11 Neb. 37; Cain v. City of Omaha, 42 Neb. 120; City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721; Parrotte v. City of Omaha, 61 Neb. 96, 84 N. W. 602.

In New Jersey the rule obtains that property fronting upon a local improvement is to be assessed, but only in proportion to the benefits received; the mere fact that it was abutting property is not a conclusive standard or measure of the special assessments that should be levied. Essex Public Road Board v. Speer, 48 N. J. Law, 372, 9 Atl. 197. If no benefits can be shown, property is exempt. Aldridge v. Essex Public Road Board, 51 N. J. Law, 166, 16 Atl. 695; Buess v. Town of West Hoboken, 51 N. J. Law, 267, 17 Atl. 110; Mann v. Jersey City, 24 N. J. Law (4 Zab.) 662; Parker v. City of New Brunswick, 30 N. J. Law, 395; Pope v. Town of Union, 32 N. J. Law, 343; City of Newark v. Inhabitants of Verona Tp., 58 N. J. Law, 595, 33 Atl. 959; Felix v. Atlantic City, 34 N. J. Law, 99; Becker v. Gardner, 34 N. J. Law, 327. A uniform assessment of a fixed sum per lineal foot on abutting property along the line of improvement is erroneous and should be set aside. Hampson v. City of Paterson, 36 N. J. Law, 159; Baxter v. Jersey City, 36 N. J. Law, 188; Pudney v. Village of Passaic, 37 N. J. Law, 65. But unless there is proof of inequality or injustice of an assessment per lineal foot, an assessment will not be necessarily void.

Van Tassel v. Jersey City, 37 N. J. Law, 128. In this case the court held void that portion of the Jersey City Charter of 1871, § 48, that each lot should be assessed for the labor and materials used to grade the street in front of it and for its share of the intersections to be graded

for the materials taken in front of it and proportionally from any neighboring intersection used because in total disregard of the whole established doctrine that the assessment should not exceed the benefits and an assessment made thereunder must be set aside.

Chosen Freeholders of Hudson County v. Paterson Ave. & S. R. Com'rs, 41 N. J. Law, 83; Frevert v. City of Bayonne, 63 N. J. Law, 202, 42 Atl. 773. The assessment must be based upon the special benefits received by the property in question. Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805. An arbitrary method for ascertaining benefits derived from local improvements will invalidate the assessment.

Johnston v. Inhabitants of Trenton, 43 N. J. Law, 166; Borton v. City of Camden, 65 N. J. Law, 511, 47 Atl. 436; Dooling v. Ocean City, 67 N. J. Law, 215, 50 Atl. 621. The fact that special assessments have been apportioned upon property in proportion to frontage will not necessarily make it invalid where such method properly apportions the benefits. Van Wagoner v. City of Paterson, 67 N. J. Law, 455, 51 Atl. 922; Benjamin v. Bog & Fly Meadow Co., 68 N. J. Law, 197, 52 Atl. 215. An act which authorizes the levy of assessments in proportion to the quantity of land and not to the benefits received is invalid. People v. City of Brooklyn, 4 N. Y. (4 Comst.) 419; Canal Bank v. City of Albany, 9 Wend. (N. Y.) 244; Howell v. City of Buffalo, 37 N. Y. 267.

In re Klock, 30 App. Div. 24, 51 N. Y. Supp. 897. Where the benefit rule obtains, an assessment on the basis of front footage is erroneous where the property is unequally benefited by the improvement. Delaware & H. Canal Co. v. City of Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976. Determining the effect upon his assessment of the construction of a portion of the local improvement by a property owner. J. & A. McKechnie Brewing Co. v. Village of Canandaigua, 162 N. Y. 631, 57 N. E. 1113, affirming 15 App. Div. 139, 44 N. Y. Supp. 317. N. Y. Laws 1887, c. 266, provides for the assessment of the cost of a sewer against property adjoining it and also such other property as may be benefited. It is not necessary, therefore, to the validity of an assessment under this law, that property receive a benefit from the construction of a sewer.

In re Church of Holy Sepulchre, 61 How. Pr. (N. Y.) 315; In re Church, 92 N. Y. 1. A law which provides for the assessment of the cost of local improvements on property benefited in counties containing cities with more than 100,000 inhabitants is not a local law and therefore constitutional.

Hoffeld v. City of Buffalo, 130 N. Y. 387. Where buildings are not benefited by the construction of a local improvement, it is not proper to consider their value in connection with the levy of special assessments.

Smith v. City of Buffalo, 159 N. Y. 427; Scovill v. City of Cleveland, 1 Ohio St. 126; Gest v. City of Cincinnati, 26 Ohio St. 275; Krumberg v. City of Cincinnati, 29 Ohio St. 69; Chamberlain v. City of Cleveland, 34 Ohio St. 551. The whole amount of the assessment must be apportioned among the several parcels of land especially benefited in proportion that the special benefit to

erty must be proceeded against according to the description by which it is legally known and designated upon official maps or plats.[329]

(a) Ascertainment of benefits. The measure of such benefits and the manner of ascertaining them is established by some arbitrary method provided by law,[330] usually either by a municipal

each bears to the whole special benefit conferred by the improvement.

Spangler v. City of Cleveland, 35 Ohio St. 469. The assessment on whatever basis levied cannot exceed the cost of the improvement. Walsh v. Barron, 61 Ohio St. 15; City of Dayton v. Bauman, 66 Ohio St. 379, 64 N. E. 433; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673.

Baker v. Gartside, 86 Pa. 498. A corner lot using water from a pipe laid on one street cannot be assessed for the cost of a watermain laid on the other and from which the owner receives no benefit. Woodhouse v. City of Burlington, 47 Vt. 301; Violett v. City Council of Alexandria, 92 Va. 561, 31 L. R. A. 382. Under a city charter which provides for local assessments on "real estate benefited thereby," a uniform assessment cannot arbitrarily be made per front foot; such would be an unwarranted assumption of benefits. Town of Elma v. Carney, 9 Wash. 466; City of New Whatcom v. Bellingham Bay Imp. Co., 9 Wash. 639; Town of Tumwater v. Pix, 18 Wash. 153; Hayes v. Douglas County, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213; Kersten v. City of Milwaukee, 106 Wis. 200, 81 N. W. 948 1103, 48 L. R. A. 851; Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141; Friedrich v. City of Milwaukee, 114 Wis. 304, 90 N. W. 174.

[329] Cram v. City of Chicago, 139 Ill. 265, 28 N. E. 758; Smith v. City of Des Moines, 106 Iowa, 590, 76 N. W. 836; Bancroft v. City of Boston, 115 Mass. 377; Scott County v. Hinds, 50 Minn. 204; Schroder v. Overman, 61 Ohio St. 1, 47 L. R. A. 156; City of Atchison v. Price, 45 Kan. 296, 25 Pac. 605; City of Ft. Scott v. Kaufman, 44 Kan. 137.

[330] City of Little Rock v. Board of Improvements, 42 Ark. 152; German Sav. & Loan Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067; Chicago, R. I. & P. R. Co. v. City of Chicago (Ill.) 27 N. E. 926; St. Louis Nat. Stock Yards v. People, 127 Ill. 22; Givins v. City of Chicago, 188 Ill. 348, 58 N. E. 912; Lovitt v. Russell, 138 Mo. 474, 40 S. W. 123. The power to assess benefits is possessed by the circuit court.

Kansas City v. Ward, 134 Mo. 172; Lansing v. City of Lincoln, 32 Neb. 457; Fink v. City of Newark, 40 N. J. Law, 11; People v. City of Brooklyn, 23 Barb. (N. Y.) 166. The decision of corporate authorities that a proposed improvement will be advantageous to certain property will be conclusive. Strusburgh v. City of New York, 45 N. Y. Super. Ct. (13 J. & S.) 508. An assessment for benefits is a judgment and cannot be attacked collaterally when made by a competent board. King Real Estate Ass'n v. City of Portland, 23 Or. 199, 31 Pac. 482; Watkins v. Zwietusch, 47 Wis. 513. Where the method provided by law involves the exercise of the judgment and discretion of the commis-

council,[331] duly qualified commissioners,[332] or a jury,[333] in the manner provided by special charter or statutory provisions,[334] who

sioners in ascertaining the amount of taxes measured by benefits received, an arbitrary calculation in which there is a failure to use such judgment and discretion will make the assessment void.

[331] Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649; Davis v. City of Litchfield, 155 Ill. 384; City of Burlington v. Quick, 47 Iowa, 222; City of Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601. That the members of a city council are taxpayers and therefore presumably interested is no objection to an assessment of benefits by them for a local improvement. Goodrich v. City of Detroit, 123 Mich. 559, 82 N. W. 255; Carpenter v. City of St. Paul, 23 Minn. 232; Savage v. City of Buffalo, 59 Hun, 606, 14 N. Y. Supp. 101.

Barnes v. Dyer, 56 Vt. 469. The act of 1878, p. 219, which authorizes a city council to make local assessments on abutting property for "so much of the expense thereof as they shall deem just and equitable" is unconstitutional as providing no fixed, certain, and local standard of assessment.

[332] Spencer v. Merchant, 125 U. S. 345. The legislature may determine this question for itself instead of delegating it to subordinate agencies. The Court in its opinion by Mr. Justice Gray, said: "In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state having the power to fix the sum necessary to be levied for the expense of a public improvement and to order it to be assessed either like other taxes upon property generally or only upon the lands benefited by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore, bear the burden although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners. When the determination of the lands to be benefited is entrusted to commissioners the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much but the legislature has the power to determine by the statute imposing the tax what lands which might be benefited by the improvement are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited. In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient either through investigations by its committees or by adopting as its own the estimates or conclusions of others whether those estimates or conclusions previously had or had not any legal sanction."

Ferguson v. Borough of Stamford, 60 Conn. 432; Murphy v. City of Peoria, 119 Ill. 509, 9 N. E. 895; Lake v. City of Decatur, 91 Ill. 596;

Latham v. Village of Wilmette, 168 Ill. 153. The determination of the extent of benefits is within the discretion of such commissioners and in absence of fraud it will not be reviewed.

Bass v. South Park Com'rs, 171 Ill. 370; Birket v. City of Peoria, 185 Ill. 369; Mock v. City of Muncie (Ind.) 32 N. E. 718; Shank v. Smith, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564. The right of a board of trustees to adjust assessments to benefits is a quasi judicial power and where such board has jurisdiction of the person and subject matter their decision cannot be collaterally attacked. See, also, as holding the same, Hibben v. Smith, 158 Ind. 206, 62 N. E. 447.

Gavin v. Decatur County Com'rs, 81 Ind. 480; Bowditch v. Superintendent of Streets of Boston, 168 Mass. 239, 46 N. E. 1026. McKusick v. City of Stillwater, 44 Minn. 372. Residents and freeholders of a city may lawfully serve as a commission to award damages and assess benefits for public improvements. State v. District Ct. of Ramsey County, 80 Minn. 293, 83 N. W. 183; Mann v. Jersey City, 24 N. J. Law (4 Zab.) 662. Construing statute prescribing form of oath. Weldon v. Town of West Hoboken (N. J. Law) 43 Atl. 535; Providence Retreat v. City of Buffalo, 29 App. Div. 160, 51 N. Y. Supp. 654; Dows v. Village of Irvington, 66 How. Pr. (N. Y.) 93. The omission to take an oath required will not invalidate an assessment where it was levied by municipal authority who are officers de factor.

Kelly v. City of Cleveland, 34 Ohio St. 468; In re Burgess & Town Council of Big Run, 137 Pa. 590. Where a statute provides for the appointment "of disinterested free holders" to make assessments on property which is to be benefited by the proposed public improvement, property owners along the street proposed to be improved are incompetent. They are not "disinterested free holders" within the meaning of the act.

[333] Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 173; Hull v. People, 170 Ill. 246. A right to a trial by jury may follow the assessment by a municipal council or other official body as an opportunity for an individual to escape what may be the exercise of an arbitrary power.

Houston v. City of Chicago, 191 Ill. 559. The jury in such a case under Hurd's Rev. St. of Ill. 1899, p. 373, cannot pass upon or determine the necessity for the proposed improvement. Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. 555; City of Detroit v. Beecher, 75 Mich. 454, 4 L. R. A. 813; Kansas City v. Bacon, 157 Mo. 450. The verdict of a jury omitting from assessment certain property will not be set aside when the question of benefits is one for their determination.

[334] Dann v. Woodruff, 51 Conn. 203; Sanitary Dist. of Chicago v. City of Joliet, 189 Ill. 270. An assessment upon the basis of benefits received is valid though it happens to correspond with frontage in amount as compared with other property. Turner v. Thorntown & M. Gravel Road Co., 33 Ind. 317; Hardwick v. Danville & N. G. Gravel Road Co., 33 Ind. 321; In re Central Park Extension, 16 Abb. Pr. (N. Y.) 56; In re Klock, 30 App. Div. 24, 51 N. Y. Supp. 897; King v. City of Portland, 38 Or. 402, 63 Pac.

pass upon the questions submitted, then ascertain and report the benefits received and levy the assessments in a proportionate manner.[335]

2, 55 L. R. A. 812; Sowles v. Village of St. Albans, 71 Vt. 418. The record of the commissioners is conclusive evidence of the facts recited.

[335] City of Springfield v. Sale, 127 Ill. 359. If the assessments are based upon benefits received and this appears from the proceedings, it is immaterial that the street frontage is given and a clerical error in the caption can be corrected.

Walters v. Town of Lake, 129 Ill. 23. If the commissioners, whose duty it is to apportion the cost of the improvement between the public and the property especially benefited, return that the public have received no benefit from the improvement and assess the entire cost upon property owners, this is conclusive.

Pike v. City of Chicago, 155 Ill. 656; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148. The decision of a city council that property was benefited by a local improvement is conclusive in the absence of facts showing an abuse of discretion. Shurtleff v. City of Chicago, 190 Ill. 473. In ascertaining benefits received it is proper for the commissioners to consider donations of land or property by the individual against whose property an assessment has been levied.

Foley v. City of Haverhill, 144 Mass. 352; Collins v. City of Holyoke, 146 Mass. 298; Lincoln v. Street Com'rs of Boston, 176 Mass. 210. Where a statute granting authority does not direct the manner of assessing benents of local improvements as a basis for the levy of a special assessment for their construction, the commissioners are authorized to regard the improvements as a whole. Citing, Norwood v. Baker, 172 U. S. 269; Alden v. City of Springfield, 121 Mass. 271; Sears v. City of Boston, 173 Mass. 71, 43 L. R. A. 834.

Medland v. Linton, 60 Neb. 249, 82 N. W. 866. The report of commissioners need not show affirmatively that the assessments as made were based upon special benefits; this will be presumed but see, however, the case of John v. Connell, 64 Neb. 233, 89 N. W. 806, as holding that under Compiled Statutes 1893, c. 12a, § 78, it must affirmatively appear that the city council as a board of equalization found that the benefits were equal and uniform upon all property affected by the proposed improvement.

Sinclaire v. Town of West Hoboken, 58 N. J. Law, 129, 32 Atl. 65. Commissioners or officials whose duty it is to ascertain benefits must exercise their own judgment in this respect. Works v. City of Perth Amboy (N. J. Law) 36 Atl. 666; Pudney v. Village of Passaic, 37 N. J. Law, 65. The report of such commissioners will not be set aside merely upon conflicting evidence of the justice of their action.

Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805. The judgment of the commissioners is conclusive in the absence of fraud or unless clearly shown. Allison Land Co. v. Borough of Tenafly, 68 N. J. Law, 205, 52 Atl. 231. The report of the commissioners should affirmatively show that the assessments do not exceed the benefits. Moran v. Jersey City, 58 N. J. Law,

fits received by the property for the assessments paid, the question of what property receives a benefit determined arbitrarily according to some fixed rule by the legislature or under its direction by subordinate agencies after an examination of all facts relating to a particular assessment.[340] The word "benefit" as used in connection with the levy of special assessments conveys the idea of a special and peculiar advantage, convenience or benefit received by particular property in excess of that received by property in general. It is the idea of a special benefit as contra-distinguished from common or universal benefit. Local improvements are supposed to result in an advantage or common benefit to all property within the jurisdiction of the taxing district and a special benefit to property in its immediate vicinity. This question of special benefits determines, as has been seen from an examination of the authorities cited in a preceding section,[341] the exemption of certain property from the levy of special assessments because of the character,[342] the location,[343] or

from an assessment by the city council for the cost of the construction of a local improvement.

[340] Keith v. City of Boston, 120 Mass. 108; In re City of Amsterdam (N. Y.) 27 N. E. 272. "Property benefited" is not necessarily limited to property fronting upon the street improvement. In re Klock, 30 App. Div. 24, 51 N. Y. Supp. 897. The decision by commissioners that certain property receives a benefit from the construction of a local improvement is not necessarily conclusive but may be reviewed by a court of proper jurisdiction. Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; Delaware & H. Canal Co. v. City of Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976, affirmed, 167 N. Y. 589, 60 N. E. 1119; McKee Land & Imp. Co. v. Williams, 63 App. Div. 553, 51 N. Y. Supp. 399, 71 N. Y. Supp. 1141; Voght v. City of Buffalo, 133 N. Y. 463. The fact that a street car track runs nearer the property on one side of the street than the other may properly reduce the benefits to be derived from the construction of a local improvement in that street.

[341] See § 343, supra. Mason v. Spencer, 35 Kan. 512; Agens v. City of Newark, 37 N. J. Law, 415; In re Department of Public Works, 65 Hun, 619, 19 N. Y. Supp. 612.

[342] Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 503. See § 343, supra.

[343] Holdom v. City of Chicago, 169 Ill. 109. The mere fact of contiguity is not conclusive evidence that property was specially benefited by the construction of a local improvement.

Fulton v. City of Davenport, 17 Iowa, 404. When the proprietors of undedicated property in their personal privileges and accommodations or in the enhancement to the value of their property receive a benefit from the proximity of municipal

the use[344] of such property. In some states the rule has been adopted either through statutory enactment or decision of the courts that agricultural lands, to illustrate, within the city limits which are incapable by their use of receiving the benefits derived from the construction of a sewer, cannot be charged with any part of its cost. In these states the specific liability of certain property, or in other words, the question of benefits received, is determined by an examination of particular facts in an orderly proceeding,[345]

Illustrations of benefits. The advancement of property in value,[346] its susceptibility for drainage to a sewerage system,[347]

improvements and accommodations and organization, the power to tax this property for such purposes exists. Hershey v. City of Muscatine, 22 Iowa, 184.

[344] City of Atlanta v. First Presbyterian Church, 86 Ga. 730, 12 L. R. A. 852, overruling Trustees of First M. E. Church v. City of Atlanta, 76 Ga. 181. See § 343, supra.

[345] Leitch v. Village of La Grange, 138 Ill. 291, 27 N. E. 917. Unplatted land within a city limit used only for farming purposes but susceptible for use as city property for suburban residences is subject to special assessments for the cost of a proposed sewer. Borough of South Chester v. Garland, 162 Pa. 91. The question is for a jury to determine whether certain lands claimed to be rural or farm lands are of this character and therefore exempt from assessments for public improvements because not benefited. City of McKeesport v. Soles, 165 Pa. 628.

[346] Thomas v. City of Chicago, 152 Ill. 292; Fahnestock v. City of Peoria, 171 Ill. 454; Mock v. City of Muncie (Ind.) 32 N. E. 718; Friedenwald v. City of Baltimore, 74 Md. 116, 21 Atl. 555; City of Baltimore v. Smith & Schwartz Brick Co., 80 Md. 458, 31 Atl. 423. The burden of proof is upon the one attempting to show an enhancement of value of property as the result of opening a street. Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564. There is no need of a separate finding of the enhancement to value of each piece of property in an assessment district. Kansas City v. Bacon, 147 Mo. 259, 48 S. W. 860; City of St. Louis v. Lane, 110 Mo. 254; Smith v. City of St. Joseph, 122 Mo. 643.

[347] Walker v. City of Aurora, 140 Ill. 402, 29 N. E. 741; Kelly v. City of Chicago, 148 Ill. 90. Distance from a sewer does not alone determine the liability of the property for a portion of its cost; it is merely one of the questions to be considered in determining the benefits received by the property. Lipes v. Hand, 104 Ind. 503; Wright v. City of Boston, 63 Mass. (9 Cush.) 233. Vacant lots are properly assessed for their portion of the cost of building a sewer in the street fronting them.

Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; Vreeland v. City of Bayonne, 58 N. J. Law, 126, 32 Atl. 68. The possible benefits which will accrue to property at an unknown period in the future

the fact that a water supply is made available,[348] better facilities and conveniences for ingress and egress,[349] and a greater advantage or convenience of any character resulting from the making of a local improvement,[350] have each and all been held special advantages or benefits sufficient to justify the imposition of local assessments upon property receiving these benefits. The ordinary rules of evidence and practice will control the courts in admitting testimony or evidence of such facts as tend to show either a benefit or damage received,[351] and making a proper charge to the jury upon the questions involved in the case and which are to be submitted to them for their determination. Evidence that other property not assessed was specially benefited or that the property has been disproportionately assessed is not usually admissible,[352]

when a connecting branch sewer can be laid will not authorize the asessment of special taxes to pay the cost of a main sewer.

City of Bayonne v. Morris, 61 N. J. Law, 127, 38 Atl. 819; Skinkle v. Clinton Tp., 39 N. J. Law, 656. Where drainage benefits, however, are uncertain and indirect, the presumption that such lands are benefited by an increase of healthfulness resulting from the construction of the sewer or drain is not a sufficient benefit to warrant the levy of a special assessment. King v. Reed, 43 N. J. Law, 186. If the land attempted to be assessed is not susceptible of drainage or will not be benefited by the construction of a sewerage system, it cannot be assessed for any portion of its cost. Seaman v. City of Camden, 66 N. J. Law, 516, 49 Atl. 977. The benefits derived may, however, be so prospective and uncertain as to relieve land of liability. People v. Adams, 18 N. Y. Supp. 443; Garratt v. Trustees of Canandaigua, 135 N. Y. 436; Michener v. City of Philadelphia, 118 Pa. 535.

In the cases of Witman v. City of Reading, 169 Pa. 375; In re Park Ave. Sewers, 169 Pa. 433, and In re Sewer on Beachwood Ave., 179 Pa. 490, it is held that mere susceptibility to prospective benefits derived from the construction of a sewer will not make property liable for a portion of its cost based upon benefits received.

[348] Baker v. Gartside, 86 Pa. 498; City of Reading v. Shepp, 13 Pa. Co. Ct. R. 634.

[349] City of Omaha v. Schaller, 26 Neb. 522, 42 N. W. 721.

[350] Platt v. Town of Milton, 58 Vt. 608. The increased trade and business caused by the construction of a highway is not a sufficient benefit to warrant the levy of a local assessment to pay the cost of construction.

[351] Hutt v. City of Chicago, 132 Ill. 352; Philadelphia & R. Coal & Iron Co. v. City of Chicago, 158 Ill. 9; Harris v. City of Chicago, 162 Ill. 288; Houston v. City of Chicago, 191 Ill. 559; Topliff v. City of Chicago, 196 Ill. 215; Henning v. Stengel, 23 Ky. L. R. 1793, 66 S. W. 41, 67 S. W. 64.

[352] Hughes v. City of Momence, 163 Ill. 535; Clark v. City of Chica-

and that as affecting other property the proceedings were invalid is not usually an error which can be taken advantage of by a property owner against whose property the proceedings have been regular. Under proper constitutional or statutory authority, the adoption by a legislative body of a certain method is conclusive that that method correctly determines the extent of benefits received and that they equal the cost of the improvement levied against particular property.[353]

go, 166 Ill. 84; Holdom v. City of Chicago, 169 Ill. 109; Heinroth v. Kochersperger, 173 Ill. 205; Farrell v. West Chicago Park Com'rs, 182 Ill. 250; Smythe v. City of Chicago, 197 Ill. 311; Kizer v. Town of Winchester, 141 Ind. 694; Mock v. City of Muncie (Ind.) 32 N. E. 718.

Sears v. Street Com'rs of Boston, 173 Mass. 350, 53 N. E. 876. Neither will such a claim afford sufficient ground for the court on certiorari to quash an assessment. Lincoln v. Street Com'rs of Boston, 176 Mass. 210; Kansas City v. Bacon, 157 Mo. 450. Such objection cannot be raised on appeal for the first time but should have been made the ground of a motion for a new trial. Wilson v. Longstreet, 38 N. J. Law, 312; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571. Neither will such condition serve as a basis for an equity suit to vacate assessments made. Sowles v. Village of St. Albans, 71 Vt. 418.

[353] French v. Barber Asphalt Pav. Co., 181 U. S. 324; Leitch v. Village of La Grange, 138 Ill. 291, 27 N. E. 917; Chicago & A. R. Co. v. City of Joliet, 153 Ill. 649; Davis v. City of Litchfield, 155 Ill. 384; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148; Illinois Cent. R. Co. v. People, 170 Ill. 224.

Hull v. People, 170 Ill. 246. In Illinois by the amendment of 1895 to the City and Village act, special taxes cannot exceed the special benefits accruing to the property taxed and an ordinance providing a method of levying special assessments is not conclusive evidence of benefits received as measured or established by such method. See, also, as holding the same, Pfeiffer v. People 170 Ill. 347. This case also holds that the amendment referred to does not abolish the distinction between taxation and special assessments but deprives the city council of a power to conclusively determine the question of special benefits.

LeMoyne v. City of Chicago, 175 Ill. 356. The final judgment in proceedings to assess lands benefited is conclusive as to the amount of benefits. City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342; City of Ft. Wayne v. Cody, 43 Ind. 197. Such determination is conclusive and cannot be reviewed by any other tribunal except that afforded a corporation in making the assessment.

City of Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007. The decision of a city council as to the extent of benefits received is conclusive and cannot be attacked collaterally except for fraud. Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930; Barfield v. Gleason, 23 Ky. L. R. 128,

§ 349. Levy based upon area or comparative value of property.

The measure by which the proper assessment to be paid by certain property is ascertained may be, instead of those suggested in preceding sections, the total area of the property[354] or

63 S. W. 964. The legislature has a large discretion in determining the property specially benefited by the construction of a local improvement and courts will not interfere.

Davies v. City of Saginaw, 87 Mich. 439. In the absence of fraud or mistake the resolution of a city council declaring the amount to be assessed for the construction of a local improvement on specific property is a legal determination that the benefits conferred are equal to such amount. Beecher v. City of Detroit, 92 Mich. 268; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564; Carpenter v. City of St. Paul, 23 Minn. 232; City of Ithaca v. Babcock, 72 App. Div. 260, 76 N. Y. Supp. 49; In re Roberts, 81 N. Y. 62.

Savage v. City of Buffalo, 131 N. Y. 568. Where the common council provides a certain method for the ascertainment of benefits as the basis of levy of special assessments, this must be strictly followed by the officers to whom ministerial duties in connection therewith are delegated that such an assessment be valid. Northwestern & P. Hypotheek Bank v. City of Spokane, 18 Wash. 456.

[354] Shumate v. Heman, 181 U. S. 402, affirming Heman v. Allen, 156 Mo. 534. Gillette v. City of Denver, 21 Fed. 822; Niklaus v. Conklin, 118 Ind. 289; Grimmell v. City of Des Moines, 57 Iowa, 144; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639; City of Covington v. Matson, 17 Ky. L. R. 1323, 34 S. W. 897; Dumesnil v. Gleason, 18 Ky. L. R. 475, 37 S. W. 69; Washle v. Nehan (Ky.) 41 S. W. 1040. The liability of property to local assessment may be, however, dependent upon its contiguity to the improvement. Barfield v. Gleason, 23 Ky. L. R. 128, 63 S. W. 964; Marshall v. Barber Asphalt Pav. Co. (Ky.) 66 S. W. 182, reversing 21 Ky. L. R. 712, 52 S. W. 1117; Malchus v. District of Highlands, 67 Ky. 547.

Thomas v. Gain, 35 Mich. 155, Johnson v. Duer, 115 Mo. 366, 21 S. W. 800; City of St. Joseph v. Farrell, 106 Mo. 437; New Brunswick Rubber Co. v. Street & Sewer Com'rs, 38 N. J. Law, 190; Benjamin v. Bog & Fly Meadow Co., 68 N. J. Law, 197, 52 Atl. 215.

People v. City of Buffalo, 39 App. Div. 654, 57 N. Y. Supp. 1144. Where the assessment of a uniform rate per square foot within the limits of an assessment district properly shows the benefits received by property from the construction of a sewer, such an assessment is not void even where the benefits-received rule is in force. Affirmed in 54 App. Div. 629, 66 N. Y. Supp. 1139. See, also, Crowley v. Copley, 2 La. Ann. 329; Yeatman v. Crandall, 11 La. Ann. 220; Wallace v. Shelton, 14 La. Ann. 498; Bishop v. Marks, 15 La. Ann. 147; Smith v. Town of Aberdeen, 25 Miss. 458; Daily v. Swope, 47 Miss. 367; Egyptian Levee Co. v. Hardin, 27 Mo. 495.

But where an act made no provision by which parties might avail themselves of the benefit, and no distinction between lots directly

its value as determined by the proper officials;[355] the theory being in the latter case that property supposedly receives benefits in proportion to its value, and in the former case the arbitrary method is employed as a convenient way of ascertaining the assessment to be paid.

§ 350. Individual liability.

A special assessment is an imposition of a burden upon specific property. The question of ownership does not affect, as a rule, the liability of such property.[356] Where there is, as customary,

benefited and those benefited in a more remote degree, this basis of assessment was repudiated as unfair and inequitable. Thomas v. Gain, 35 Mich. 155.

[355] Town of Monticello v. Banks, 48 Ark. 251; Newman v. City of Emporia, 41 Kan. 583, 21 Pac. 593; Parker v. City of Atchison, 48 Kan. 574, 30 Pac. 20; Blair v. City of Atchison, 40 Kan. 353; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; S. D. Moody & Co. v. Chadwick, 52 La. Ann. 1888; Snow v. City of Fitchburg, 136 Mass. 183; Walker v. City of Ann Arbor, 118 Mich. 251, 76 N. W. 394. The basis of assessment was frontage according to land values. In re Whitlock Ave., 51 App. Div. 436, 64 N. Y. Supp. 717.

Arkansas and Tennessee have constitutional provisions requiring the assessments to be made on property "according to its true value in money." In Arkansas under this provision assessments for paving cannot be levied according to frontage (Peay v. City of Little Rock, 32 Ark. 31); and in Tennessee frontage assessments for paving are invalid (Taylor v. Chandler, 56 Tenn. [9 Heisk.] 349).

[356] Creighton v. Manson, 27 Cal. 613; Himmelmann v. Steiner, 38 Cal. 175; Himmelmann v. Hoadley, 44 Cal. 213; Murphey v. City of Wilmington, 5 Del. Ch. 281; Hoover v. People, 171 Ill. 182; Cummings v. West Chicago Park Com'rs, 181 Ill. 136; Hudson v. People, 188 Ill. 103; Palmer v. Nolting, 13 Ind. App. 581, 41 N. E. 1045; Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665; City of Muscatine v. Chicago, R. I. & P. R. Co., 88 Iowa, 291, 55 N. W. 100; City of Covington v. Boyle, 69 Ky. (6 Bush) 204; Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345.

Morey v. City of Duluth, 75 Minn. 221, 77 N. W. 829. The term "owner" as used in the charter authorizes an appearance in proceedings levying special taxes refers to all persons interested in the land taxed including mortgagees. Keith v. Bingham, 100 Mo. 300; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; City of Newark v. State, 34 N. J. Law, 523; Chancellor of State v. City of Elizabeth, 65 N. J. Law, 483, 47 Atl. 455.

Marvin v. Town, 56 Hun, 510, 10 N. Y. Supp. 148. The levy of a special assessment against an individual is void without reference to or a description of the land or object of assessment. Butler v. City of Toledo, 5 Ohio St. 225; Village of St.

no personal liability, an error in the use of a name as party defendant supposed to be the owner of the property or a misjoinder of parties defendant is immaterial[357] when the property is correctly described, though this rule may be changed by statutory provisions.[358] When land is occupied by an individual in a fiduciary or official capacity or as lessee, there can be no personal cause of action against him in any case.[359] Where, however, there are statutory provisions establishing or creating a personal liability on the part of the owner of property, in case of the nonpayment of special assessments,[360] a judgment to be valid must be obtained under the usual rules of law as to parties and other statutory requirements regulating the trial of cases and the entry of judgments.[361]

§ 351. Estoppel of taxpayer.

A taxpayer may be estopped through laches,[362] acquiescence[363]

Bernard v. Kemper, 60 Ohio St. 244, 45 L. R. A. 662; Ivanhoe v. City of Enterprise, 29 Or. 245, 45 Pac. 771, 35 L. R. A. 58; City of Philahelphia v. Marklee, 159 Pa. 515; City of Galveston v. Heard, 54 Tex. 420; City of Seattle v. Yesler, 1 Wash. T. 571.

[357] Conlin v. Seamen, 22 Cal. 546; Cohen v. City of Alameda, 124 Cal. 504; City of New London v. Miller, 60 Conn. 112; Edwards & Walsh Const. Co. v. Jasper County, 117 Iowa, 365, 90 N. W. 1006; Masonic Bldg. Ass'n v. Brownell, 164 Mass. 306; Hill v. Warrell, 87 Mich. 135. An assessment against a person who does not hold a legal title is void as to such person. Remsen v. Wheeler, 51 Hun, 643, 4 N. Y. Supp. 350.

[358] Ede v. Knight, 93 Cal. 159; Hutt v. City of Chicago, 132 Ill. 352; Becker v. Baltimore & O. S. W. R. Co., 17 Ind. App. 324, 46 N. E. 685; Brennan v. City of St. Paul, 44 Minn. 464; Donnelly v. City of Brooklyn, 121 N. Y. 9.

[359] Walford v. Hackney Board of Works, 15 Rep. 10; Appeal of Reese, 32 Cal. 567; Morrow v. Shober, 19 Ind. App. 127, 49 N. E. 189; City of Muscatine v. Chicago, R. I. & P. R. Co., 88 Iowa, 291; Smith v. Carney, 127 Mass. 179.

[360] In re Vacation of Centre St., 115 Pa. 247, 8 Atl. 56; Deblois v. Barker, 4 R. I. 445.

[361] City of New Orleans v. Wire, 20 La. Ann. 500. A surviving widow may be proceeded against under the La. Statutes as being the owner of land abutting and adjoining a local improvement. City of Sedalia v. Gallie, 49 Mo. App. 392; Felthousen v. City of Amsterdam, 69 Hun, 505, 23 N. Y. Supp. 424.

[362] Stark v. City of Boston, 180 Mass. 293, 62 N. E. 375; Taber v. City of New Bedford, 135 Mass. 162; Van Buskirk v. City of Bayonne (N. J. Eq.) 38 Atl. 458; Liebstein v. City of Newark, 24 N. J. Eq. (9 C. E. Green) 200; Lord v. City of Bayonne, 65 N. J. Law,

or acceptance of benefits,[364] from denying the validity of a special assessment.

§ 352. Place of assessment.

It is equally true with the exercise of the right to levy a special assessment as with the levy and collection of general taxes that the taxing district can only exercise this power over property within its jurisdiction which is limited by its geographical confines.[365]

§ 353. Acquiring jurisdiction; preliminary proceedings.

Not only must the property which may be chargeable with a special assessment lie within the geographical limits of the taxing district, but it also must have been in the manner provided by law brought within its jurisdiction in other respects.[366] The principle thus stated is one of the most important in connection with the levy and collection of special assessments. The power

127, 46 Atl. 701; Van Wagoner v. City of Paterson, 67 N. J. Law, 455, 51 Atl. 922; Wiggin v. City of New York, 9 Paige (N. Y.) 16.

[363] City of New Haven v. Fairhaven & W. R. Co., 38 Conn. 422; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; State v. District Ct. of St. Louis County, 61 Minn. 542; Barker v. City of Omaha, 16 Neb. 269; People v. City of Utica, 65 Barb. (N. Y.) 1; Seattle Transfer Co. v. City of Seattle, 27 Wash. 520, 68 Pac. 90. Where, however, there is no statutory authority for certain council proceedings, a property owner is not estopped by his failure to object. See, also, 10 Am. Rep. 399.

[364] Wyandotte County Com'rs v. Hoag, 48 Kan. 413, 29 Pac. 758, following, Stewart v. Wyandotte County Com'rs, 45 Kan. 708; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446. A subsequent purchaser may be estopped through the action of his grantor.

[365] Dehail v. Morford, 95 Cal. 457; Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990. The presumption exists that property is within the jurisdiction of the taxing district. See, also, as holding the same, Bliss v. City of Chicago, 156 Ill. 584, 41 N. E. 160; Wheeler v. People, 153 Ill. 480; Stanton v. City of Chicago, 154 Ill. 23; Meadowcroft v. People, 154 Ill. 416; Young v. People, 155 Ill. 247; and West Chicago St. R. Co. v. People, 155 Ill. 299.

Golding v. Collector of Chambersburg, 37 N. J. Law, 258; Providence Retreat v. City of Buffalo, 31 App. Div. 635, 53 N. Y. Supp. 1113, sustaining 29 App. Div. 160, 51 N. Y. Supp. 654; Town of Tumwater v. Pix, 18 Wash. 153.

[366] Bates v. City of Mobile, 46 Ala. 158.

to levy and collect special assessments is one which does not exist as a matter of common right but must be specially granted to a municipal organization by the sovereign.[367] The grant is found either in organic law, general statutes or special legislation. That a levy be legal and capable of enforcement in case of a failure to pay by the property owner, the taxing district must first have acquired jurisdiction or power over the property

[367] Walker v. District of Columbia, 6 Mackey (D. C.) 352. Where the authority is given in a city charter, upon its expiration an assessment made by an unauthorized officer is void. McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812. "The city of Keokuk exists under a special charter, and its powers are derived from that charter and the statutes. It is a familiar rule that when a mode of exercising a power granted is prescribed, the power can only be legally exercised in that mode. In determining whether a power is conferred, charters and statutes are strictly construed; but when the power is ascertained to be conferred, the exercise of authority within the recognized limits is favored by the courts. These principles are familiar and undisputed and citations are unnecessary. Guided by these rules, we now turn to the special charter and statutes to see whether a mode of establishing and changing grade is prescribed. The city of Keokuk was incorporated by chapter three, Acts 2d General Assembly, approved December 13, 1848. Section 13 of said chapter authorizes the city council to make and publish ordinances upon certain subjects, among which are 'such laws and ordinances as to them shall seem necessary to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of said city and inhabitants thereof.' * * * Clearly if this power is to be exercised under authority of this section, it must be by law or ordinance. * * * There is no provision in the entire act for exercising any of the powers conferred on the city council by merely passing a resolution. Resolutions are not required to be signed nor published and we do not think that a matter of such importance to property owners as the establishment of grades was intended to be exercised by the mere passage of resolutions. * * * Our conclusion is that the power conferred upon the city council of the city of Keokuk to establish and change grades can only be legally exercised by the enactment and publication of ordinances."

Ft. Dodge Elec. Light & Power Co. v. City of Ft. Dodge, 115 Iowa, 568, 89 N. W. 7; Heywood v. City of Buffalo, 14 N. Y. (4 Kern.) 534; Pickton v. City of Fargo, 10 N. D. 469, 88 N. W. 90. The repeal of legislation subsequent to the inception of special assessment proceedings but before their completion will render them invalid, as the repeal deprives the municipality of its authority to levy the tax. City of Portland v. Bituminous Pav. Co., 33 Or. 307, 52 Pac. 28.

liable.[368] This power is acquired only by a strict and technical compliance with the various provisions of the law granting the authority in the first instance and further providing the details for its exercise. Such statutes are construed strictly,[369] their provi-

[368] Zeigler v. Hopkins, 117 U. S. 683; Brady v. King, 53 Cal. 44; Mulligan v. Smith, 59 Cal. 206; West Chicago Park Com'rs v. Sweet, 167 Ill. 326; Heman v. McNamara, 77 Mo. App. 1; Armstrong v. Ogden City, 12 Utah, 476, 43 Pac. 119, sustaining 9 Utah, 255, 34 Pac. 53. The decision by the proper officers of a municipality that it has acquired such jurisdiction is not conclusive in an action brought to enjoin the collection of assessments. The court say in part: "But appellants contend that the publication of the notice of intention gave the city council jurisdiction and that the attempt to dislodge that jurisdiction by a protest was a matter of judicial inquiry upon the part of the city council and the fact of their having determined that a majority of the front feet abutting had not properly protested precluded any further attack upon that decision. This reasoning is absolutely fallacious. The statute plainly provides that if sufficient objections are not filed within the time required, 'the city council shall be deemed to have acquired jurisdiction;' and of course by rule of statutory construction, it provides that if a sufficient protest has been filed, they fail to acquire jurisdiction, notwithstanding any decision the city council might arrive at to the contrary. Two essential facts were necessary before the city council could acquire jurisdiction: First, that a proper and legal notice of intention had been published; and second, that more than one-half of the front feet abutting upon the street to be improved had failed to object within the time specified. If these two requirements did not exist, no owner of property within the proposed paving district was concluded by the decision of the city council." Welty, Assess. § 276. "Until the corporation acquires jurisdiction over the street to be improved, no levy of a tax or assessment on the adjoining property is valid or binding. The first subject of inquiry, therefore, is the mode of acquiring jurisdiction over the improvement to be made, so as to make a valid assessment or tax. In some cases proceedings are commenced by a preliminary survey and estimate of the cost of the work, followed by a resolution, order or ordinance of the legislative authority of the town or city; in others by a petition describing the work to be done, signed by the owners of a majority of frontage of the street, part of a street, or other public way sought to be improved; and in still other cases, by notice given by the legislative authority of the town or city of the intention to have the particular improvement made at the cost of the property benefited. Whatever the mode prescribed in the organic law of the municipality, it must be strictly, or at least substantially complied with, in order to obtain jurisdiction over the work. A failure to do so results in a failure to acquire jurisdiction, and any proceedings had without this prerequisite will be null and void."

[369] Pittsburgh, C., C. & St. L. R. Co. v. Hays, 17 Ind. App. 261, 44

sions are considered usually mandatory,[370] and, in cases of doubt, resolved against the corporation in favor of the property owner.[371]

N. E. 375, 45 N. E. 675, 46 N. E. 597. A substantial compliance with the statutes will confer jurisdiction upon the authorities. Case v. Johnson, 91 Ind. 477.

City of Chariton v. Holliday, 60 Iowa, 391; City of Argentine v. Simmons, 53 Kan. 491, 37 Pac. 14; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189. Where the mode of action of a municipal corporation is limited by charter those contracting with it for the construction of a local improvement must take notice of such restrictions.

Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608; Inhabitants of Northampton v. Aboll, 127 Mass. 507; City of Springfield v. Knott, 49 Mo. App. 612. Where there is a failure to comply literally with all the regulations contained in an ordinance, by which, however, the special rights of property owners are not affected, this will not invalidate a special tax bill.

Saxton v. City of St. Joseph, 60 Mo. 153; Stewart v. City of Clinton, 79 Mo. 603; Town of Trenton v. Coyle, 107 Mo. 193; Arnett v. City of Lambertville (N. J. Law) 6 Atl. 432; Vreeland v. Jersey City, 54 N. J. Law, 49; Finnell v. Kates, 19 Ohio St. 405; Hawthorne v. City of East Portland, 13 Or. 271; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726; Kneeland v. City of Milwaukee, 18 Wis. 411. "It is a general rule when measures are authorized by statute in derogation of the common law which may result in divesting the title of one person to land and transferring it to another that every requisite having the semblance of benefit to the owner must be strictly complied with." Wells v. Burnham, 20 Wis. 112. State v. City of Ashland, 88 Wis. 599. A preliminary assessment as required by Laws 1889, c. 27, is essential to the validity of an assessment to pay for improvements.

[370] Michigan Cent. R. Co. v. Huehn, 59 Fed. 335; Crane v. City of Siloam Springs, 67 Ark. 30; City of Sterling v. Galt, 117 Ill. 11; Village of Hammond v. Leavitt, 181 Ill. 416; John v. Connell, 61 Neb. 267, 85 N. W. 82. "At the time Poppleton avenue was ordered graded, by the city authorities, the charter of 1887 had been adopted and was in force. By § 117 (c. 10, Sess. Laws 1887), it was provided: 'Before any street, avenue, or alley shall be ordered graded, the damages, if any, by reason of such grading to property along that portion of the street proposed to be graded, including approaches thereto, shall first be ascertained and determined by three disinterested freeholders, who shall be appointed by the mayor and council for that purpose who shall make such appraisement, taking into consideration the benefits, if any, to such property, and who shall exclude any damages resulting from any change or changes of the original or first established grade, and the amount of damages so assessed, unless the appeal is taken, shall be due and payable to such property owners, or their agents, in sixty days after the completion and acceptance of such work of grading.' The requirement of this section in regard to the ascertainment of damages was, in our opinion, mandatory and indispensable. It was a condi-

In the succeeding sections will be considered some of the steps necessary to acquire the necessary jurisdiction.

§ 354. Same subject.

The proceedings should clearly show from their inception the property assessed[372] and the locality of the local improvement[373]

tion precedent to the exercise of the power to order the grading to be done. * * * There was no attempt on the part of the city authorities to comply with section 117, supra, and consequently, they never acquired jurisdiction to levy the grading tax. Not only was the sale to plaintiff unwarranted and null, but the levy itself was without lawful authority and created no lien against defendant's property." Citing, Von Steen v. City of Beatrice, 36 Neb. 421; State v. Birkhauser, 37 Neb. 521; Smith v. City of Omaha, 49 Neb. 883; Ives v. Irey, 51 Neb. 136; Harmon v. City of Omaha, 53 Neb. 164; Leavitt v. Bell, 55 Neb. 57; Merrill v. Shields, 57 Neb. 78; and Henderson v. City of South Omaha, 60 Neb. 125, 82 N. W. 315.

In re Delaware & H. Canal Co., 8 N. Y. Supp. 352: Void assessments are not validated by curative acts. See, also, cases cited in preceding note.

[371] Preston v. Roberts, 75 Ky. (12 Bush) 570; City of Springfield v. Baker, 56 Mo. App. 637. Rev. St. Mo. 1889, § 1499, provides that a special tax bill shall in an action thereon be prima facie evidence of the regularity of all prior proceedings and in the absence of evidence to the contrary the court will presume regularity. Keith v. Bingham, 100 Mo. 300. In the absence of evidence against the regularity of proceedings, this will be presumed.

[372] Bensinger v. District of Columbia, 6 Mackey (D. C.) 285; Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131. Where the description is void on its face, a failure to appeal will not cure the defect. Diggins v. Hartshorne, 108 Cal. 154; Cohen v. City of Alameda, 124 Cal. 504; Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315. A land owner cannot object to a description which does not include all of the property subject to the assessment since the insufficiency results in his advantage. Louisville & N. R. Co. v. City of East St. Louis, 134 Ill. 656; Dickey v. People, 160 Ill. 587; People v. Clifford, 166 Ill. 165; Harts v. People, 171 Ill. 458; Upton v. People, 176 Ill. 632; Balfe v. Johnson, 40 Ind. 235.

Becker v. Baltimore & O. S. W. R. Co., 17 Ind. App. 324, 46 N. E. 685; Cleveland, C., C. & St. L. R. Co. v. O'Brien, 24 Ind. App. 547, 57 N. E. 47. An assessment describing the property as being "65.65 feet of right of way" of a certain railroad company is fatally defective where the right of way of such company extends through the city for many miles. Citing, among other cases, Van Sickle v. Belknap, 129 Ind. 558; City of Terre Haute v. Mack, 139 Ind. 99; and Harrison Bldg. & Deposit Co. v. Lackey, 149 Ind. 10.

City of Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909; Heman Const. Co. v. Loevy, 64

for which the assessment is levied; if diagrams or plats are used, they must contain such references as will enable the description of the premises to be understood.[374] As the levy of a local as-

Mo. App. 430; Drew v. Morrill, 62 N. H. 23; Jackson v. Healy, 20 Johns. (N. Y.) 495; Hooker v. City of Rochester, 30 N. Y. Supp. 297; Morse v. City of Buffalo, 35 Hun (N. Y.) 613. Where there is no resulting injustice, however, from inaccuracy of the description, it will not impair the validity of a sewer assessment. Roberts v. First Nat. Bank, 8 N. D. 504, 79 N. W. 1049; Poland v. Connolly, 16 Ohio St. 64. A description, however, which identifies the property is sufficient. Lewis v. Laylin, 46 Ohio St. 663; Baltimore & O. R. Co. v. City of Bellaire, 60 Ohio St. 301; City of Scranton v. Jones, 133 Pa. 219, 19 Atl. 347; Dallas Title & Trust Co. v. City of Oak Cliffe, 8 Tex. Civ. App. 217, 27 S. W. 1036; Kerr v. City of Corsicana (Tex. Civ. App.) 35 S. W. 694; Harrell v. Storrie (Tex. Civ. App.) 47 S. W. 838.

[373] Banaz v. Smith, 133 Cal. 102, 65 Pac. 309; McDonald v. Conniff, 99 Cal. 386; McChesney v. City of Chicago, 173 Ill. 75; People v. Assessors of Utica, 50 App. Div. 54, 63 N. Y. Supp. 445.

[374] Gafney v. City & County of San Francisco, 72 Cal. 146, 13 Pac. 467. If a scale of the map is indicated this will be sufficient; it is not necessary to have the distance written in figures. People v. Quackenbush, 53 Cal. 52; Norton v. Courtney, 53 Cal. 691; Dyer v. Parrott, 60 Cal. 551.

Blanchard v. Ladd, 135 Cal. 24, 67 Pac. 131. "In this case * * * it is found by the court not only that the width and grade of the street was never established, but, in effect, that the diagram accompanying the assessment was never recorded; and it appeared from the evidence offered by the plaintiff to make his prima facie case that there is in fact a variance from the original in the copy of the diagram in the record, consisting in the position of the arrow indicating direction, which in the recorded copy is at right angles to Farallones street, and in the original parallel with it. The question presented therefore, * * * is, whether this is a fatal variance. In considering this question it is to be observed that it appears from the description of the land assessed in the complaint, and the undenied allegations with reference thereto, that Farallones street runs east and west, as indicated by the arrow in the recorded copy of the diagram, and consequently that the error in the direction of the arrow is in the original, and also that the lot of the defendant as described, was in fact assessed, as alleged. It follows that the variance must be regarded as immaterial. 'The purpose of the recordation being to carry notice by an inspection of the record to the owner, and all others having dealings with the property, it follows that any variance between the original and the recorded instruments which defeats this purpose is material. Per contra, if the diagram and assessment as recorded, do contain a sufficient description, then, in this regard, any departure from the original form will be held

sessment is usually a proceeding against property, not an individual, it is not always necessary to name correctly the owner of property; a mistake in this respect in the name will not vitiate subsequent proceedings.[375] When the form of the assessment is prescribed by statutory provisions, ordinarily these are considered of a mandatory character and the form thus prescribed must be strictly followed.[376] Statutory requirements for the recording of contracts or warrants upon which the assessment is based or the certificates of the completion of such contract unless regarded as mandatory will be considered directory only and a failure to strictly follow them will not invalidate the assessment;[377] usually,

trifling and immaterial.'" Citing, Labs v. Cooper, 107 Cal. 657.

Gillis v. Cleveland, 87 Cal. 214. The identity of the property must be ascertained from the recorded diagram without reference to other official maps, plats or records.

[375] De Koven v. City of Lake View, 129 Ill. 399, 21 N. E. 813; White v. City of Alton, 149 Ill. 626, 37 N. E. 96; Zeigler v. People, 164 Ill. 531; Pfeiffer v. People, 170 Ill. 347; Smith v. City of Des Moines, 106 Iowa, 590, 76 N. W. 836; City of New Orleans v. Ferguson, 28 La. Ann. 240; Gregory v. City of Ann Arbor, 127 Mich. 454, 86 N. W. 1013; Auditor General v. Maier, 95 Mich. 127; Gallaher v. Bartlett, 2 Mo. App. Rep'r, 1006-1289; City of St. Louis v. De Noue, 44 Mo. 136. But see, however, Lane v. Morrel, 3 Edw. Ch. (N. Y.) 185, which holds differently, a decision, however, based upon a special act.

Gallaher v. Bartlett, 64 Mo. App. 258; Farrell v. Rammelkamp, 64 Mo. App. 425; Brewer v. City of Elizabeth, 66 N. J. Law, 547, 49 Atl. 480. An error in name can be corrected under the authority of a subsequent curative act. In re Munn, 165 N. Y. 149, reversing 49 App. Div. 232, 63 N. Y. Supp. 22.

[376] Stebbins v. Kay, 51 Hun (N. Y.) 589; City of Chicago v. Wright, 32 Ill. 192; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189; Worthington v. City of Covington, 82 Ky. 265; City of Lowell v. Wheelock, 65 Mass. (11 Cush.) 391; Brophy v. Landman, 28 Ohio St. 542; Flewellin v. Proetzel, 80 Tex. 191, 15 S. W. 1043; Allen v. City of Galveston, 51 Tex. 302; City of Spokane Falls v. Browne, 3 Wash. St. 84, 27 Pac. 1077.

[377] Connolly v. City & County of San Francisco (Cal.) 33 Pac. 1109. A contractor through his failure to complete his contract forfeits his right to any warrant or assessment thereunder. Rauer v. Lowe, 107 Cal. 229, 40 Pac. 337. Statutes of 1891, p. 205, require a certificate of the completion of street work to be signed by the city engineer that the moneys assessed may become a lien on property liable for the assessment. Such a certificate when signed by a mere clerk under the general jurisdiction of the city engineer is not sufficient. Brady v. Bartlett, 56 Cal. 350; Cotton v. Watson, 134 Cal. 422, 66 Pac. 490; Ede v. Knight, 93 Cal. 159; Moffitt v. Jordan, 127 Cal. 622; Allen v. City of Galveston, 51 Tex. 302. See, also,

however, they are considered mandatory and the corresponding principle applies as to the performance of acts so required.[378]

Local statutes, charters or ordinances may contain provisions, compliance with which is necessary on the part of the taxing district that the assessment be legal and result in the required jurisdiction of property. In some states it is essential that property owners be given an opportunity to construct the local improvement and only upon their failure to act can the municipality proceed.[379]

The filing or recording of plans, profiles and specifications may be also necessary for the validity of subsequent proceedings;[380] these must contain a description of the property or district or both likely to be affected or benefited by the proposed improvement.[381] An accurate and definite description of the work to be

Jenkins v. Stetler, 118 Ind. 275; Gearhart v. Dixon, 1 Pa. 224.

[378] Rauer v. Lowe, 107 Cal. 229; Frenna v. Sunnyside Land Co., 124 Cal. 437. Where the form is defective, not being signed by the engineer or his deputy as required by law, the truth of its statements will not cure such defect. But see the case of Gray v. Lucas, 115 Cal. 430.

[379] Perine v. Forbush, 97 Cal. 305, 32 Pac. 226. It will be no defense in an action to enforce a street assessment that the contract for the construction of the improvement relieves from assessment certain abutting property where the owner had previously constructed such improvement. California Imp. Co. v. Quinchard, 119 Cal. 87; McChesney v. City of Chicago, 173 Ill. 75; Biggins' Estate v. People, 193 Ill. 601; Hawley v. City of Ft. Dodge, 103 Iowa, 573; Gleason v. Barnett, 22 Ky. L. R. 1660, 61 S. W. 20. The permission of the property owners to make the improvement may be granted by the municipal authorities. Bonsall v. Town of Lebanon, 19 Ohio, 419; Washington v. City of Nashville, 31 Tenn. (1 Swan) 177; Town of Franklin v. Maberry, 25 Tenn. (6 Humph.) 368; Fass v. Seehawer, 60 Wis. 525. Such action on part of the abutter may be required by law.

[380] Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947.

[381] Grant v. Barber, 125 Cal. 188, 67 Pac. 127. "In the present case, before the passage of the resolution of intention, the common council adopted special specifications for the grading of Figueroa street, setting forth with great minuteness the manner in which the grading was to be completed and made those specifications a part of its resolution of intention. The council must be assumed to have known the configuration on the ground upon which the work was to be done. * * * Under this specification a bidder could intelligently comprehend the amount of work to be done and estimate its cost; and the superintendent * * * could determine whether the work was

done is also necessary to obtain jurisdiction of property for the purpose of levying the special assessment; this description should be in writing and should be of such a character as to leave nothing open to oral proof. The character, the extent or the locality of the improvement, must not be left to the determination of subordinate officials or municipal employes.[382] A designation of the locality, or extent of the work that will be done in a street, by the phrases "where necessary" or "where required" or "where not already done," is insufficient. As well said, such a description of the locality of the work to be done would give no notice to the landowner of an intention to charge his property with an assessment.[383] In some states in order that a special assessment be valid it is necessary that a special board or public official having control or charge of such property request or take other action relative to the levy of a special tax or the institution of special assessment proceedings.[384] In other states before these

performed in accordance with the contract. * * * If it was necessary to construct culverts at any place along the line of grading the council should have designated such places as well as the materials of which they were to be constructed." Haughawout v. Hubbard, 131 Cal. 675.

[382] Peters v. City of Newark, 31 N. J. Law, 364.

[383] People v. Clark, 47 Cal. 457; People v. Ladd, 47 Cal. 604; Richardson v. Haydenfeldt, 46 Cal. 69; Himmelmann v. McCreery, 51 Cal. 562; Andrews v. City of Chicago, 57 Ill. 240. An assessment is void when based upon an ordinance providing for an improvement in the following language: "Curbed with curb stones, filled, graded and paved with wooden blocks excepting such portions of the above described work which have already been done in a suitable manner; said work to be done under the superintendence of the board of public works." The court said however, "what portion had already been done in a suitable manner was in no way defined." Merrill v. Abbott, 62 Ind. 549; Smith v. Duncan, 77 Ind. 92.

[384] Greenwood v. Morrison, 128 Cal. 350; Hunt v. City of Chicago, 60 Ill. 183. An officer who owns property which is to be affected by the local improvement is disqualified by reason of interest from participation in the preliminary proceedings and the assessment made is void.

Hundley v. Lincoln Park Com'rs, 67 Ill. 559. The corporate authorities of one town cannot participate in assessing the property of other towns, so held where a park was situated partly in two towns and the proper authorities of each of the two towns met in joint session and fixed the assessment upon property in both towns.

West Chicago Park Com'rs v. Sweet, 167 Ill. 326. The West Chicago Park Commissioners are "corporate authorities" of the town within the meaning of constitution,

proceedings can be sustained, the local legislative body must have authorized the construction of the local improvement.[385]

§ 355. Execution of a contract.

Elsewhere we find it necessary that the proper authorities enter into a contract for the construction of the improvement before any steps can be taken for the levy and collection of the special assessments necessary to meet the financial obligations of such contract.[386] Without its execution the assessment will be invalid,

art. IX, § 9, and may, under this section, be authorized to levy special assessments for the making of local improvements within their jurisdiction. See, also, West Chicago Park Com'rs v. Farber, 171 Ill. 146.

Murphy v. City of Chicago, 186 Ill. 59. Where the ordinance does not provide for a majority report of recommendation, joint and unanimous action of the board is necessary. City of Westport v. Jackson, 69 Mo. App. 148; Equitable Trust Co. v. O'Brien, 55 Neb. 735, 76 N. W. 417; Medland v. Connell, 57 Neb. 10, 77 N. W. 437; Merrill v. Shields, 57 Neb. 78, 77 N. W. 368; White v. City of Bayonne, 49 N. J. Law, 311, 8 Atl. 295; Central R. Co. v. City of Bayonne, 51 N. J. Law, 428, 17 Atl. 971. Where by law the map and report of commissioners of assessment should be filed within a certain time, the common council of Bayonne, it was held in this case, might grant a reasonable extension of time. See, however, the case of Central R. Co. v. City of Bayonne, 35 N. J. Law, 332, which holds that their neglect in this respect would render void their proceedings. Van Anglen v. City of Bayonne, 56 N. J. Law, 463, 29 Atl. 168; Hendrickson v. Borough of Point Pleasant, 65 N. J. Law, 535, 47 Atl. 465. Where an ineligible person acts as a member of a commission, assessments levied by it will be invalid. Hooker v. City of Rochester, 30 N. Y. Supp. 297; In re Schell, 76 N. Y. 432.

[385] Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393. See post, §§ 358 and 359.

[386] Wiles v. Hoss, 114 Ind. 371; Budd v. Kraus, 79 Ind. 137; City of Argentine v. Simmons, 53 Kan. 491, 37 Pac. 14. A change of grade in a proposed street improvement without the letting of a new contract for its construction will invalidate the assessment.

Horne v. Mehler, 23 Ky. L. R. 1176, 64 S. W. 918. The cancellation of an old contract and the execution of a new, it is held in this case, will not in an action between the plaintiff, contractor, and defendant, property owner, entitle the latter to any abatement of the amount assessed. See, also, Gibson v. O'Brien, 9 Ky. L. R. 639, 6 S. W. 28, where it is held that a variance between the mayor's report regarding a street improvement and the contract based upon it is no defense in an action by the contractor against the abutting property owners after the ratification of the contract and per-

and further it is essential that the contract must be legal, namely, executed in the manner required by law,[887] observing all the requirements for competitive bidding if such exist.[888] A legal contract must exist as a basis for legal proceedings, instituting and collecting local assessments.[889] In some jurisdictions not only must the contract be executed as above stated but the work called for must be fully completed.[890] An immaterial variance or a ma-

formance of the work. Oakley v. Atlantic City, 63 N. J. Law, 127.

[887] Ede v. Knight, 93 Cal. 159. The presumption exists that the contract had been duly executed and performed. Gray v. Richardson, 124 Cal. 460; Union Pav. & Contracting Co. v. McGovern, 127 Cal. 638; Clingman v. People, 183 Ill. 339; McEwen v. Gilker, 38 Ind. 233; City of Terre Haute v. Lake, 43 Ind. 480; Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386. The fact that a contract let for a street improvement does not conform exactly to the ordinance is not jurisdictional and such a variance may be disregarded if not prejudicial to property owners. Bogard v. O'Brien, 14 Ky. L. R. 648, 20 S. W. 1097.

[888] Edwards v. Berlin, 123 Cal. 544; Dewey v. City of Des Moines, 101 Iowa, 416; Fishburn v. City of Chicago, 171 Ill. 338, 39 L. R. A. 482; Alberger v. City of Baltimore, 64 Md. 1. Inviting proposals for material for the repaving of a street in common with other streets instead of separately as required by ordinance does not necessarily invalidate an assessment levied to pay the cost of such repaving. Bambrick v. Campbell, 37 Mo. App. 460; People v. Board of Improvement, 43 N. Y. 227. See, also, § 262, supra.

[889] Reid v. Clay, 134 Cal. 207, 66 Pac. 262; City of Meriden v. Camp, 46 Conn. 284. The assessment can be made either before or after the completion of the work. City of Connersville v. Merrill, 14 Ind. App. 303; Pittsburg, C., C. & St. L. R. Co. v. Hays (Ind. App.) 44 N. E. 375. A substantial compliance with the statute will confer jurisdiction upon the authorities. Willard v. Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446; Levi v. Coyne, 22 Ky. L. R. 493, 57 S. W. 790. A failure to complete a contract within the time set is no defense to an assessment where the failure was waived by the proper city authorities.

Bowditch v. Superintendent of Streets, 168 Mass. 239, 46 N. E. 1026; Kansas City v. O'Connor, 82 Mo. App. 655. Street sprinkling is not a local improvement for which local assessments can be levied to pay the cost and a performance or part performance of a contract for sprinkling will not legalize such a contract or validate an assessment based upon it. As the court said, "part performance will not validate an ultra vires contract." Quinn v. City of New York, 16 App. Div. 408, 45 N. Y. Supp. 7. City of Philadelphia v. Jewells' Estate (Pa.) 20 Atl. 281. A paving contract void because not completed in time may be revived by general ordinance.

[890] Blair v. Luning, 76 Cal. 134, 18 Pac. 153; Doane v. Houghton, 75 Cal. 360; Wood v. Strother, 76 Cal. 545; Wilbur v. City of Springfield,

terial one which has been ratified by the proper authorities will not usually, as a defense, be available to the property owner in an action brought to enforce the payment of a special assessment.[391]

§ 356. Preliminary investigation or estimates.

It is a common requirement that before a special assessment can be legally levied and collected, an investigation into the advisability and feasibility of the construction of the local improvement must be made by civil engineers or commissioners,[392] and an es-

123 Ill. 395; Craig v. People, 193 Ill. 199.

Fralich v. Barlow, 25 Ind. App. 383, 58 N. E. 271. The estimate of the engineer was conclusive upon the quantity of the work done. Dittoe v. City of Davenport, 74 Iowa, 66; Shaw v. Des Moines County, 74 Iowa, 679; State v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122. In this case, the court writing the syllabus says: "The mayor and common council, having authority to make improvements cannot make the assessments to pay for the contemplated improvements until the walks are built. They must, in the first instance, contract for building and create the indebtedness, and then ascertain the cost of the same. This must necessarily precede making the assessments on abutting lots to pay for the same. The indebtedness being created and assessments made, the mayor and council are authorized to issue warrants on the treasurer for the payment of the same, specifying the nature of the claim for which it is issued and the fund out of which it is payable and the treasurer must pay the same out of the proper funds on presentation of the warrants when he has money in his hands for the payment of such warrants." Nevin v. Roach, 86 Ky. 492; City of Westport v. Mastin, 62 Mo. App. 647.

[391] McDonald v. Mezes, 107 Cal. 492, 40 Pac. 808; Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Holloran v. Morman, 27 Ind. App. 309, 59 N. E. 869; Ottumwa Brick & Const. Co. v. Ainley, 109 Iowa, 386; Gibson v. O'Brien, 9 Ky. L. R. 639, 6 S. W. 28; Horne v. Mehler, 23 Ky. L. R. 1176, 64 S. W. 918; City of Baltimore v. Raymo (Md.) 13 Atl. 383; Toop v. City of New York, 13 N. Y. Supp. 280; Dady v. City of New York, 57 Hun (N. Y.) 456; Gilmore v. City of Utica, 131 N. Y. 26; People v. City of Buffalo, 147 N. Y. 675; Murphy v. City of Albina, 22 Or. 106, 29 Pac. 353. The question of what is an acceptance or ratification is one of fact to be determined by the evidence. The ratification of a contract will not be presumed from the subsequent use of the improved street or the acceptance of the work.

[392] Edgar v. City of Pittsburg, 114 Fed. 586; Hammond v. City of San Leandro, 135 Cal. 450, 67 Pac. 692. Under act of March 19th, 1889, § 4, it is not necessary that such specifications and plans be official. The court say: "Witness Williams testified that 'no one ever submitted any written estimate * * * but that one Scrivener gave verbal esti-

timate of the cost of the improvement with or without maps, profiles and specifications filed in the proper office.[393] This esti-

mate * * * of the cost of an electric light plant for said city * * * at the request of said board.' One John Driver testified that he submitted plans and estimates to the board for a building * * * and a plan for an engine and they were the only plans he submitted; * * * that he had an electrician make out the specifications for the rest of the plant and they were adopted by the board. Whether this was Scrivener or some other electrician does not appear. This was all the evidence. It sufficiently appears that there were no written plans and specifications of a complete plan filed by any one person. But it appears that an electrician made out plans and specifications for the plant except for the building and engine and as to these Driver made plans and specifications. It appears that plans and specifications were before the board and adopted though submitted by different persons. There is no evidence that the persons making these plans did not possess the requisite qualifications and it was incumbent on plaintiff to overcome this presumption by evidence."

[393] Edgar v. City of Pittsburg, 114 Fed. 586; Thomason v. Ruggles, 69 Cal. 465, 11 Pac. 20; White v. City of Alton, 149 Ill. 626, 37 N. E. 96. A member of a city commission is not disqualified because of the fact that he owns property which will be affected by the proposed improvement. Barber v. City of Chicago, 152 Ill. 37; Illinois Cent. R. Co. v. People, 170 Ill. 224. It is not necessary under Illinois act of April 15, 1875, to appoint commissioners to estimate the cost of a sidewalk before the same can be ordered constructed. But in Moore v. City of Mattoon, 163 Ill. 622, a report of such commissioners signed by two only of the three appointed held insufficient to sustain a special assessment.

Hinkle v. City of Mattoon, 170 Ill. 316. A majority of the committee or commissioners appointed to estimate a report of cost of the proposed street improvement may make a report which shall be binding under authority of Rev. St. c. 131, § 1, cl. 9, which provides that authority given to three or more public officials or other persons shall be construed as authority given to a majority of such officials or persons. That such a report, however, be considered binding, it is necessary that all of the trustees or commissioners should be present and acting at the time of the adoption of the report. This should be shown in the report. See, however, the case of Markley v. City of Chicago, 170 Ill. 358, holding to the contrary.

Berry v. City of Chicago, 192 Ill. 154; Sands v. Hatfield, 7 Ind. App. 357, 34 N. E. 654; Goring v. McTaggart, 92 Ind. 200; Yarnold v. City of Lawrence, 15 Kan. 126; Gilmore v. Hentig, 33 Kan. 156; Kansas Town Co. v. City of Argentine, 5 Kan. App. 50, 47 Pac. 542, affirmed in 59 Kan. 779, 54 Pac. 113. The preliminary estimate of a city engineer should be upon a cash basis. The fact that such estimate was, however, made upon the basis of bonds at ninety cents on the dollar will not invalidate subsequent proceedings

mate should contain in detail the various items entering into the cost of the improvement.[894] The inclusion of illegal items of cost

because the cash basis can be readily ascertained from the estimate as made.

Kansas City v. Cullinan, 65 Kan. 68, 68 Pac. 1099; City of Shreveport v. Prescott, 51 La. Ann. 1895, 46 L. R. A. 193; City of Independence v. Briggs, 58 Mo. App. 241; State v. City of St. Louis, 161 Mo. 371, 61 S. W. 658; Barber Asphalt Pav. Co. v. Hezel, 76 Mo. App. 135; City of Marshall v. Rainey, 78 Mo. App. 416; City of Rich Hill v. Donnan, 82 Mo. App. 386; Kohler v. Town of Guttenberg, 38 N. J. Law, 419; Gilmore v. City of Utica, 61 Hun, 618, 15 N. Y. Supp. 274; Id., 131 N. Y. 26. The existence of errors or mistakes in an estimate of costs on which the assessment was based will not render invalid such assessment where no fraud, collusion or bad faith appears. People v. Assessors of Utica, 50 App. Div. 54, 63 N. Y. Supp. 445; Jones v. Town of Tonawanda, 158 N. Y. 438; City of Dallas v. Atkins (Tex. Civ. App.) 32 S. W. 780, following City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128.

City of Corsicana v. Kerr, 89 Tex. 461, 35 S. W. 794; Davies' Ex'rs v. City of Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145; Frosh v. City of Galveston, 73 Tex. 401; Pound v. Chippewa County Sup'rs, 43 Wis. 63.

See, in regard to the sufficiency of the estimate, Cuming v. City of Grand Repids, 46 Mich. 150; Goodwillie v. City of Detroit, 103 Mich. 283; Wewell v. City of Cincinnati, 45 Ohio St. 407, 15 N. E. 196; City of Erie v. Brady, 150 Pa. 462.

[894] City of Chicago v. Cummings, 144 Ill. 446, 33 N. E. 34. The validity of such estimate will not be presumed. Ware v. City of Jerseyville, 158 Ill. 234. Where the report contains no estimate of the cost of levying and collecting a special tax as required by law, the assessment should not be confirmed.

Quick v. Village of River Forest, 130 Ill. 323. The declaration of commissioners is not competent to impeach their report or estimate of cost. Gage v. City of Chicago, 162 Ill. 313; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505; Moore v. City of Mattoon, 163 Ill. 622. Court costs are legitimate items to be included in the estimate. Pfeiffer v. People, 170 Ill. 347. It is not necessary that such an estimate determine the relative proportion of the total cost of the improvement borne respectively by the municipality and the property benefited.

Harts v. People, 171 Ill. 373; Adcock v. City of Chicago, 172 Ill. 24. An estimate specifying the width and number of lineal feet to be built, cost per lineal foot of sidewalk and the aggregate cost of the price specified together with the cost of laying and making the improvement, is sufficiently definite.

Dobler v. Village of Warren, 174 Ill. 92; Cramer v. City of Charleston, 176 Ill. 507; Biggins' Estate v. People, 193 Ill. 601; Ronan v. People, 193 Ill. 631; Jenney v. City of Des Moines, 103 Iowa, 347. If the plans and specifications are sufficiently full and definite this is sufficient; they need not be as full and complete as it is possible to make them.

City of Argentine v. Simmons, 54

will not usually affect the validity of the estimate as a basic requirement, provided such items can be deducted from the total cost before its apportionment upon property subject to the tax.[395] Where the statutes do not require such an estimate or report in advance of the construction of the local improvement or the levy of the tax, a failure to make it will not invalidate the proceedings.[396] The rule also holds that where the work has been per-

Kan. 699; Kansas City v. Gray, 62 Kan. 198, 61 Pac. 746; Friedenwald v. Shipley, 74 Md. 220, 21 Atl. 790, 24 Atl. 156. The estimate of the examiner must be in detail.

Cuming v. City of Grand Rapids, 46 Mich. 150; Goodwillie v. City of Detroit, 103 Mich. 283, 61 N. W. 526. An estimate of the gross cost will be sufficient. Duffy v. City of Saginaw, 106 Mich. 335, 64 N. W. 581; Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108; Kuhns v. City of Omaha, 55 Neb. 183, 75 N. W. 562. The compensation of appraisers is also a proper item. People v. Common Council of Buffalo, 2 Misc. 7, 21 N. Y. Supp. 601; People v. Common Council of Kingston, 39 App. Div. 80, 56 N. Y. Supp. 606; Wewell v. City of Cincinnati, 45 Ohio St. 407, 15 N. E. 196; City of Erie v. Brady, 150 Pa. 462, 24 Atl. 641. Where the statute provides that the estimate should "particularly state the items and cost of each," an approximate estimate of quantities and cost is not sufficient.

[395] Brethold v. Village of Wilmette, 168 Ill. 162. A commissioner after having reported an estimate cannot change it by testifying that he included an illegal item of cost. Loesnitz v. Seelinger, 127 Ind. 422, following White v. Fleming, 114 Ind. 560. Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774. Neither will a special assessment be set aside for the reason that the estimate of cost was determined on insufficient evidence when it does not appear that the officers acted dishonestly or that the assessment is excessive. In re Leake & Watts Orphan Home, 92 N. Y. 116; City of Cincinnati v. Anchor White Lead Co., 44 Ohio St. 243.

[396] Ronan v. People, 193 Ill. 631; McKusick v. City of Stillwater, 44 Minn. 372. Where a clause in a city charter provides that no informality or irregularity in or preliminary to making a special assessment shall affect its validity when the assessment roll has been adopted by the city council, a failure to make a preliminary estimate of the cost of the proposed improvement before the assessment is made must be treated as an irregularity. The court say: "The charter provides that after the city engineer has made his plat, survey and profile of the proposed improvement, showing the character and extent thereof, and his estimate of the cost thereof, 'the city council may cause such plat and survey to be modified, amended or changed as it may deem proper and shall estimate and fix upon the cost of making such improvement when the assessment made for defraying the expense of such work or improvement is ordered, prior to the doing of such work or making such improvement. When such plat and survey shall be

formed in compliance with the contract, the failure to make an estimate cannot defeat a lien for the cost of the local improvement.[397]

§ 357. Same subject continued.

In still other municipalities we find the requirement that the city council, an assessing board or other official body must take specific and definite action either in regard to the necessity for the improvement, by the adoption of a resolution of intention, or an order directing its construction,[398] or official action of some

finally adopted by the city council it shall be filed with the city clerk and it shall be held to show correctly the character and extent of the improvement actually agreed upon and ordered by the city council.' It is objected that the council did not make any formal estimate, as above provided, upon the filing of the survey and estimate of the engineer. But the latter were filed and acted on by the council and the commissioners duly appointed to proceed thereunder, which was equivalent to an adoption of the report as a whole. Besides it is provided in section 16, c. 10 (Sp. Laws 1881, c. 92, p. 590) of the charter that 'no omission, informality or irregularity in proceedings in or preliminary to the making of any special assessment shall affect the validity of the same where the assessment roll has been adopted by the city council. * * * And no variance from the directions herein contained as to the form or manner of any of the proceedings shall be held material, unless it be clearly shown that the party objecting was materially injured thereby and unless such objections were taken at the time and in the manner prescribed in this chapter.' This objection was not so taken and must be disregarded." Herbert v. City of Bayonne, 63 N. J. Law, 532, 42 Atl. 833.

[397] Tennessee Pav. Brick Co. v. Barker (Ky.) 59 S. W. 755.

[398] Williams v. McDonald, 58 Cal. 527; Haughawout v. Hubbard, 131 Cal. 675, 63 Pac. 1078; Grant v. Barber, 135 Cal. 188, 67 Pac. 127; Union Pav. & Contracting Co. v. McGovern, 127 Cal. 638; Edwards v. Berlin, 123 Cal. 544; West Chicago Park Com'rs v. Sweet, 167 Ill. 326. After eight years' undisputed jurisdiction and control over a street by park commissioners, the regularity of proceedings, where such jurisdiction was conceded to them, cannot be questioned in proceedings for the levy of a special assessment for the improvement of a street.

Clarke v. City of Chicago, 185 Ill. 354. Where a preliminary hearing on the question of cost is required by statute, before a valid resolution can be made recommending a proposed street improvement by the board of local improvements, upon failure to give such preliminary hearing all subsequent proceedings are invalid. Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; City of Nevada v. Eddy, 123 Mo. 546; King v. City of Port-

character[399] designed to serve as a basis for putting in motion all the proceedings and steps necessary to the legal levy and collection of a special assessment. The action of such officials is, in this respect, usually considered ministerial in its character, not judicial, but no appeal[400] will lie unless this right is expressly given

land, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812; Mason v. City of Sioux Falls, 2 S. D. 640; Buckley v. City of Tacoma, 9 Wash. 253; Bellingham Bay Imp. Co. v. City of New Whatcom, 17 Wash. 496; Jones v. City of Seattle, 19 Wash. 669; Kline v. City of Tacoma, 11 Wash. 193, 39 Pac. 453; Id., 12 Wash. 657, 40 Pac. 418.

See, also, the following cases considering especially the question of a declaration of necessity, so called, for the improvement. Such declaration is usually required by special charter provisions, and is not, in their absence, a jurisdictional matter, but it may be necessary for the acquirement of jurisdiction over property sought to be assessed: Michigan Cent. R. Co. v. Huehn, 59 Fed. 335; McLauren v. City of Grand Forks, 6 Dak. 397; Hoyt v. City of East Saginaw, 19 Mich. 39; Stephan v. Daniels, 27 Ohio St. 527.

Generally on the question of necessity see the following: Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455; City of Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Dorman v. City Council of Lewiston, 81 Me. 411; Com. v. Abbott, 160 Mass. 282; Davies v. City of Saginaw, 87 Mich. 439; Beecher v. City of Detroit, 92 Mich. 268; Naegely v. City of Saginaw, 101 Mich. 532; Cook v. Slocum, 27 Minn. 509; Taylor v. City of St. Louis, 14 Mo. 20; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Strowbridge v. City of Portland, 8 Or. 67; Clinton v. City of Portland, 26 Or. 410; Kerr v. City of Corsicana (Tex. Civ. App.) 35 S. W. 694; Connor v. City of Paris, 87 Tex. 32; Boyd v. City of Milwaukee, 92 Wis. 456. See § 361, post.

[399] City of Chicago v. Weber, 94 Ill. App. 561. No contract relation exists between the commissioners, who make a special assessment, and the municipality. They are not its agents but officers of the court appointing them. West Chicago Park Com'rs v. Farber, 171 Ill. 146; Kingman, Petitioner, 156 Mass. 361, 30 N. E. 820, construing statutes of 1889, c. 439, authorizing the construction of sewerage systems for certain cities and towns. Stifel v. Southern Cooperage Co., 38 Mo. App. 340. Where a charter provision requires "that all special bills for work contemplated by this charter shall be made out by the president" of the board of public improvements and signed by him, this power cannot be delegated and a tax bill made out and signed by the president pro tem is void. Hendrickson v. Borough of Point Pleasant, 65 N. J. Law, 535, 47 Atl. 465.

[400] Galt v. City of Chicago, 174 Ill. 605. The report is conclusive of commissioners fixing the relative proportion of the cost of an improvement to be borne respectively by the municipality and owners of property liable.

City of Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468, holding the acts of the engineer ministerial and

by statute,[401] or unless they abuse their discretion or are palpably wrong in some important particular;[402] they may be vested, moreover, with the power by law to correct such errors as may be shown to exist.[403]

§ 358. Jurisdiction acquired through the introduction and passage of an ordinance.

In the greater number of municipalities or other districts authorized to levy special assessments, it will be found that the entire machinery of the law relating thereto is set in motion through the adoption of an ordinance.[404] Without this, the authority for

not judicial and therefore not appealable under Vigo County Com'rs v. Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515.

[401] Vigo County Com'rs v. Davis, 136 Ind. 503, 36 N. E. 141, 22 L. R. A. 515; City of Terre Haute v. Mack, 139 Ind. 99, 38 N. E. 468.

[402] Davis v. City of Newark, 54 N. J. Law, 144, 23 Atl. 276; In re Brook Ave., 8 App. Div. 294, 40 N. Y. Supp. 949; Sinclaire v. Town of West Hoboken, 58 N. J. Law, 129.

[403] Brooks v. City of Chicago, 168 Ill. 60; Aldis v. South Park Com'rs, 171 Ill. 424; In re Delaware & H. Canal Co., 8 N. Y. Supp. 352.

[404] Edgar v. City of Pittsburg, 114 Fed. 586; Kansas City, P. & G. R. Co. v. Waterworks Imp. Dist. No. 1, 68 Ark. 376, 59 S. W. 248; Pacific Pav. Co. v. Reynolds, 130 Cal. XVIII, 62 Pac. 212; City of Napa v. Easterby, 76 Cal. 222; City of Savannah v. Weed, 96 Ga. 670. If the charter so provides, a single ordinance may authorize the paving of several streets.

City of Atlanta v. Smith, 99 Ga. 462; Maywood Co. v. Village of Maywood, 140 Ill. 216, 29 N. E. 704. It is not necessary that the municipality own the title to land in which a sewer is to be constructed at the time the ordinance authorizing such sewer is passed. City of Carlyle v. Clinton County, 140 Ill. 512, 30 N. E. 782. The city cannot levy a special tax to pay for an improvement constructed before the ordinance authorizing it was passed. See, also, City of East St. Louis v. Albrecht, 150 Ill. 506, 37 N. E. 934.

Weld v. People, 149 Ill. 257, 36 N. E. 1006; Freeport St. R. Co. v. City of Freeport, 151 Ill. 451. The illegality of one part of an ordinance will not affect the remainder where it is not to be applied or taken as a whole. Adcock v. City of Chicago, 160 Ill. 611. It is not necessary that an ordinance be certified for its use in connection with a petition for an assessment.

Payne v. Village of South Springfield, 161 Ill. 285. A single ordinance may provide for more than one improvement. Thaler v. West Chicago Park Com'rs, 174 Ill. 211. An assessment for the cost of an improvement is invalid where the contract for its construction was let before the ordinance authorizing it was passed. Shannon v. Village of Hinsdale, 180 Ill. 202. The invalid portions of an improvement ordinance

the levy of the assessment does not exist and if a failure to pass a legal ordinance can be shown, all subsequent proceedings will be considered invalid and the collection of the assessment can be successfully resisted by the property owner.[405]

if separable from those which are valid will not affect them.

Noonan v. People, 183 Ill. 52. An improvement ordinance may be repealed so far as it relates to street intersections without impairing its validity in other respects. Thomson v. People, 184 Ill. 17; State v. Common Council of Michigan City, 138 Ind. 455, 37 N. E. 1041. The ordinance may become a part of the contract for the execution of which it is authority. Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071. The improvement of two streets may be authorized by one resolution. McManus v. Hornaday, 99 Iowa, 507, 68 N. W. 812; Cooper v. City of Cedar Rapids, 112 Iowa, 367, 83 N. W. 1050. No special authority is necessary for the construction of a temporary open sewer for surface drainage.

Barron v. Krebs, 41 Kan. 338; Richardson v. Mehler, 23 Ky. L. R. 917, 63 S. W. 957; Alberger v. City of Baltimore, 64 Md. 1; Barber Asphalt Pav. Co. v. French, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492. Passing upon the constitutionality of an ordinance authorizing the paving of a street and the levy of a special assessment according to the front-foot rule; such ordinance held valid. This case was taken to the supreme court of the United States on writ of error and afterwards affirmed. See French v. Barber Asphalt Pav. Co., 181 U. S. 364. See, also, note 223, § 337.

Maudlin v. City of Trenton, 67 Mo. App. 452; Wheeler v. City of Poplar Bluff, 149 Mo. 36; Orr v. City of Omaha, 2 Neb. Unoff. 771, 90 N. W. 301; Turner v. Brigantine Borough, 54 N. J. Law, 476, 24 Atl. 481; Murphy v. City of Albina, 20 Or. 379, 26 Pac. 234; City of Chester v. Eyre, 181 Pa. 642. The effect of a paving ordinance cannot be abrogated by oral declarations of individual members of the council to the effect that the paving directed to be made will not be immediately required. In re Beachwood Ave., 194 Pa. 86; Davie's Ex'rs v. City of Galveston, 16 Tex. Civ. App. 13, 41 S. W. 145; City of Spokane v. Browne, 8 Wash. 317.

[405] Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127. A defective ordinance may be subsequently amended so as to validate the special assessment. St. John v. City of East St. Louis, 136 Ill. 207, 27 N. E. 543; People v. Green, 158 Ill. 594. An objection cannot be sustained in an application for judgment under a delinquent special tax which should have been raised during the pendency of other proceedings prior to the assessment. People v. McWethy, 165 Ill. 222. The repeal of an ordinance will not affect the liability for unpaid instalments of the assessment levied under it.

Bradford v. City of Pontiac, 165 Ill. 612. Where a city engineer is given power to supervise an improvement and see that the work done and materials used are in accordance with the ordinance, this will not invalidate such ordinance because delegating the power vested in the city council. Cass v. People, 166 Ill. 126. No objection can be

(a) Legality of ordinances. The legality of the ordinance will depend upon the validity of the various steps required by law for

made to the insufficiency of an improvement ordinance on application for judgment for assessments made thereunder.

O'Neil v. People, 166 Ill. 561; Trimble v. City of Chicago, 168 Ill. 567; Holdom v. City of Chicago, 169 Ill. 109. An ordinance providing for street improvements repeals a prior one inconsistent and in conflict with it. Andrews v. People, 173 Ill. 123. It is not necessary that an ordinance should set out the particular statute authorizing its passage. City of Bloomington v. Reeves, 177 Ill. 161. Where the improvement must be considered as a whole when the proceedings relating to a prior one are invalid, this will invalidate the improvement in toto.

Village of Western Springs v. Hill, 177 Ill. 634; Davidson v. City of Chicago, 178 Ill. 582. A general objection to the sufficiency of an improvement ordinance is sufficient. Connecticut Mut. Life Ins. Co. v. City of Chicago, 185 Ill. 148. After the completion of an improvement,. an ordinance authorizing it is valid and an assessment upon property liable can be made.

Hull v. West Chicago Park Com'rs, 185 Ill. 150; Zelie v. City of Webster City, 94 Iowa, 393, 62 N. W. 796; Altman v. City of Dubuque, 111 Iowa, 105, 82 N. W. 461. Where the law requires that the mayor of a city of the first and second class shall sign or veto and return resolutions directing street improvements before the same shall take effect or be in force, such a requirement is mandatory and a failure to do this will invalidate the special tax levied to pay the cost. Mackin v. Wilson, 20 Ky. L. R. 218, 45 S. W. 663. The formalities required for the construction of an original street improvement will not apply to an ordinance for its reconstruction. See, also, upon this question as holding the same principle, the case of City of Augusta v. McKibben, 22 Ky. L. R. 1224, 60 S. W. 291.

Bitzer v. Dinwiddy, 20 Ky. L. R. 298, 45 S. W. 1049, following Fehler v. Gosnell, 18 Ky. L. R. 238, 35 S. W. 1125. An ordinance which is void in part is not necessarily void in toto. Richardson v. Mehler, 23 Ky. L. R. 917, 53 S. W. 957; Bitzer v. O'Bryan, 21 Ky. L. R. 1307, 54 S. W. 951. The burden of proving the illegality of proceedings is upon the party attacking them. See, also, as discussing the same question, Elder v. Cassilly, 21 Ky. L. R. 1274, 54 S. W. 836; and McHenry v. Selvage, 18 Ky. L. R. 473, 35 S. W. 645.

Lynde v. City of Malden, 166 Mass. 244; Dennison v. City of Kansas, 95 Mo. 416, 8 S. W. 429; City of Nevada v. Eddy, 123 Mo. 546, 27 S. W. 471; McQuiddy v. Brannock, 70 Mo. App. 535; Heman v. Ring, 85 Mo. App. 231; Steffen v. Fox, 124 Mo. 630. Morse v. City of Westport, 136 Mo. 276. The excessive cost of an improvement authorized by an ordinance will not of itself alone make such ordinance invalid. Neill v. Gates, 152 Mo. 585; Grant v. Bartholomew, 58 Neb. 839, modifying judgment in 57 Neb. 673, 78 N. W. 314. The burden of proving the validity of special assessments is upon the party attacking them. See, also, upon this question and holding

its passage. The manner and mode of its introduction into the local legislative body,[406] the procedure within that body upon its passage,[407] the question of a quorum,[408] the necessary number of

the same, the case of Johnson v. Ferrell, 8 Ky. L. R. 216, 1 S. W. 412, 541, distinguishing Ormsby v. City of Louisville, 79 Ky. 197.

North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62. The fact that a citizen promises to pay part of the expense of opening a street will not invalidate an ordinance induced by such promise. Ogden v. City of Hudson, 29 N. J. Law (5 Dutch.) 475. It is not necessary that questions affecting the legality of an ordinance be raised before the levy of an assessment. Wilson v. City of Hudson, 32 N. J. Law, 365. The fact that funds were injudiciously applied is no ground against an improvement ordinance. Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571. An assessment ordinance is not invalid though three of the members of the city council were influenced in its favor by fraud there being irrespective of such three votes, a sufficient number to pass it under the provisions of the city charter. Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673; Vesta Mills v. City Council of Charleston, 60 S. C. 1.

[406] Wadlow v. City of Chicago, 159 Ill. 176. The ordinance should be passed at the time required by law considering the proceedings for the making of the improvement, passage of the ordinance and the levy and collection of the assessment as a whole.

People v. Colvin, 165 Ill. 67. The respective proceedings should follow in their chronological order as required by statute and objections made to any one of them should be raised at the proper time and before the question of the local improvement has passed this stage. See, also, chapter on Ordinances, post.

[407] Gleason v. Barnett, 20 Ky. L. R. 1865, 49 S. W. 1060. People v. Board of Contract & Apportionment of Albany, 39 App. Div. 30, 56 N. Y. Supp. 334. The court say: "The objections are based upon the claim that the proceedings of the common council in passing the ordinance or law referred to were so irregular as to render it invalid. The argument is that, the law being invalid, the board has no jurisdiction to take any proceedings to cary it out. There is no provision in the charter that I can discover authorizing any party to require the board to disregard such a law on the ground that it has been irregularly passed, and it may be that such board has no authority to inquire into such a matter. Section 3 of title 9 of the charter gives the board charge of such matters, 'under the direction of the common council,' and it is not altogether plain that the board has any power to review the proceedings of such council or reject any of its ordinances. But without deciding that question, it is clear that such review should not be exercised by the board and an ordinance disregarded unless it is made to appear that the irregularities complained of have actually occurred. Nothing appears in the record before us to show that any proofs of the alleged irregulari-

votes,[409] its publication or recording regarded both from the

ties were made or tendered to the board. In the objections filed, certain irregular modes are stated to have been followed by the common council in passing the law but it is squarely denied in the return that the correctness of that statement was conceded and it is not claimed by the relators that any proof thereof was ordered. It cannot be said, therefore, that the board has committed any error in proceeding as if a valid ordinance was before them."

The following cases consider the element of time in connection with the passage or presentation of ordinance providing for local improvements and the levying of local assessments. City of Paxton v. Bogardus, 201 Ill. 628. The failure to pass the necessary ordinance before the execution of a contract for local improvements invalidates it. Kendig v. Knight, 60 Iowa, 29; Fehler v. Gosnell, 99 Ky. 380; Smith v. Tobener, 32 Mo. App. 601 (special meeting of council); Dollar Sav. Bank v. Ridge, 62 Mo. App. 324; Aurora Water Co. v. City of Aurora, 129 Mo. 540 (validity of ordinance passed at special meeting considered); City of Springfield v. Weaver, 137 Mo. 650 (Bids for the paving of a street may be advertised for before the formal passage of an ordinance ordering the work to be done); Wright v. Forrestal, 65 Wis. 341.

The manner of the passage of such an ordinance considered in the following cases: Hough v. City of Bridgeport, 57 Conn. 290; Murphy v. City of Louisville, 72 Ky. (9 Bush) 189.

State v. Armstrong, 54 Minn. 457. It is necessary to take a separate vote upon each of the several different propositions having in view the construction of local improvements. Stewart v. City of Clinton, 79 Mo. 603; Town of Trenton v. Coyle, 107 Mo. 193; Campbell v. City of Cincinnati, 49 Ohio St. 463. An improvement ordinance must be read on three different days under a charter provision requiring all ordinances of a permanent nature to be read in such manner. City of Cincinnati v. Anderson, 52 Ohio St. 600.

Gilman v. City of Milwaukee, 61 Wis. 588. The failure to refer an ordinance to a committee of the council as required by the charter invalidates street improvement ordinances. See the following cases relative to the signing of such an ordinance by a presiding or other officer: Creighton v. Manson, 27 Cal. 613; Thompson v. Hoge, 30 Cal. 179; Williams v. McDonald, 58 Cal. 527. Where a charter provision requires the clerk to sign the resolution for a local improvement, his printed signature is sufficient.

The mayor's signature held necessary in the following cases: Doty v. Lyman, 166 Mass. 318; Saxton v. Beech, 50 Mo. 488; Irvin v. Devors, 65 Mo. 625; Kinsella v. City of Auburn, 54 Hun (N. Y.) 634.

The following hold signature or approval not necessary: Taylor v. Palmer, 31 Cal. 241; Beaudry v. Valdez, 32 Cal. 269; McDonald v. Dodge, 97 Cal. 112; Martindale v. Palmer, 52 Ind. 411; State v. Armstrong, 54 Minn. 457; Hall v. City of Racine, 81 Wis. 72.

[408] Ferguson v. Crittenden County, 6 Ark. 479; Price v. Grand Rapids & I. R. Co., 13 Ind. 58; City of Logansport v. Legg, 20 Ind. 315.

[409] Bacon v. City of Savannah, 86

standpoint of manner and time,[410] will all be considered and due weight given to all statutory requirements controlling or affecting the passage of local legislation.

Ga. 301; City of Logansport v. Legg, 20 Ind. 315; Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741. Where the ordinance directing the public improvement recites that it was passed by a two-thirds vote, this statement is conclusive of the fact stated on collateral attack. McEneney v. Town of Sullivan, 125 Ind. 407; City of Covington v. Sullivan, 19 Ky. L. R. 1884, 44 S. W. 630; City of Covington v. Casey, 66 Ky. (3 Bush) 698.

Tennant v. Crocker, 85 Mich. 328; Clark v. City of Elizabeth, 61 N. J. Law, 565, 40 Atl. 616, 737; City of Bradford v. Fox, 171 Pa. 343; Connor v. City of Paris, 87 Tex. 32, 27 S. W. 88; Kerr v. City of Corsicana (Tex. Civ. App.) 35 S. W. 694; City of Waco v. Prather (Tex. Civ. App.) 35 S. W. 958; Buckley v. City of Tacoma, 9 Wash. 269; Dieckmann v. Sheboygan County, 89 Wis. 571.

In re City of Mt. Vernon, 34 Misc. 225, 68 N. Y. Supp. 823, the court say: "The charter of this city authorizes the common council by an ordinary majority vote to allow a street to be laid out and opened on receipt of a petition therefor signed by one-third of the landowners along its line and after giving a hearing thereon on a prescribed notice by publication; but only provided that there be no remonstrance against it on such hearing. It then adds: 'The common council by an unanimous vote of all its members, may allow any such improvement to be made * * * without such petition and notice, or, in case of a petition, notwithstanding such remonstrance;' and next follows a provision that if the proposed improvement be a sewer 'the common council by the vote of a majority of all its members, to be ascertained by taxing and recording the ayes and noes,' may allow the improvement to be made and the property rights or easements to be taken without petition of any owner and notwithstanding any remonstrance.' There was no petition in this case, and the moving papers purport to show that whereas the common council consisted of ten aldermen, only eight were present at the meeting and voted to allow the improvement. If this be true the contention that the common council never allowed this improvement is valid. It could allow it only 'by a unanimous vote of all its members.' The statute is plain and unambiguous on this head and therefore artificial rules of construction may not be resorted to. They cannot be invoked to change a plain meaning."

[410] Crane v. City of Siloam Springs, 67 Ark. 30; Heilman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, judgment modified on rehearing in 128 Cal. 236, 60 Pac. 772; City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112; City of New Albany v. Endres, 143 Ind. 192; City of Dubuque v. Wooton, 28 Iowa, 571; City of Lexington v. Headley, 68 Ky. (5 Bush) 508; Fox v. Middlesborough Town Co., 96 Ky. 262, 28 S. W. 776; Nevin v. Roach, 86 Ky. 492; Chase

(b) Form. As the collection of a local assessment may result in the confiscation of property, it follows that to protect the owner, the law may require all ordinances designed as a basis for the levy of local assessments to be of a special form setting forth in detail the character,[411] cost,[412] and locality or place[413] of the im-

v. Aldermen of Springfield, 119 Mass. 556; Inhabitants of Leominster v. Conant, 139 Mass. 384; City of Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Kansas City v. Duncan, 135 Mo. 571. The acquirement of jurisdiction through the publication of an ordinance directed "to whom it may concern" without naming them is not unconstitutional as taking property without due process of law though most of the interested parties are resident property owners. McGavock v. City of Omaha, 40 Neb. 64; Hand v. City Council of Elizabeth, 30 N. J. Law, 365; Cunningham v. Borough of Merchantville, 61 N. J. Law, 466, 39 Atl. 639; Cowen v. Village of West Troy, 43 Barb. (N. Y.) 48. Haven v. City of New York, 67 App. Div. 90, 73 N. Y. Supp. 678. A substantial compliance with the statute, however, is all that is necessary. In re Burmeister, 76 N. Y. 174; In re City of Buffalo, 78 N. Y. 362; Oil City v. Lay, 164 Pa. 370.

[411] Williams v. Bisagno (Cal.) 34 Pac. 640; City of Los Angeles v. Dehail, 97 Cal. 13; Pearson v. City of Chicago, 162 Ill. 383, distinguishing Washington Ice Co. v. City of Chicago, 147 Ill. 327; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505; Culver v. City of Chicago, 171 Ill. 399. An improvement ordinance need not show on its face whether it will prove beneficial to the property on which the proposed assessment is to be levied. Brewster v. City of Peru, 180 Ill. 124. A description is sufficient if the character of the improvement can be ascertained either from the ordinance itself or by reference to some other ordinance or map.

The statutes of Illinois, c. 24, art. 9, § 19, provide that to authorize a local improvement to be paid by special assessment, an ordinance must be passed specifying the nature, locality and description of the proposed improvement. Under this statute as originally passed and as amended in 1887, the following cases hold that the descriptions contained in the ordinances were not sufficiently definite in some one of the particulars as specified to sustain an assessment. St. John v. City of East St. Louis, 136 Ill. 207, 27 N. E. 543; Lake Shore & M. S. R. Co. v. City of Chicago, 144 Ill. 391, 33 N. E. 602, following Village of Hyde Park v. Carton, 132 Ill. 100. Hull v. City of Chicago, 156 Ill. 381, 40 N. E. 937. A sidewalk ordinance which directs the sidewalk to be constructed of plank at one place and stone in another is void for uncertainty. City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112. The specifications, however, need not be set out in the minutest detail. Rose v. City of Chicago, 188 Ill. 347, 58 N. E. 933; Fehringer v. City of Chicago, 187 Ill. 416, 58 N. E. 303; Willis v. City of Chicago, 189 Ill. 103, 59 N. E. 543; City of Sterling v. Galt, 117 Ill. 11.

City of Alton v. Middleton's Heirs, 158 Ill. 442. A description in an or-

dinance of a public improvement cannot be made good by a reference to plans in the office of the village engineer. Otis v. City of Chicago, 101 Ill. 199. An ordinance providing for the erection of a specified number of lamp posts on a certain avenue between two streets named accompanied by a plat of the street does not comply with the statute which requires the ordinance to specify the nature, character, locality and description of the improvement. Illinois Cent. R. Co. v. City of Effingham, 172 Ill. 607. If a street is to be improved by tiling, the ordinance should give a specific description of the tiles. Jacobs v. City of Chicago, 178 Ill. 560. An ordinance is insufficient which does not describe the height of the curb directed to be laid. See, also, as holding the same, the case of Lingle v. City of Chicago, 178 Ill. 628.

Davidson v. City of Chicago, 178 Ill. 582. An ordinance which prescribes that the curb stones "shall be firmly bedded on flat stones" is void because of an insufficient description of the flat stones. Dickey v. City of Chicago, 179 Ill. 184; Gage v. City of Chicago, 179 Ill. 392; Lundberg v. City of Chicago, 183 Ill. 572; Kuester v. City of Chicago, 187 Ill. 21; Libbey v. City of Chicago, 187 Ill. 189; City of Chicago v. Sherman, 192 Ill. 576; Nichols v. City of Chicago, 192 Ill. 290; Kelly v. City of Chicago, 193 Ill. 324; Beach v. City of Chicago, 193 Ill. 369; Moll v. City of Chicago, 194 Ill. 28.

The following cases hold the description sufficiently definite in either one or all of the above particulars to warrant the assessment as levied: Woods v. City of Chicago, 135 Ill. 582, 26 N. E. 608. Paving ordinances need not specify the width of a street where the recorded plats show this as well as the width of the sidewalks. See, also, as holding the same, Chicago, B. & Q. R. Co. v. City of Quincy, 136 Ill. 563, 27 N. E. 192, from the opinion in which, however, Craig, J., dissented. Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723; Steele v. Village of River Forest, 141 Ill. 302, 30 N. E. 1034; City of Carlinville v. McClure, 156 Ill. 492, 41 N. E. 169 A profile with an ordinance where the former is made a part of the latter may sufficiently describe the improvement.

Harrison v. City of Chicago, 163 Ill. 129, 44 N. E. 395. Where the statutes provide that the ordinance must specify the nature, locality and description of the improvement, it is not necessary to state the width of a proposed pavement. White v. City of Chicago, 188 Ill. 392, 58 N. E. 917; Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10; Johnson v. People, 189 Ill. 83, 59 N. E. 515; Peters v. City of Chicago, 192 Ill. 437, 61 N. E. 438.

Callon v. City of Jacksonville, 147 Ill. 113. It is sufficient under the Ill. statutes if the character and description of the proposed local improvement can be ascertained from the ordinance directing its construction or by reference to official maps, plans, profiles or specifications on file.

Newman v. City of Chicago, 153 Ill. 469; Cunningham v. City of Peoria, 157 Ill. 499. The fact that an ordinance, complete and sufficient in itself, refers to documents on file in the department of public works does not render it invalid. Dickey v. City of Chicago, 164 Ill. 37. An ordinance need not state the width

of a street unless some uncertainty is shown as to this fact in order to comply with the Rev. St. c. 24, § 19, art. 9, requiring a special assessment ordinance to specify the nature, character, locality and description of the work.

Bradford v. City of Pontiac, 165 Ill. 612. A street ordinance is void which delegates to the city engineer the power to substantially determine the character of the improvement. Latham v. Village of Wilmette, 168 Ill. 153. A specification in an ordinance that certain portions of the work shall be of "no less than" certain specified dimensions does not render it invalid for uncertainty. Trimble v. City of Chicago, 168 Ill. 567. An ordinance which provides that a pavement may be leveled by a roller or pavement rammer is not void for uncertainty.

Walker v. People, 170 Ill. 410; Hoover v. People, 171 Ill. 182. General ordinances relating to the same subject can be referred to and made a part of a local improvement ordinance. Chicago & N. P. R. Co. v. City of Chicago, 172 Ill. 66; Gross v. People, 172 Ill. 571; Kunst v. People, 173 Ill. 79; Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439; Lehmers v. City of Chicago, 178 Ill. 530.

Chicago Terminal Transfer Co. v. City of Chicago, 178 Ill. 429. An ordinance which fails to specify material with which the new curbing shall be constructed or its height or thickness is not invalid where such curbing is to improve or replace curbing already in place. Claflin v. City of Chicago, 178 Ill. 549. See this case of a sufficient description under the Ill. Statutes for paving an avenue. Ewart v. Village of Western Springs, 180 Ill. 318. An ordinance is not indefinite in failing to state the dimension of electric light poles where the top and length is given, the bottom dimensions being approximately ascertainable therefrom.

Bickerdike v. City of Chicago, 185 Ill. 280. It is not necessary to give the dimensions of each stone to be used in a local improvement. Givins v. City of Chicago, 186 Ill. 399; Hintze v. City of Elgin, 186 Ill. 251; Hardin v. City of Chicago, 186 Ill. 424; Markley v. City of Chicago, 190 Ill. 276; Houston v. City of Chicago, 191 Ill. 559; Tuttle v. Polk, 84 Iowa, 12.

Kentucky Gen. St. § 3449, provides that an improvement ordinance shall "fully declare and prescribe the kind and extent of improvement to be made." Under this section the following cases hold the descriptions sufficiently specific. Councilmen of Frankfort v. Murray, 99 Ky. 422, 36 S. W. 180; Hackworth v. Louisville Artificial Stone Co., 20 Ky. L. R. 1789, 50 S. W. 33. The description of sidewalk material as "granitoid" is sufficiently specific. Dumesnil v. Hexagon Tile Walk Co., 23 Ky. L. R. 144, 58 S. W. 705; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957; Horne v. Mehler, 23 Ky. L. R. 1176, 64 S. W. 918. An ordinance calling for "vitrified brick" is sufficient.

Scott County v. Hinds, 50 Minn. 204; City of St. Joseph v. Owen, 110 Mo. 445, 19 S. W. 713. It is not necessary, however, to specify the minutest details. Verdin v. City of St. Louis (Mo.) 27 S. W. 447. A street improvement ordinance is void which fails to comply with a charter provision that such ordinance must specify the material to be used. Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543, 38 S. W. 458. An ordi-

nance is sufficient which refers to specifications in the office of the city engineer giving the manner in which the work shall be done. Haegele v. Mallinckrodt, 46 Mo. 577. An ordinance authorizing the macadamizing of a street without furnishing directions as to the manner of doing the work is insufficient. Skinker v. Heman, 148 Mo. 349, 49 S. W. 1026, reversing 64 Mo. App. 441. An ordinance which provides the character of materials to be used is not unreasonable and oppressive because the cost of replacing the sidewalk will many times exceed the cost of the repairs. City of Rich Hill v. Donnan, 82 Mo. App. 386; Huling v. Bandera Flag Stone Co., 87 Mo. App. 349; Turner v. Brigantine Borough, 54 N. J. Law, 476; Clarke v. Long Branch Com'rs,, 54 N. J. Law, 484; Caldwell v. Village of Carthage, 49 Ohio St. 334; Buckley v. City of Tacoma, 9 Wash. 253.

The following cases consider with other questions the sufficiency of descriptions in connection with local assessment proceedings referring to the particular improvement suggested.

Sewers, including catch-basins, manholes and connections: Rickcords v. City of Hammond, 67 Fed. 380. Under Ind. St., a failure to specify the size of a sewer held not to invalidate the proceedings. Village of Hyde Park v. Borden, 94 Ill. 26; City of St. Joseph v. Owen, 110 Mo. 445; Village of Hyde Park v. Spencer, 118 Ill. 446; Ogden v. Town of Lake View, 121 Ill. 422; City of Springfield v. Mathus, 124 Ill. 88; Pearce v. Village of Hyde Park, 126 Ill. 287; City of Springfield v. Sale, 127 Ill. 359; Cochran v. Village of Park Ridge, 138 Ill. 295; Steele v. Village of River Forest, 141 Ill. 302 (location of drain); Barber v. City of Chicago, 152 Ill. 37; Rich v. City of Chicago, 152 Ill. 18; City of Alton v. Middleton's Heirs, 158 Ill. 442; Payne v. Village of South Springfield, 161 Ill. 285; Village of Hinsdale v. Shannon, 182 Ill. 312; Peters v. City of Chicago, 192 Ill. 437; Duane v. City of Chicago, 198 Ill. 471; Walker v. City of Chicago, 202 Ill. 531; Bennett v. City of New Bedford, 110 Mass. 433; Com. v. Abbott, 160 Mass. 282; Young v. City of Kansas, 27 Mo. App. 101; City of St. Joseph v. Landis, 54 Mo. App. 315; State v. City of St. Louis, 56 Mo. 277; South Highland Land & Imp. Co. v. Kansas City, 172 Mo. 523.

For street improvements, including opening, extending, grading and widening, see the following cases: Washington Ice Co. v. City of Chicago, 147 Ill. 327; City of Danville v. McAdams, 153 Ill. 216; Pearson v. City of Chicago, 162 Ill. 383; Rawson v. City of Chicago, 185 Ill. 87; Hays v. City of Vincennes, 82 Ind. 178; Mann v. Jersey City, 24 N. J. Law (4 Zab.) 662; Parker v. City of New Brunswick, 30 N. J. Law, 395; Woodruff v. Town of Orange, 32 N. J. Law, 49; Boice v. Inhabitants of Plainfield, 38 N. J. Law, 95.

Paving streets, including material: Main v. City of Ft. Smith, 49 Ark. 480. Material need not be described under an ordinance requiring the proceedings "to specify, briefly and plainly the kind of material ordered." Emery v. San Francisco Gas Co., 28 Cal. 345; Deady v. Townsend, 57 Cal. 298; Durand v. Borough of Ansonia, 57 Conn. 70; Bacon v. City of Savannah, 86 Ga. 301; Jacksonville R. Co. v. City of Jacksonville, 114 Ill. 562; Woods v. City of Chicago, 135 Ill. 582; Harrison Bros. v.

City of Chicago, 163 Ill. 129; Shannon v. Village of Hinsdale, 180 Ill. 202 (Stone); Hull v. West Chicago Park Com'rs, 185 Ill. 150; Topliff v. City of Chicago, 196 Ill. 215; City of Chicago v. Singer, 202 Ill. 75. Brick: Barber Asphalt Pav. Co. v. Garr, 115 Ky. 334, 73 S. W. 1106; Redersheimer v. Flower, 52 La. Ann. 2089. Asphalt: Morley v. Weakley, 86 Mo. 451; Becker v. City of Washington, 94 Mo. 375; Verdin v. City of St. Louis, 131 Mo. 26; Skinker v. Heman, 148 Mo. 349; Barber Asphalt Pav. Co. v. Hezel, 155 Mo. 391, 48 L. R. A. 285.

Sidewalks: City of Charlton v. Holliday, 60 Iowa, 391; Councilmen of Frankfort v. Murray, 99 Ky. 422; City of Lowell v. Wheelock, 65 Mass. (11 Cush.) 391; Browne v. City of Boston, 166 Mass. 229. Gallaher v. Smith, 55 Mo. App. 116. A description of material for a sidewalk by reference to a specific section of a general ordinance is sufficient.

Miscellaneous: Washburn v. City of Chicago, 202 Ill. 210. A description of a fire hydrant and supply pipes as "city of Chicago standard" is insufficient.

[412] Kimble v. City of Peoria, 140 Ill. 157, 29 N. E. 723, following Kuehner v. City of Freeport, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774; Lake Shore & M. S. R. Co. v. City of Chicago, 144 Ill. 391, 33 N. E. 602, following Village of Hyde Park v. Carton, 132 Ill. 100; Sterling v. Galt, 117 Ill. 11. An ordinance which states substantially as the statute requires "the nature, character, locality and description" of the improvement, is invalid; the provisions of the statute are mandatory. West Chicago Park Com'rs v. Farber, 171 Ill. 146; Ronan v. People, 193 Ill. 631.

[413] Rollo v. City of Chicago, 187 Ill. 417, 58 N. E. 355; Steele v. Village of River Forest, 141 Ill. 302, 30 N. E. 1034. Where from the ordinance as a whole the location can be determined, it is sufficient. Levy v. City of Chicago, 113 Ill. 650; City of Kankakee v. Potter, 119 Ill. 324; Barber v. City of Chicago, 152 Ill. 37, following City of Springfield v. Mathus, 124 Ill. 88. An ordinance which provides that the authorized number of manholes shall be built upon a sewer at such points as may be designated by the department of public works sufficiently describes their location. See, also, as holding the same, Rich v. City of Chicago, 152 Ill. 18.

City of Danville v. McAdams, 153 Ill. 216; Newman v. City of Chicago, 153 Ill. 469; Stanton v. City of Chicago, 154 Ill. 23. In describing the locality of an improvement in an ordinance authorizing it, it is not necessary to state that it is within the limits of the municipality making it, the presumption being that the council did not exceed its powers. See, also, as holding the same, Bliss v. City of Chicago, 156 Ill. 584, 41 N. E. 160; Wheeler v. People, 153 Ill. 480; Meadowcroft v. People, 154 Ill. 416; West Chicago St. R. Co. v. People, 155 Ill. 299; Beach v. People, 157 Ill. 659; Andrews v. People, 158 Ill. 477; Delamater v. City of Chicago, 158 Ill. 575; Illinois Cent. R. Co. v. City of Chicago, 169 Ill. 329.

Sargent v. City of Evanston, 154 Ill. 268; Steenberg v. People, 164 Ill. 478; Sanger v. City of Chicago, 169 Ill. 286. The limits of the improvement must be definitely stated. McChesney v. People, 171 Ill. 267; Parker v. Village of La Grange, 171 Ill. 344; Nicholes v. People, 171 Ill. 376; Kunst v. People, 173 Ill. 79. An or-

provement with a description of the property upon which the assessment levied to pay its cost may become a lien;[414] and the manner of payment.[415] Clearness of expression, accuracy of descrip-

dinance is sufficiently definite which refers to a datum as a standard of measurements.

Church v. People, 179 Ill. 205; Ewart v. Village of Western Springs, 180 Ill. 318. The location of an electric light plant "at the waterworks pump house" is sufficient; this being a public building and its location well known.

McManus v. People, 183 Ill. 391; Givins v. City of Chicago, 186 Ill. 399. In establishing a street grade, reference can be made in an ordinance to an outside source of information which the law recognizes and which places all improvements; in this case the plane of low water mark in Lake Michigan of 1874 as established by the trustees of the Ill. & Mich. Canal and adopted by the municipality of Chicago as a basis for such levels. See, also, as discussing the same subject, Hardin v. City of Chicago, 186 Ill. 424.

Gage v. City of Chicago, 191 Ill. 210. An ordinance which directs the construction of a sewer commencing at a sewer which does not exist is void for uncertainty. Craig v. People, 193 Ill. 199. An ordinance for a street improvement based upon the established grade is invalid in the absence of an ordinance establishing such grade.

Job v. People, 193 Ill. 609. An improvement ordinance is invalid which does not specify the grade on which the improvement is to be constructed or a reference to a general ordinance fixing such grade. City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112. See City of Shreveport v. Prescott, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193, construing statute, § 2 of Act No. 10 of 1896 apportioning the cost of an improvement where the street is occupied by a railroad bed or track. Browne v. City of Boston, 166 Mass. 229; People v. Delaware, L. & W. R. Co., 11 App. Div. 280, 42 N. Y. Supp. 1011.

[414] Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32; Hyman v. City of Chicago, 188 Ill. 462, 59 N. E. 10; Chicago, R. I. & P. R. Co. v. City of Moline, 158 Ill. 64; Cramer v. City of Charleston, 176 Ill. 507; Cummings v. West Chicago Park Com'rs, 181 Ill. 136; Middaugh v. City of Chicago, 187 Ill. 230; Graham v. City of Chicago, 187 Ill. 411; People v. Hills, 193 Ill. 281; Becker v. City of Henderson, 18 Ky. L. R. 881, 38 S. W. 857; Elder v. Cassilly, 21 Ky. L. R. 1274, 54 S. W. 836. An ordinance is not void which provides for the improvement of each side of the street by separate contracts, citing Barlow v. Waters, 16 Ky. L. R. 426, 28 S. W. 785; Wise v. Foote, 81 Ky. 10; and Bush v. Lisle, 89 Ky. 400.

Trustees of Phillip's Academy v. Inhabitants of Andover, 175 Mass. 118, 48 L. R. A. 550; City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165; Moale v. City of Baltimore, 61 Md. 224; Farrington v. City of Mt. Vernon, 51 App. Div. 250, 64 N. Y. Supp. 863.

[415] Burhans v. Village of Norwood Park, 138 Ill. 147, 27 N. E. 1088; Lawrence v. People, 188 Ill. 407, 58 N. E. 991; Dolese v. McDougall, 78

tion and particularity in detail, are all essential to the validity of an ordinance,[416] and strict compliance with its provisions necessary.

(c) A local improvement ordinance must be reasonable. An improvement ordinance or one levying a local assessment must in common with other legislative enactments, in order to be valid, comply with the law, not only in the particulars suggested in the

Ill. App. 629; City of Sterling v. Galt, 117 Ill. 11; Davis v. City of Litchfield, 155 Ill. 384; Delamater v. City of Chicago, 158 Ill. 575; Hughes v. City of Momence, 163 Ill. 535.

White v. Town of West Chicago, 164 Ill. 196. Under act of May 2d, 1873, the cost of the improvement of a boulevard cannot be divided into instalments. Andrews v. People, 164 Ill. 581; Latham v. Village of Wilmette, 168 Ill. 153; Trimble v. City of Chicago, 168 Ill. 567; Walker v. People, 170 Ill. 410; Parker v. Village of La Grange, 171 Ill. 344; Ryder Estate v. City of Alton, 175 Ill. 94; Danforth v. Village of Hinsdale, 177 Ill. 579; Village of Western Springs v. Hill, 177 Ill. 634. The time of payment cannot be extended by ordinance beyond the time authorized by law. Gray v. Town of Cicero, 177 Ill. 459; Walker v. City of Chicago, 202 Ill. 531; Gleason v. Barnett, 20 Ky. L. R. 1694, 50 S. W. 67; Kansas City v. Marsh Oil Co., 140 Mo. 458, 41 S. W. 943; Moran v. Thompson, 20 Wash. 525, 56 Pac. 29.

[416] Cunningham v. City of Peoria, 157 Ill. 499. "Objection is also made that the ordinance is void because it refers for greater certainty in the description of the proposed improvement, to the plans and specifications on file in the department of public works of the city of Peoria. It is claimed that as the statute provides that reference may be made to 'maps, plats, plans, profiles or specifications on file,' * * * reference to such documents on file in any other department of the city government is nugatory. If that is admitted the consequences contended for would not seem to follow in this case. The ordinance itself, by its own terms, specifies the nature, character, locality and description of the improvement with sufficient certainty to answer the requirements of the statute; and the fact that the reference to documents on file in the department of public works is nugatory in nowise invalidates the specification of the improvement, which is already sufficiently full and precise."

Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505. McQuillin, Mun. Ord. § 540. "The cases differ materially respecting the construction of laws relative to the description of the proposed improvement but this difference is due mainly to the fact that the laws are different. Where this is to be paid for by special assessment or taxation, closer adherence to charter provisions is usually enforced. The proceedings should clearly indicate the nature, extent, cost and method of apportionment that the property owners may know what they will be called upon to pay and the probable benefits to them. Simple justice demands this."

preceding paragraph, but must also be considered legal with reference to its subject-matter. It must be reasonable and not violate the other principles given in those sections treating generally this question.[417]

[417] Village of Norwood v. Baker, 172 U. S. 269; Field v. Barber Asphalt Pav. Co., 117 Fed. 925; City of Bloomington v. Chicago & A. R. Co., 134 Ill. 451. The fact that a local improvement ordinance is grossly unreasonable, unjust and oppressive, can be shown in defense of an application for confirmation of the assessment.

Davis v. City of Litchfield, 145 Ill. 313, 21 L. R. A. 563; Palmer v. City of Danville, 154 Ill. 156. An ordinance levying a special tax for a local improvement is void when it can be shown that it is unreasonable and an arbitrary abuse of power.

Hawes v. City of Chicago, 158 Ill. 653, 30 L. R. A. 225. "The uncontradicted evidence further shows that the street along which it is proposed to construct this cement sidewalk has never been improved by the city. It is neither curbed nor paved, sewered nor watered, surveyed nor graded. If it is to be considered as a street 66 feet wide, then there is a line of telegraph poles planted right through the center of it; and the north 33 feet of it has never been formally dedicated by the owner to public use, nor condemned by any municipal corporation; and if the public have any right to it at all it is a right by prescription or by implied dedication. Such was and is the condition of this street in front of appellants' property. And yet, as appears from the record of the case, the common council of the city of Chicago, only five months after the construction at a great expense of a new plank sidewalk, built in conformity with the order of the city council, 1,256 feet long passed a second ordinance ordering this new plank sidewalk torn up, and a cement walk, at an assessed expense of $1,915.50 or $1,638.75, put down in its place. It is admitted by the city—at least not denied—that this plank or wooden sidewalk, at the time the ordinance for the cement sidewalk was passed, and at the time this case was heard in the court below, was in good order and condition, and will answer equally as well, for the purpose of travel, as a cement walk. Nor can it for a moment be contended that it is not unreasonable, unjust and oppressive to compel the owner of a vacant 20 acre lot first to construct and pay for a wood sidewalk, and then within less than six months, and when it is in substantially as good condition as when first built, and in all respects safe, convenient, and sufficient for public use and travel, take it up, throw it away, and put down another in its place, at an expense of over $1,600? It seems to us that it cannot be, especially when we take into consideration the fact that the street has never been improved, curbed, graded, paved or sewered. And further, it is clear from the evidence in the case that if this judgment should be affirmed, and appellant compelled to take up the wood sidewalk and put down one of cement, the cement sidewalk will be ruined by putting in the house drains every 25 feet along

the line of the street, or at least seriously injured; and whenever the street is improved, and dwellings are constructed along the line of the walk, the walk itself is quite likely to be destroyed. An ordinance must be reasonable; and if it is unreasonable, unjust, and oppressive, the courts will hold it invalid and void (City of Chicago v. Rumpff, 45 Ill. 90; Tugman v. City of Chicago, 78 Ill. 405). The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption (Toledo, W. & W. R. Co. v. City of Jacksonville, 67 Ill. 37; City of Lake View v. Tate, 130 Ill. 247; 1 Dillon, Mun. Corp. § 327). And even where the power to legislate on a given subject is conferred on a municipal corporation, yet, if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. City of St. Paul v. Colter, 12 Minn. 41 (Gil. 16); Dunham v. Trustees of Rochester, 5 Cow. (N. Y.) 462; Brenlnger v. Treasurer of Town of Belvidere, 44 N. J. Law, 350." Washburn v. City of Chicago, 198 Ill. 506.

Corrigan v. Gage, 68 Mo. 541. An ordinance for the paving of a sidewalk in an uninhabited portion of the city and disconnected with any other portion of the street or sidewalk was held void because unreasonable, oppressive and therefore subject to judicial inquiry. Wistar v. City of Philadelphia, 80 Pa. 505, where in the opinion Agnew, C. J., says: "But if we say the city may change its pavements at pleasure and as often as it please at the expense of the ground owner, we take a new step and there must be explicit legislation to authorize such taxation. * * * If, while the pavement is good and stands in no need of repair, the city may tear it up, re-lay and charge the owner again with one excessively costly, it would be exaction; not taxation. * * * We are not at liberty to impute such a design to the legislature unless it has plainly expressed its meaning to do this unjust thing." Wistar v. City of Philadelphia, 111 Pa. 604.

Allen v. Drew, 44 Vt. 174. "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden and become extortion and confiscation. In that case, it would be the duty of the court to protect the citizen from robbery under color of a better name." Cooley, Taxation, c. 20, p. 428. "A clear case of abuse of legislative authority in imposing the burden of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power and void."

McQuillin, Mun. Ord. § 550. "Considering all the circumstances, courts having the authority to determine whether a particular power has been reasonably exercised, may declare improvement ordinances void for unreasonableness, notwithstanding the broad discretion usually conceded to be vested in the municipal authorities. This judicial power is most frequently invoked in proceedings

§ 359. Resolutions.

The technical name applied to the statutory requirement suggested in the preceding section may be that of "resolution" instead of "ordinance." If this be the case, the same principles of law will apply and the same results will follow a failure to comply with statutory requirements.[418]

for improvements by special assessment or taxation in cases where, in the opinion of the court, unjust discrimination has been exercised; or positive legal provisions have been violated, as where the method of laying the tax as prescribed is not observed; or where improvements are ordered without necessity or reason whatever, as in a sparsely settled and uninhabited section or directing the tearing up of a good sidewalk or pavement and replacing it with an expensive one, according to the caprice or whim of municipal officers or to favor some contractor; or exercising the power in such arbitrary and unreasonable manner as to constitute extortion, confiscation or the taking of private property without just compensation or due process of law."

[418] Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. An ordinance considered equivalent to a "resolution of intention" within act of March 18, 1885, as amended by statutes of 1889, p. 157. City St. Imp. Co. v. Babcock, 123 Cal. 205, 55 Pac. 762; Whitney v. Village of Hudson, 69 Mich. 189, 37 N. W. 184. The limits of a taxing district must be definitely specified in a resolution providing for the pavement of a street.

Auditor General v. Maier, 95 Mich. 127, 54 N. W. 640; Twiss v. City of Port Huron, 63 Mich. 528; Boehme v. City of Monroe, 106 Mich. 401, 64 N. W. 204; Davies v. City of Saginaw, 87 Mich. 439; City of Carthage v. Badgley, 73 Mo. App. 123; Packard v. Bergen Neck R. Co., 48 N. J. Eq. 281, 22 Atl. 227. A "resolution" is insufficient where the charter of a city requires the passage of an ordinance for the construction of public improvements.

Gilmore v. City of Utica, 131 N. Y. 26; City of Cincinnati v. Anderson, 52 Ohio St. 600. Resolutions relating to the improvement of several streets may be voted on altogether in a council without invalidating the assessments levied thereunder for the cost of each particular improvement. Alford v. City of Dallas (Tex. Civ. App.) 35 S. W. 816; Texas Transp. Co. v. Boyd, 67 Tex. 153. The contract for street improvements cannot differ either in character, work or cost from the resolution authorizing it.

See the following cases as passing upon the sufficiency of a resolution authorizing the improvement: Michigan Cent. R. Co. v. Huehn, 59 Fed. 335; Gill v. Dunham (Cal.) 34 Pac. 68; King v. Lamb, 117 Cal. 401, 49 Pac. 561; Chase v. City Treasurer of Los Angeles, 122 Cal. 540, 55 Pac. 414; Wells v. Wood, 114 Cal. 255; Thomason v. Cuneo, 119 Cal. 25; Edwards v. Berlin, 123 Cal. 544; Lake Shore & M. S. R. Co. v. City of Dunkirk, 65 Hun, 494, 20 N. Y. Supp. 596; Welker v. Potter, 18 Ohio St. 85; City of Cincinnati v. Sherike. 47

§ 360. Petition by property owners.

The basis of the validity of a local assessment is the supposed local and special benefit or advantage received by the property owners in the immediate vicinity of the local improvement. As it is constructed, therefore, for their special benefit, it will be found in many states that action by them is necessary for the construction of a local improvement and the levy of special assessments to pay the cost.[419] The step contemplated by the stat-

Ohio St. 217; King v. City of Portland, 38 Or. 402, 63 Pac. 2, 55 L. R. A. 812.

See the following cases holding the assessment invalid because based upon a resolution void for lack of sufficient description of the proposed improvement. Kutchin v. Engelbret, 129 Cal. 635, 62 Pac. 214; Bay Rock Co. v. Bell, 133 Cal. 150, 65 Pac. 299; McDonnell v. Gillon, 134 Cal. 329, 66 Pac. 314; Schwiesau v. Mahon, 128 Cal. 114; Merrill v. Abbott, 62 Ind. 549; Wheeler v. City of Poplar Bluff, 149 Mo. 36; City of Waco v. Chamberlain (Tex. Civ. App.) 45 S. W. 191.

[419] In addition to the cases cited below, see, also, generally, the authorities given under this section. Liebman v. City & County of San Francisco, 24 Fed. 705; Dyer v. Miller, 58 Cal. 585; Mulligan v. Smith, 59 Cal. 206; Gately v. Leviston, 63 Cal. 365.

Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262. Under the California Statutes of 1891, p. 196, § 3, where the owners of the majority of the frontage in a proposed street improvement protest against its construction, it suspends proceedings thereon for six months. Merritt v. City of Kewanee, 175 Ill. 537. A written and signed petition is necessary. City of Bloomington v. Reeves, 177 Ill. 161; Gray v. Town of Cicero, 177 Ill. 459; Whaples v. City of Waukegan, 179 Ill. 310. Such provision applies only to cities of less than 25,000 inhabitants. Village of Hammond v. Leavitt, 181 Ill. 416; Givins v. City of Chicago, 186 Ill. 399. No petition is necessary in a city the size of Chicago. Wiles v. Hoss, 114 Ind. 371, 16 N. E. 800.

De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016. It is not necessary that two-thirds of the adjoining owners petition for a street improvement under Ind. Act March 8, 1889. City of Lafayette v. Fowler, 34 Ind. 140; Town of Covington v. Nelson, 35 Ind. 532; Case v. Johnson, 91 Ind. 477; Thompson v. City of Lexington, 104 Ky. 165, 46 S. W. 481; Byrne v. Parish of East Carroll, 45 La. Ann. 392, 12 So. 521; Bouldin v. City of Baltimore, 15 Md. 18. Such petition must be in writing. City of Marshall v. Rainey, 78 Mo. App. 416. Action by a city council upon a petition in regard to a proposed improvement is discretionary; they can legally refrain from ordering the improvement.

State v. Birkhauser, 37 Neb. 521; Grant v. Bartholomew, 58 Neb. 839; Jones v. City of South Omaha, 3 Neb. Unoff. 551, 554, 94 N. W. 957; Piard v. Jersey City, 30 N. J. Law, 148; App v. Town of Stockton, 61

utes in such cases is usually the signing and filing of a petition signed by a certain percentage or number of the property owners asking for the construction of the improvement and virtually consenting to the institution of the proceedings for the levy of the assessment and its collection.[420] Many charters, however, do not

N. J. Law, 520, 39 Atl. 921; In re Banta, 60 N. Y. 165; In re Garvey, 77 N. Y. 523; O'Reilley v. City of Kingston, 114 N. Y. 439; Jones v. Town of Tonawanda, 158 N. Y. 438; Hays v. Jones, 27 Ohio St. 218; Hays v. City of Cincinnati, 62 Ohio St. 116; Smith v. Minto, 30 Or. 351, 48 Pac. 166. Where the city charter gives the council authority to proceed in the improvement of a street unless unsafe only on petition of adjoining owners, the question of safety is a jurisdictional one. See, also, under jurisdictional question of safety, Shannon v. City of Portland, 38 Or. 382, 62 Pac. 50.

Reuting v. City of Titusville, 175 Pa. 512. A petition of abutting owners is necessary only in case of the original improvement of the street, not its repair. City of Waco v. Chamberlain (Tex. Civ. App.) 45 S. W. 191; Jones v. City of Seattle, 19 Wash. 669.

[420] Rector v. Board of Improvement, 50 Ark. 116, 6 S. W. 519. A stockholder in a corporation owning property in the local improvement district is not an owner of such property within the meaning of Mansf. Dig. Ark. § 828 which provides that the petition must be presented to the council, signed by a majority of the real estate owners in such district. Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575. The purchaser in possession although his vendor's deed has not been delivered is such a property owner, and also the mortgagor of property covered by a mortgage in process of foreclosure. Property owned by tenants in common signed for by only one should be counted for his interest only. The widow of the deceased owner is not a property owner, she being only a life tenant within the meaning of the statute and an executor of an estate had no power to bind the heirs by signing such petition. See, also, Kahn v. San Francisco City & County Sup'rs, 79 Cal. 388, as holding that the signatures of executors, administrators and agents could not be counted in absence of evidence of authority to sign the petition, and also that the signature of a corporation must be made in the manner prescribed by its by-laws.

Earl v. Board of Improvement, 70 Ark. 211, 67 S. W. 312. Only one-half of the value of partnership property should be counted where but one of the two partners sign the petition. City of Atlanta v. Smith, 99 Ga. 462. A municipal corporation owning property on the strect on which the proposed improvement is constructed cannot sign such a petition in order to make the number required. Kirchman v. West & South Towns St. R. Co., 58 Ill. App. 515. A city council in acting upon the sufficiency of a petition exercises duties of a quasi judicial character and its judgment in that respect in the absence of fraud will not be interfered with by the courts. Merritt v. City of Kewanee, 175 Ill. 537.

require such a petition or the consent of the property owners affected and these steps are not then jurisdictional. A brief reference to those cases holding a petition or consent of the property

The signature by the husband of a woman owning property abutting a street improvement is insufficient; neither can a tenant in common sign in behalf of his co-tenant. Wahlgren v. Kansas City, 42 Kan. 243. Such a petition is valid although it does not include a request for paving street intersections. Kansas City v. Trotter, 9 Kan. App. 222, 59 Pac. 679; Ready v. City of New Orleans, 27 La. Ann. 169. The required percentage of property owners adjoining that portion of the street to the improvement is all that is necessary. But see Barber Asphalt Pav. Co. v. Gogreve, 41 La. Ann. 251.

Swann v. Town of Cumberland, 8 Gill (Md.) 150; Holland v. City of Baltimore, 11 Md. 186. The lessee of property for a term of ninety-nine years is not an owner within an ordinance requiring as a basis for the improvement an application of the proprietors of a majority of the frontage on such local improvement. But in the state of Ohio in the case of Village of St. Bernard v. Kemper, 60 Ohio St. 244, 45 L. R. A. 662, it is held that a lessee in possession under a ninety-nine year lease renewable for ever, is such an owner of property as to entitle him to subscribe to a petition for street improvements.

De Groot v. Jersey City, 55 N. J. Law, 120, 25 Atl. 272; Allen v. City of Portland, 35 Or. 420. The owner of a life estate is such a property owner and therefore competent to sign the petition. This case also holds that a corporation need not attach its corporate seal to make its signature effective, and, further, that where an owner's name is signed by an agent the authority of such agent will be presumed and need not affirmatively appear upon the petition. Also if there is a substantial use of the correct name of the corporation, this will be sufficient.

See, also, the following cases considering the particular improvement suggested in addition to those stated above.

General street improvement, including opening, paving, vacating, macadamizing or re-paving: Shrum v. Town of Salem (Ind. App.) 39 N. E. 1050; Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600; Gargan v. Louisville, N. A. & C. R. Co., 89 Ky. 212, 6 L. R. A. 340; McGuinn v. Peri, 16 La. Ann. 326; City of Baltimore v. Eschbach, 18 Md. 276; Bradley v. Village of West Duluth, 45 Minn. 4; People v. Judge of Recorder's Ct., 40 Mich. 64; State v. Birkhauser, 37 Neb. 521; Carron v. Martin, 26 N. J. Law (2 Dutch.) 594, reversing 26 N. J. Law (2 Dutch.) 228; Woodruff v. City of Elizabeth, 39 N. J. Law, 55; In re Smith, 99 N. Y. 424; Jex v. City of New York, 103 N. Y. 536; Miller v. City of Amsterdam, 149 N. Y. 288; City of Pittsburg v. Walter, 69 Pa. 365; Dean v. City of Madison, 9 Wis. 402; Pettibone v. Hamilton, 40 Wis. 402; Warren v. City of Wausau, 66 Wis. 206; James v. City of Darlington, 71 Wis. 173.

Sewers: Keese v. City of Denver, 10 Colo. 112; Van Brunt v. Town of Flatbush, 128 N. Y. 50; Auditor

owners unnecessary will be found in the notes.[421] Some statutes or charters, while requiring the consent of the property owners for an original improvement, do not impose such a condition upon the municipal authorities before ordinary repairs can be made or a street regraded, repaved or a pavement in place relaid.[422]

(a) Petition not necessary where cost is paid from general funds. Where a local improvement is paid from the general funds or revenues of a municipality, the reason for the consent of the property owners not existing, the cases hold that a petition or the consent of the property owners who may be affected by the taxes is not necessary in order to authorize the ordering of a contract or a local improvement by the municipal authorities.[423] The law providing for such petition or consent may require either a certain percentage of frontage or value located upon the contemplated improvement,[424] or a certain percentage

General v. Chase, 132 Mich. 630, 94 N. W. 178. The consent of the property owners is not necessary to make a slight change in a street grade.

[421] City of Napa v. Easterby, 76 Cal. 222; Spaulding v. Wesson, 84 Cal. 141; Park Ecclesiastical Soc. v. City of Hartford, 47 Conn. 89; DePuy v. City of Wabash, 133 Ind. 336; Wilkin v. Houston, 48 Kan. 584 (sidewalk); City of St. Louis v. Oeters, 36 Mo. 456; City of St. Louis v. Clemens, 36 Mo. 467; Jelliff v. City of Newark, 48 N. J. Law, 101; Id., 49 N. J. Law, 239; Provident Ins. for Savings v. Jersey City, 52 N. J. Law, 490; Reed v. City of Camden, 53 N. J. Law, 322; Brewster v. City of Syracuse, 19 N. Y. 116; In re Walter, 83 N. Y. 538; People v. Village of Port Jervis, 100 N. Y. 283; O'Reilley v. City of Kingston, 114 N. Y. 439; Excelsior Brick Co. v. Village of Haverstraw, 142 N. Y. 146; Beaumont v. City of Wilkesbarre, 142 Pa. 198; Wood v. McGrath, 150 Pa. 451, 16 L. R. A. 715.

[422] Watkins v. Griffith, 59 Ark. 344; Reuting v. City of Titusville, 175 Pa. 512.

[423] Goodwillie v. City of Detroit, 103 Mich. 283.

[424] Watkins v. Griffith, 59 Ark. 344; Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575. Railroad right of way which will not be benefited by the construction of a proposed improvement is properly excluded in determining whether a majority in value of the owners of assessable real property in the district have signed the petition. Church property, since it is subject to local improvement assessments, should be included.

Thomason v. Carroll, 132 Cal. 148, 64 Pac. 262; Kahn v. San Francisco City & County Sup'rs, 79 Cal. 388. The question of ownership is based by statute upon the names appearing in the last preceding assessment roll. Kyle v. Malin, 8 Ind. 34; Farraher v. City of Keokuk, 111 Iowa, 310, 82 N. W. 773; Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600; Dennison v. Kansas City, 95 Mo. 416; Von Steen v. City of Be-

in number of the property owners affected.[425] The filing of a petition in the manner and at the time provided is jurisdictional and necessary to the legality of the assessment, and, unless estopped either by laches[426] or acquiescence,[427] property owners whose land is sold for nonpayment of an assessment may show in an action brought to recover their property that the petition or proceedings were irregular in some respect.[428] The

atrice, 36 Neb. 209, 54 N. W. 677; Northern R. Co. v. City of Englewood, 62 N. J. Law, 188, 40 Atl. 653; Wirth v. Jersey City, 56 N. J. Law, 216; Miller v. City of Amsterdam, 149 N. Y. 288; Speer v. City of Pittsburg, 166 Pa. 86. Only a majority in interest of owners of property abutting that part of the street which is to be improved is necessary. Wright v. City of Tacoma, 3 Wash. T. 410. The charter of Tacoma limits the necessary signers to "resident owners."

[425] Town of Covington v. Nelson, 35 Ind. 532; Gately v. Leviston, 63 Cal. 365; Warren v. Russell, 129 Cal. 381. See Pittsburgh, C., C. & St. L. R. Co. v. Town of Crown Point, 150 Ind. 536, 50 N. E. 741, as holding that under statutes of Ind. (§ 6762, Burns' Rev. St. 1894), where a town board has the right to order a street improvement by a two-thirds vote of the board, a petition of the property owners for such improvement is not necessarily jurisdictional. McEneney v. Town of Sullivan, 125 Ind. 407; DePuy v. City of Wabash, 133 Ind. 336; Bohle's Adm'r v. Stannard, 7 Mo. App. 51; Smith v. Syracuse Imp. Co., 161 N. Y. 484.

[426] Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575; Pipher v. People, 183 Ill. 436; Kansas City v. Trotter, 9 Kan. App. 222, 59 Pac. 679.

[427] In re Beechwood Ave., 194 Pa. 86. "The objection that a majority in interest and number of property owners did not sign the petition to councils was not made in the court below nor is it embraced in any of the specifications of error. It might be well dismissed with the remark that it is not properly on the record. Treating it as properly before us, however, it is still without merit. The tenth section of the act of May 16th, 1891, makes special provision for raising this objection by proceedings on the ordinance, under penalty of estoppel. As to the vital importance of definitively settling such questions in the outset, Mr. Justice Sharswood, in City of Erie v. Bootz, 72 Pa. 200 said: 'It is not only important that this should be settled but that the question of the numbers should be conclusively determined before the expense of the improvement should be incurred. If it were left open for contest, no street could be paved without leading to controversy on the subject.'"

[428] McVey v. City of Danville, 188 Ill. 428, 58 N. E. 955. The burden of proof is upon the one attacking the validity of the proceedings. Merritt v. City of Kewanee, 175 Ill. 537. The subsequent ratification of a petition by signers will not validate a defectively signed petition. Taylor v. City of Bloomington, 186 Ill. 497. The city cannot by manipulation change the lines of streets and alleys so as to increase the frontage

question of whether the petition has been signed by the requisite number of property owners is one of fact,[429] a jurisdictional question,[430] and, therefore, one which can be raised at any time even in an action of ejectment to recover back the land after a subsequent sale.[431] The recitals in an ordinance concerning the

of petitioning owners thereby validating the petition. Bouldin v. City of Baltimore, 15 Md. 18; Collins v. Grand Rapids Tp., 108 Mich. 675, 66 N. W. 586; Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Allen v. City of Portland, 35 Or. 420.

[429] Ahern v. Board of Improvement, 69 Ark. 68, 61 S. W. 575; City of Bloomington v. Reeves, 177 Ill. 161; Patterson v. City of Macomb, 179 Ill. 163; Carroll County Com'rs v. Justice, 133 Ind. 89, 30 N. E. 1085. A misunderstanding on the part of property owners as to the amount to be assessed will not relieve them. Maguire v. Smock, 42 Ind. 1; City of Argentine v. Simmons, 54 Kan. 699; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78. The petition need not show affirmatively the fact that it was signed by a majority of the frontage to be approved.

State v. City of Bayonne, 54 N. J. Law, 293, 23 Atl. 648; People v. City of Syracuse, 30 Misc. 409, 63 N. Y. Supp. 878. Signers of a petition may withdraw their names and in such case if it leaves less than the required number, the petition will be invalid. Allen v. City of Portland, 35 Or. 420. A city council in determining the sufficiency of a petition exercises a quasi judicial function and such determination, therefore, is not open to collateral attack.

Kent v. Village of Enosburg Falls, 71 Vt. 255. Such petition must affirmatively show on its face that the requisite number of signers were freeholders and legal voters. Wright v. City of Tacoma, 3 Wash. T. 410, 19 Pac. 42. In ascertaining whether the petition has been signed by the required number of property owners in determining the frontage, the width of intersecting streets should be subtracted from the total length of the improvement.

[430] Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98; Kahn v. San Francisco City & County Sup'rs, 79 Cal. 388; Keese v. City of Denver, 10 Colo. 112; Grant v. Bartholomew, 58 Neb. 839; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; App v. Town of Stockton, 61 N. J. Law, 520, 39 Atl. 921. Town of Roswell v. Dominice, 9 N. M. 624, citing Zeigler v. Hopkins, 117 U. S. 683; Mulligan v. Smith, 59 Cal. 206; and Holland v. City of Baltimore, 11 Md. 186.

Miller v. City of Amsterdam, 149 N. Y. 288. The decision of a city council that a petition for an improvement has been signed by the required majority of property owners is a ministerial act, not a judicial or quasi judicial one and can be collaterally attacked. Allen v. City of Portland, 35 Or. 420; Dieckmann v. Sheboygan County, 89 Wis. 571.

[431] Zeigler v. Hopkins, 117 U. S. 683, approving and following Mulligan v. Smith, 59 Cal. 206. In the last case the subject is elaborately discussed and authorities cited. The court say: "A statute of California authorized the opening of a street in San Francisco to be known as "Montgomery Avenue," the cost and

filing of a petition with the requisite signatures is usually considered, however, prima facie evidence of such facts,[432] and the burden of proof is on the one attacking the validity of the proceedings in any respect.

§ 361. Declaration of necessity.

In still other municipalities the act necessary for the construction of the local improvement and the resulting levy of a local assessment is based upon what may be termed "a declaration of necessity" by the proper public officials;[433] this, as the

expenses to be assessed on certain specified lots in proportion to the benefits accruing therefrom; and provided that when a majority in frontage of the owners of these benefited lots should petition certain officials for the opening, those officials should organize into a board and proceed to open it and to apportion the cost in the manner appointed out by the statute. A petition being presented to the designated officials, they organized, and certified that the petition had been subscribed by the owners of the requisite amount of frontage and proceeded to lay out the street and apportion the costs and expenses among those benefited in the manner provided by the statute. They reported their action to the county court as required by the statute and the report was confirmed by the court. A tax was thereupon levied in the ordinary way in 1878-9 to meet the portion of the costs and expenses payable that year by the terms of the statute. H, an owner of a lot thus assessed and levied on, declining to pay, the land was seized and sold for the default to Z; H thereupon brought ejectment to recover possession. Held, that on the trial of this action, H was not estopped by the acceptance of the petition by the officials and their certificate upon it or by the judgment of the county court confirming their report, from showing that the petition for the opening was not signed by the owners of the requisite amount of frontage."

[432] Farrell v. West Chicago Park Com'rs, 181 U. S. 404, affirming 182 Ill. 250; Cummings v. West Chicago Park Com'rs, 181 Ill. 136; McManus v. People, 183 Ill. 391; City of Scranton v. Jermyn, 156 Pa. 107. The passage of such an ordinance based upon such petition is held conclusive of the fact that the necessary majority of owners have petitioned for the improvement.

[433] Field v. Village of Western Springs, 181 Ill. 186. Irrespective of a declaration of necessity, the question of the necessity of local improvements is committed by law to the city council, and in the exercise of the power, unless it is so unreasonable as to be void, the courts will not interfere. See, also, as holding the same general principle, Trustees of Hazelgreen v. McNabb, 23 Ky. L. R. 811, 64 S. W. 431.

City of Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007. The resolution of necessity may refer to plans on file in the office of the city

phrase implies, is simply an official declaration that the improvement contemplated is a public necessity and will result in a benefit or advantage to the property in that vicinity.[434] This declaration may be the result of an investigation in regard to its substance, and can be said, therefore, theoretically to be based upon an official investigation of the merits, advantages and necessity for the public improvement or local improvement.[435] Ordinarily, the determination of whether a necessity exists is a matter of discretion for municipal authorities and their action will not be interfered with by the courts except in case of corruption or manifest abuse of the power.[436]

engineer and in such case it is not necessary to repeat the details of such specifications and plans in the body of the resolution. Pittsburgh, C., C. & St. L. R. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597. Under Indiana Rev. St. 1894, § 4289, the resolution declaring the necessity of a street improvement is not jurisdictional. See, also, as holding the same, Willard v. Albertson, 20 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403.

Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455; Hughes v. Parker, 148 Ind. 692. A failure to pass the resolution of necessity is not fatal where proper notice and hearing were given to the property owner before the making of the final assessment. Kansas Town Co. v. City of Argentine, 5 Kan. App. 50, 47 Pac. 542, affirmed in 59 Kan. 779, 54 Pac. 1131; Hoyt v. City of East Saginaw, 19 Mich. 39; Cuming v. City of Grand Rapids, 46 Mich. 150; Welker v. Potter, 18 Ohio St. 85.

[434] McManus v. Hornaday, 99 Iowa, 507; Purdy v. Drake, 17 Ky. L. R. 819, 32 S. W. 939; Dorman v. City Council of Lewiston, 81 Me. 411; State v. Armstrong, 54 Minn. 457; City of Springfield v. Weaver, 137 Mo. 650; City of Raleigh v. Peace, 110 N. C. 32. The element of necessity will be implied from the passage of an ordinance ordering the improvement. Caldwell v. Village of Carthage, 49 Ohio St. 344, 31 N. E. 602. The necessity for such a resolution does not apply under Rev. St. § 2304, to the condemnation of private property for public streets but only to improvements of a constructive character.

Hunter v. City of Newport, 5 R. I. 325; Noel v. City of San Antonio, 11 Tex. Civ. App. 580; City of Waco v. Chamberlain (Tex. Civ. App.) 45 S. W. 191; City of Waco v. Prather, 90 Tex. 80; Kent v. Village of Enosburg Falls, 71 Vt. 255. The question of necessity based upon public health or convenience is jurisdictional. Boyd v. City of Milwaukee, 92 Wis. 456, 66 N. W. 603.

[435] Young v. City of St. Louis, 47 Mo. 492; Jackson v. State, 104 Ind. 516.

[436] Burckhardt v. City of Atlanta, 103 Ga. 302, 30 S. E. 32; Bacon v. City of Savannah, 105 Ga. 62, 31 S. E. 127; Regenstein v. City of Atlanta, 98 Ga. 167; Holdom v. City of Chicago, 169 Ill. 109; McChesney v. City

§ 362. Construction of the improvement.

The improvement or assessment, however, authorized or commenced, must follow strictly the authority for its construction or levy;[437] the cost or amount cannot exceed that authorized,[438]

of Chicago, 171 Ill. 253; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342; Coburn v. Bossert, 13 Ind. App. 359, 40 N. E. 281; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Wilkin v. Houston, 48 Kan. 584, 30 Pac. 23; Seward v. Rheiner, 2 Kan. App. 95, 43 Pac. 423; Stewart v. City of Neodesha, 3 Kan. App. 330, 45 Pac. 110; Bullitt v. Selvage, 20 Ky. L. R. 599, 47 S. W. 255; Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964; City of Baltimore v. Stewart, 92 Md. 535, 48 Atl. 165; Alberger v. City of Baltimore, 64 Md. 1; Burnett v. City of Boston, 173 Mass. 173, 53 N. E. 379; Miller v. City of Fitchburg, 180 Mass. 32, 61 N. E. 277; Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725; City of Detroit v. Beecher, 75 Mich. 454, 4 L. R. A. 813; Monroe County v. Strong, 78 Miss. 565, 29 So. 530; City of Cape Girardeau v. Houck, 129 Mo. 607, 31 S. W. 933; Moran v. Lindell, 52 Mo. 229; City of Marionville v. Henson, 65 Mo. App. 397; City of Kansas v. Baird, 98 Mo. 215; State v. Engelmann, 106 Mo. 628; In re Folts St. in Village of Herkimer, 18 App. Div. 568, 46 N. Y. Supp. 43.

[437] Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234; Williams v. Bisagno (Cal.) 34 Pac. 640; Partridge v. Lucas, 99 Cal. 519; Jefferson County v. City of Mt. Vernon, 145 Ill. 80; McChesney v. City of Chicago, 152 Ill. 543. Where variations between the authority and the ordinance can be reconciled, a discrepancy will not be fatal to the assessment. Illinois Cent. R. Co. v. City of Effingham, 172 Ill. 607. Neither can the actual improvement be less in extent than that authorized.

Pells v. City of Paxton, 176 Ill. 318; People v. McWethy, 177 Ill. 334; Galt v. City of Chicago, 174 Ill. 605. An attempted amendment which is void of a local improvement ordinance changing the character of a local improvement will not invalidate an assessment based upon the ordinance attempted to be amended. Whaples v. City of Waukegan, 179 Ill. 310; Chicago Terminal Transfer R. Co. v. City of Chicago, 184 Ill. 154; Clarke v. City of Chicago, 185 Ill. 354; Mead v. City of Chicago, 186 Ill. 54. An immaterial variance will not, however, invalidate an assessment. Halsey v. Town of Lake View, 188 Ill. 540; People v. Church, 192 Ill. 302. The construction of an improvement approximately near that authorized will not invalidate an assessment where it appears that such deviation from the ordinance authorized has not worked any injury to the property owners assessed for the improvement; reversing in this respect Church v. People, 174 Ill. 366.

Lake Erie & W. R. Co. v. Walters, 13 Ind. App. 275, 41 N. E. 465; City of St. Joseph v. Landis, 54 Mo. App. 315; City of Marionville v. Henson, 65 Mo. App. 397; City of Trenton v. Collier, 68 Mo. App. 483; Hutchinson v. City of Omaha, 52 Neb. 345, 72 N. W. 218; Vanderbeck v. Jersey City,

neither should the improvement differ in character or extent of work or materials[439] from that directed to be constructed or petitioned for.

§ 363. Notice to property owners.

The authorities hold almost universally that the legality of

29 N. J. Law (5 Dutch.) 441. This case holds quite contrary to the general authority that an assessment for a public improvement is not invalidated by a change in its plan of construction from that which was originally adopted by the city council. People v. Board of Improvement, 43 N. Y. 227; Conde v. City of Schenectady, 164 N. Y. 258. The exercise of discretionary powers by a municipal council regarding the time of payment of the assessment will not be interfered with. Haisch v. City of Seattle, 10 Wash. 435, following Buckley v. City of Tacoma, 9 Wash. 253.

Texas Transp. Co. v. Boyd, 67 Tex. 153.

[438] Piedmont Pav. Co. v. Allman, 136 Cal. 88, 68 Pac. 493; Partridge v. Lucas, 99 Cal. 519; Payne v. Village of South Springfield, 161 Ill. 285; Chicago Terminal Transfer Co. v. City of Chicago, 178 Ill. 429; Wells County Com'rs v. Fahlor, 114 Ind. 176, 15 N. E. 830.

Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887. Where the cost of the work exceeds the estimate, the assessment will still be valid to the extent of such estimate. Campbell v. Monroe County Com'rs, 118 Ind. 119; Kansas Town Co. v. City of Argentine, 59 Kan. 779, 54 Pac. 1131. Where the unauthorized improvement is easily separable from the authorized work, the assessment will be valid to such extent. Brady v. Rogers, 63 Mo. App. 222; Souther v. Village of South Orange, 46 N. J. Law, 317.

[439] McClellan v. District of Columbia, 7 Mackey (D. C.) 94. An ordinance which authorizes paving and curbing will not sustain an assessment for paving, grading and curbing. N. P. Perine Contracting & Pav. Co. v. City of Pasadena, 116 Cal. 6; City of Burlington v. Gilbert, 31 Iowa, 356. Where the variance, however, is immaterial, it will not affect the validity of the proceedings or of the assessment. Jefferson County v. City of Mt. Vernon, 145 Ill. 80, 33 N. E. 1091; Hull v. West Chicago Park Com'rs, 185 Ill. 150. A general objection directed against a variance between the estimate of cost made by commissioners and the ordinance providing for a special assessment is of no force when the specific items are not given.

Fiske v. People, 188 Ill. 206, 52 L. R. A. 291. A variance between a description of a street improvement in the ordinance authorizing it, in the estimate of cost, cannot be first set up on the application for judgment of sale. Allen v. City of Davenport, 107 Iowa, 90, 77 N. W. 532; Harbaugh v. Martin, 30 Mich. 234; Davies v. City of Saginaw, 87 Mich. 439; Conde v. City of Schenectady, 164 N. Y. 258, reversing 29 App. Div. 604, 51 N. Y. Supp. 854; Tredwell v. City of Brooklyn, 11 App. Div. 224, 43 N. Y. Supp. 458; Mason v. City of Sioux Falls, 2 S. D. 640, 51 N. W. 770.

special assessment proceedings depends not only upon some one or more of the various steps suggested in the preceding sections, but also upon the further and most essential act, namely, the giving of notice to the owners of property that will become subject to the special assessment, the information that the municipal organization is contemplating the construction of a local improvement.[440] This, in some jurisdictions, is imparted to the

[440] See cases collected, 32 Am. & Eng. Corp. Cas. 234 et seq. upon the right of property owners to notice of assessment for local improvements. Paulsen v. City of Portland, 149 U. S. 30. Also, Id., 16 Or. 450, 1 L. R. A. 673. Scott v. City of Toledo, 36 Fed. 385. Revised statutes of Ohio, § 2283, require that "so far as practicable, * * * regard must be had in making special assessments to the probable benefits to the property assessed." Under this section the court held that it was an essential element of due "process of law" that in levying special assessments notice or an opportunity to be heard be given to the owner of the land assessed and this rule is especially applicable where under the laws of the state special assessments can be collected by distress without notice to the owner.

Bensinger v. District of Columbia, 6 Mackey (D. C.) 285; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057. The burden of proof is upon the one claiming that notice was not either given or was impliedly given. Oakland Bank of Savings v. Sullivan, 107 Cal. 428; Brown v. City of Denver, 7 Colo. 305; Walsh v. City of Ansonia, 69 Conn. 558, 37 Atl. 1096; Bowman v. People, 137 Ill. 436, 27 N. E. 598; McChesney v. People, 145 Ill. 614.

Chicago West Div. R. Co. v. People, 154 Ill. 256, following Stanton v. City of Chicago, 154 Ill. 23, 39 N. E. 987. When the proceedings have reached the stage that a judgment of confirmation has been given, such judgment is conclusive upon the question of the sufficiency in all respects of a notice to property owners. See also as holding the same, People v. Ryan, 156 Ill. 620, 41 N. E. 180; Clark v. People, 146 Ill. 348.

Boynton v. People, 155 Ill. 66. In this case the giving of notice is held jurisdictional under the question of sufficiency and therefore, raised at any time even on application for judgment on delinquent taxes. Larson v. City of Chicago, 172 Ill. 298. The findings of jurisdictional facts recited in the special assessment judgment it will be presumed were warranted by the evidence in the absence of a bill of exceptions. In the case of Gage v. People, 188 Ill. 92, it is held that the record in default cases must affirmatively show the sufficiency and the existence of the necessary jurisdictional facts including that of the giving of notice.

Michael v. City of Mattoon, 172 Ill. 394; Porter v. City of Chicago, 176 Ill. 605. The petition with a properly certified copy of the ordinance, the assessment roll, affidavit of mailing and posting notices and proof of publication, are sufficient evidence under Laws 1897, p. 119, § 49, to authorize the confirmation of a special assessment where this law pro-

property owner through what may be termed, technically, a

vides that those proofs "shall be prima facie evidence of the correctness of the amount assessed against each objecting owner." Taber v. Ferguson, 109 Ind. 227, 9 N. E. 723. The question of insufficiency of a notice must be raised by answer, not by a demurrer to the transcript under Rev. St. § 3165. Quill v. City of Indianapolis, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Dowell v. Talbot Pav. Co., 138 Ind. 675; Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; Gatch v. City of Des Moines, 63 Iowa, 718. A notice is necessary though not required by either statute or ordinance. Chesapeake & O. R. Co. v. Mullins, 94 Ky. 355, 22 S. W. 558; Ulman v. City of Baltimore, 72 Md. 587, 20 Atl. 141, 21 Atl. 709, 11 L. R. A. 224.

Collins v. City of Holyoke, 146 Mass. 298, 15 N. E. 908. No notice is necessary of a resolution of intention to lay out or construct a public improvement. Boyce v. Peterson, 84 Mich. 490, 47 N. W. 1095. Where affirmative proof of posting of notice is required, its omission in the records will render the assessment void. Mills v. City of Detroit, 95 Mich. 422, 54 N. W. 897; Grand Rapids School Furniture Co. v. City of Grand Rapids, 92 Mich. 564. In the absence of a charter requirement for the giving of notice this will not be necessary.

Flint v. Webb, 25 Minn. 93; Overmann v. City of St. Paul, 39 Minn. 120, 39 N. W. 66. The giving of notice as required by §§ 8 and 15 of title 1, c. 7, St. Paul City charter is jurisdictional and a failure in this respect will render void a local improvement proceeding. State v. Otis, 53 Minn. 318; Clarke v. Long Branch Com'rs, 54 N. J. Law, 484, 24 Atl. 368; Ives v. Irey, 51 Neb. 136, 70 N. W. 961. A provision for notice to property owners will be mandatory. Milner v. Inhabitants of Trenton, 66 N. J. Law, 150, 48 Atl. 531; Winans v. Commissioners of Highways of Cranford, 57 N. J. Law, 71; Tifft v. City of Buffalo, 7 N. Y. Supp. 633. The existence of jurisdictional facts will be presumed including the giving of notice. Seaman v. Dickinson, 1 App. Div. 19, 36 N. Y. Supp. 748, following People v. Village of New Rochelle, 83 Hun, 185, 31 N. Y. Supp. 592.

In re Zborowski, 68 N. Y. 88. Where the statute does not require the giving of notice, none will be necessary. People v. McCue, 74 App. Div. 40, 77 N. Y. Supp. 303; McLaughlin v. Miller, 124 N. Y. 510. The giving of notice to landowners is necessary though not required by statute. In re Pennie, 19 Abb. N. C. (N. Y.) 117; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978. The presumption exists that the proper notice was given. Cook v. City of Portland, 35 Or. 383. A notice is necessary when street repairs are to be charged against adjacent property and are, therefore, regarded as "improvements." Hershberger v. City of Pittsburgh, 115 Pa. 78, 8 Atl. 381; City of Pittsburg v. Coursin, 74 Pa. 400. The rule that affirmative words relating to the manner in which power or jurisdiction in a public officer is to be exercised are applied in this case to an act requiring notice. Buchanan v. Borough of Beaver, 171 Pa. 567; City Council v. Pinckney, 3 Brev. (S. C.) 217; Con-

notice to construct;[441] that is, a proper notice is served upon the property owner requiring the construction of the local improvement and giving him an opportunity to do so. Upon his failure, the municipality is then authorized to proceed itself without further notice of the assessment proceedings.[442] The notice to construct given is all that is necessary to enable the property owner to protect his rights, correct errors or prevent in some cases the construction of the local improvement,[443] al-

nor v. City of Paris, 87 Tex. 32. Where the charter, however, requires no notice, none is necessary. Dietz v. City of Neenah, 91 Wis. 422.

[441] Village of Western Springs v. Hill, 177 Ill. 634. "The main objection to the confirmation of the assessment discussed by counsel in their briefs is that the ordinance providing for the sidewalk does not give to the property owners fifteen days to complete or build the sidewalk in front of their property, as required by section nineteen of article nine of the city and village act. * * * As special taxation is to be levied, assessed and collected in the mode provided for the making, levying, assessing and collecting of special assessments and as section nineteen is embraced within the sections which provide the mode of making improvements by special assessments, it would seem to follow that section nineteen and the provisos thereto apply as well to improvements made by special taxation as to improvements made by special assessment. Where the improvement is by special assessment, the owner is to be allowed fifteen days after the taking effect of the ordinance in which to build the sidewalk opposite his land and thereby relieve the same from the assessment. So also where the improvement is by special taxation there is no reason why the property owner should not be allowed the privilege of building or renewing the sidewalk opposite his land within the fifteen days named in the proviso." Leuly v. Town of West Hoboken, 53 N. J. Law, 64.

[442] See cases cited in note 379, § 354. Manning v. Den, 90 Cal. 610; Case v. Johnson, 91 Ind. 477; South Bellevue Lot Ass'n v. Town of Bellevue, 22 Ky. L. R. 541, 58 S. W. 443. On the other hand, where street improvements have been made by a property owner without the knowledge of the town, it will not be liable to him for its cost. Trustees of Hazelgreen v. McNabb, 23 Ky. L. R. 811, 64 S. W. 431; Tufts v. City of Charlestown, 98 Mass. 583; Scott County v. Hinds, 50 Minn. 204; Rogers v. City of Milwaukee, 13 Wis. 610; Myrick v. City of La Crosse, 17 Wis. 442.

[443] Culbertson v. The Southern Belle, 1 Newb. Adm. 461, Fed. Cas. No. 3,462. Municipal corporations when authorized by the legislature have the right to pass rules and regulations relative to river landings within their limits. Remy v. Municipality No. 2, 15 La. Ann. 657.

Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434. "But appellant insists that, if the law is valid, the city was not justified in proceeding under it without notice to him and

though the latter is usually a discretionary matter with the municipal authorities and one which will not be interfered with by the courts except in cases of corruption, fraud or a manifest abuse of the power.[444]

§ 364. When given.

The time when notice shall be given depends upon the statutes or local ordinance of each state or organization; this is immaterial so long as it is given at some stage during the proceedings and in such a manner as to serve the purpose in view and to accomplish the desired result.[445] It may be given at the incep-

that no notice was ever given. The decree of the district court recites that no written notice or order requiring Horbach to fill or grade the lots was ever served. The language of this finding implies that the court may have reached the conclusion that notice in some other form was given, but after a diligent search, we are prepared to say that the record affords no evidential support of that implication. And there can be in this case no presumption of law to supply the want of proof. Hutchinson v. City of Omaha, 52 Neb. 345; Smith v. City of Omaha, 49 Neb. 883. Under the section of the charter above quoted it is quite clear that the power of the city to fill or grade the lots in question at the owner's expense depended upon a previous demand having been made upon him to do the work, and a refusal on his part to do it. Demand and refusal were indispensable and prerequisite to the authority of the city to improve the property and charge it with the expense of the improvement. The legislature having prescribed the terms on which the city was authorized to make assessments of this character, the power to make them could be lawfully exercised only when there had been a substantial compliance with the statute. This proposition is well established by authority." Citing, Fitchburg R. Co. v. City of Fitchburg, 121 Mass. 132; Inhabitants of Northampton v. Abell, 127 Mass. 507; Grace v. Board of Health, 135 Mass. 490; Milton v. Wacker, 40 Mich. 229; Hutchinson v. City of Omaha, 52 Neb. 345; Edmiston v. Edmiston, 2 Ohio, 253; Anderson v. Hamilton County Com'rs, 12 Ohio St. 644; and Johnston v. City of Oshkosh, 21 Wis. 186.

Winans v. Commissioners of Highways of Cranford, 57 N. J. Law, 71, 29 Atl. 429; Richter v. City of New York, 24 Misc. 613, 54 N. Y. Supp. 150.

[444] Bozarth v. McGillicuddy, 19 Ind. App. 26; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455; Boyd v. Murphy, 127 Ind. 174.

[445] Allman v. District of Columbia, 3 App. D. C. 8; Jones v. District of Columbia, 3 App. D. C. 26; King v. Lamb, 117 Cal. 401; Swain v. Fulmer, 135 Ind. 8, 34 N. E. 639; Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454. Under § 27 "Barrett Law," so called, no no-

tion of the improvement, the time of making the original estimate of cost,[446] at the time of the passage of an ordinance if this is the mode used,[447] within a prescribed time after the work of special improvement has been done,[448] or even later, at the time of what is termed the levy of the special assessment.[449] The purpose of such notice is to apprise the property owner of the contemplated action by municipal authorities and give him, in justice to himself, an opportunity to protest, remonstrate or take such action to prevent the improvement as the law may afford.[450]

tice of the adoption of the primary resolutions for a street improvement is required to be given.

Oliver v. Monona County, 117 Iowa, 43, 90 N. W. 510; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546; City of Lawrence v. Webster, 167 Mass. 513; Buddecke v. Ziegenhein, 122 Mo. 239, 26 S. W. 696, following Michael v. City of St. Louis, 112 Mo. 610; Verdin v. City of St. Louis, 131 Mo. 26. Where the notice is given by the board of public improvements that on a day named they will consider the feasibility of the improvement of a certain street, such notice need not be specific in its details as to the character of improvement. Heman v. Allen, 156 Mo. 534; Ives v. Irey, 51 Neb. 136; Medland v. Linton, 60 Neb. 249, 82 N. W. 866; Bacon v. City of Elizabeth, 51 N. J. Law, 246, 17 Atl. 91; In re City of Amsterdam (N. Y.) 27 N. E. 272, reversing 55 Hun, 270, 8 N. Y. Supp. 234; Matter of Zborowski, 68 N. Y. 88. Where the right to enter upon the work of public improvement is on condition and upon the giving of notice to property owners, a failure in this respect will render such proceedings invalid. Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785; Hennessy v. Douglas County, 99 Wis. 129.

[446] Gage v. City of Chicago, 196 Ill. 512; Fayssoux v. De Chaurand, 36 La. Ann. 547; Ulman v. City of Baltimore, 72 Md. 587, 11 L. R. A. 224; Hand v. City Council of Elizabeth, 31 N. J. Law, 547; Delaware & H. Canal Co. v. City of Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976.

[447] Gill v. City of Oakland, 124 Cal. 335; City of Baltimore v. Scharf, 54 Md. 499.

[448] District of Columbia v. Burgdorf, 6 App. D. C. 465.

[449] Bowman v. People, 137 Ill. 436, 27 N. E. 598, distinguishing People v. Clayton, 115 Ill. 150; Smith v. Abington Sav. Bank, 171 Mass. 178, 50 N. E. 545.

[450] Carson v. St. Francis Levee Dist., 59 Ark. 513; Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156; Smith v. Hazard, 110 Cal. 145; House v. City of Greensburg, 93 Ind. 533; Kirkland v. Board of Public Works, 142 Ind. 123; Marshall v. City of Leavenworth, 44 Kan. 459; Daniel v. City of New Orleans, 26 La. Ann. 1; Nugent v. City of Jackson, 72 Miss. 1040; Forbis v. Bradbury, 58 Mo. App. 506; Durant v. Jersey City, 25 N. J. Law (1 Dutch.) 309; Jersey City Brewery Co. v. Jersey City, 42 N. J. Law,

§ 365. How given and to whom.

The giving of notice is intended to apprise the property owner of the pendency of the local assessment proceedings. In many cases property subject to the assessment is owned by nonresidents and we therefore find the statutes providing for the giving of either actual[451] or constructive[452] notice making either suffi-

575; Vanderbeck v. Jersey City, 44 N. J. Law, 626; In re Street Opening & Imp. Board, 133 N. Y. 436; Joyce v. Barron, 67 Ohio St. 264; Clinton v. City of Portland, 26 Or. 410; Armstrong v. Ogden City, 12 Utah, 476.

[451] Perry v. People, 155 Ill. 307; Larson v. People, 170 Ill. 93. In this case the court holds that notice by mailing, posting and publication are all essential to jurisdiction. City of Auburn v. Paul, 84 Me. 212; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345. An ordinance which requires the council "to give notice in writing to the several owners" is complied with by serving written notices upon all known owners personally or at their several places of abode. City of Lawrence v. Webster, 167 Mass. 513. If the statute makes no specific requirement as to the manner of serving notice upon resident landowners, if sent by mail it will be sufficient.

City of Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276; Locker v. Borough of South Amboy, 62 N. J. Law, 197, 40 Atl. 637. N. J. Laws of April 24th, 1897, relating to the improvement of streets does not provide for constructive notice to property owners; actual notice must, therefore, be given or an ordinance authorizing the construction of a sidewalk will be invalid. Wilson v. Inhabitants of Trenton, 53 N. J. Law, 645, 16 L. R. A. 200. Notice required by the charter of the city of Trenton must be served personally on resident owners. Service by leaving a copy at the residence with a member of the family is insufficient.

Landis v. Borough of Vineland, 60 N. J. Law, 264. Where no provision is made for constructive notice a reasonable actual notice can be given. Hansen v. Hammer, 15 Wash. 315. The law is not unconstitutional as granting power to take private property without due process of law simply because it does not provide for personal service of a petition organizing a taxing district on every person residing within the limits of the proposed district.

[452] Lent v. Tillson, 140 U. S. 316, affirming 72 Cal. 404, 14 Pac. 71. The publication of a notice required by statute can be made in the supplement of a local newspaper. Williams v. Bisagno (Cal.) 34 Pac. 640; King v. Lamb, 117 Cal. 401, 49 Pac. 561; California Imp. Co. v. Reynolds, 123 Cal. 88, 55 Pac. 802; Miller v. Mayo, 88 Cal. 568; Porphyry Pav. Co. v. Ancker, 104 Cal. 340. The word "thereupon" does not mean immediately thereafter in construing California act, March 18th, 1885, as amended March 31st, 1891, providing for the posting of a more particular notice of a contemplated improvement for the adoption of the "resolution of intention" by the city council.

Angus v. City of Hartford, 74

cient if given in the manner, at the time and in the form legally required.[453] The rule of strict construction, as usual, applies to

Conn. 27, 49 Atl. 192; White v. City of Chicago, 188 Ill. 392, 58 N. E. 917. The written portion of an affidavit controls its printed portion in respect to recitals of fact. Evans v. People, 139 Ill. 552; Derby v. West Chicago Park Com'rs, 154 Ill. 213; Perry v. People, 155 Ill. 307; Hoover v. People, 171 Ill. 182; Lingle v. City of Chicago, 172 Ill. 170; Klein v. Tuhey, 13 Ind. App. 74, 40 N. E. 144; Lyman v. Plummer, 75 Iowa, 353, 39 N. W. 527. The legislature may delegate to municipalities the power to determine the manner in which notice must be given. A notice by publication having been prescribed by ordinance is, therefore, sufficient.

Chesapeake & O. R. Co. v. Mullins, 15 Ky. L. R. 139, 22 S. W. 558; Cassidy v. City of Bangor, 61 Me. 434; Philadelphia, W. & B. R. Co. v. Shipley, 72 Md. 88, 19 Atl. 1; Smith v. Abington Sav. Bank, 171 Mass. 178; Hill v. Warrell, 87 Mich. 135, 49 N. W. 479; State v. Pillsbury, 82 Minn. 359, 85 N. W. 175. The publication of the estimate of cost and various other matters in the record of the proceedings of the city council is sufficient notice to all persons concerned of the determination of the city council to make a specific local improvement. Marsh v. City of Oregon, 105 Mo. 226, 16 S. W. 896; Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; City of Trenton v. Collier, 68 Mo. App. 483; Longwell v. Kansas City, 69 Mo. App. 177; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 22 Atl. 1004, 14 L. R. A. 62. The publication of a notice in the English language in a German newspaper is insufficient under a charter provision which requires it to be printed in German.

Wilson v. Inhabitants of Trenton, 53 N. J. Law, 645, 23 Atl. 278, 16 L. R. A. 200. Where the statute requires notice to a nonresident to be published in a newspaper, the mailing of a copy to his address is insufficient. Boyce v. Inhabitants of Plainfield, 38 N. J. Law, 95. Personal notice is not required where a charter provides for constructive notice by publication.

Forbes v. City of Elizabeth, 42 N. J. Law, 56; Wilson v. Inhabitants of Trenton, 53 N. J. Law, 178; North Baptist Church v. City of Orange, 54 N. J. Law, 111, 14 L. R. A. 62; Opening of Albany St., 6 Abb. Pr. (N. Y.) 273. Under a statute requiring an affidavit to show that a notice was posted in a conspicuous place, it is enough to state that the notice was put up and that the place was conspicuous. The affidavit need not specify the place. People v. Village of New Rochelle, 17 App. Div. 603, 45 N. Y. Supp. 836. A requirement of a village charter for publication of a notice is jurisdictional. In re Burmeister, 56 How. Pr. (N. Y.) 416; Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; Gilmore v. City of Utica, 61 Hun, 618, 15 N. Y. Supp. 274, affirmed in 131 N. Y. 26; Beaumont v. City of Wilkes Barre, 142 Pa. 198.

Davis v. City of Lynchburg, 84 Va. 861, 6 S. E. 230. The passage of public laws and progress of a work of local improvement is considered in this case sufficient notice to all persons interested. Town of Tumwater v. Pix, 15 Wash. 324. Where a law provides for constructive serv-

such statutes and a failure to comply with their requirements in any particular will invalidate the proceedings depending upon the regularity and sufficiency of notice for their validity.[454]

ice, the substitution of personal service, therefore, will not invalidate the proceedings. Jones v. City of Seattle, 19 Wash. 669.

[453] Perine v. Erzgraber, 102 Cal. 234, 36 Pac. 585. The inclusion of surplusage will not invalidate a notice if otherwise it is sufficient, under statutes of 1889, p. 158, § 3, which requires that it shall describe "briefly the work or improvement proposed." Washburn v. Lyons, 97 Cal. 314, 32 Pac. 310; Oakland Bank of Savings v. Sullivan, 107 Cal. 428, 40 Pac. 546; King v. Lamb, 117 Cal. 401, 49 Pac. 561. An immaterial variance, in this case surplusage, in the form of notice required by statute will not affect its validity.

Anderson v. De Urioste, 96 Cal. 404; White v. Harris, 116 Cal. 470. A posted notice must comply with the statutes requiring it to describe briefly the improvement proposed. Greenwood v. Hassett, 128 Cal. xviii, 61 Pac. 173; City of Ottawa v. Macy, 20 Ill. 413.

West Chicago St. R. Co. v. People, 156 Ill. 18, 40 N. E. 605, following Schemick v. City of Chicago, 151 Ill. 336. The omission in a notice of what may be regarded as surplusage will not affect its validity. See, also, as holding the same, Linck v. City of Litchfield, 141 Ill. 469; and Michael v. City of Mattoon, 172 Ill. 394.

Wheeler v. People, 153 Ill. 480. A notice need not affirmatively state that the improvement is within the limits of the city making it since it will be presumed that the city council did not intend to transcend its territorial jurisdiction. Aldis v. South Park Com'rs, 171 Ill. 424. "Ten days' notice" does not mean a publication for ten successive days. Followed by Royal Ins. Co. v. South Park Com'rs, 175 Ill. 491.

Quinn v. James, 174 Mass. 23, 54 N. E. 343; Fairchild v. City of St. Paul, 46 Minn. 540. Sufficiency of description of land in the notice. Voght v. City of Buffalo, 133 N. Y. 463; Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112; Jones v. City of Seattle, 19 Wash. 669.

[454] Paulsen v. City of Portland, 149 U. S. 30. But where from the construction of the ordinance as a whole, a provision for notice to property owners will be implied therein, the ordinance will not be held void for failure to embody an express provision. Williams v. Bergin, 108 Cal. 166; Dumars v. City of Denver, 16 Colo. App. 375, 65 Pac. 580. The failure to publish, for twenty days, a newspaper notice of the date, nature and manner of a proposed public improvement and the resolution ordering it, will invalidate an assessment.

City of Atlanta v. Gabbett, 93 Ga. 266. A notice relative to the construction of a sewer must state specifically its size. Hemingway v. City of Chicago, 60 Ill. 324; Armstrong v. City of Chicago, 61 Ill. 352. A certificate of publication of a notice made by a person not at that time a publisher is insufficient and the court acquires no jurisdiction of the assessment proceedings.

Brown v. City of Chicago, 62 Ill.

Special assessment proceedings are directed as a rule against the property liable, not an individual, and less accuracy is required and a more liberal rule of construction applied in naming or determining the owner or owners of property. However, if notice is required to be given the property owner, this rule will not

106; Marsh v. City of Chicago, 62 Ill. 115; Beygeh v. City of Chicago, 65 Ill. 189; McChesney v. People, 148 Ill. 221. An affidavit of posting and publishing signed by three persons one of whom is not one of the three commissioners appointed is, under the statute, insufficient to give the court jurisdiction. West Chicago St. R. Co. v. People, 155 Ill. 299. A notice sent to the "Chicago W. Div. R. R. Co." is not indefinite, the owner being "Chicago West Division Railway Company" and the fact that the envelope was addressed to "W. Div. R. R. Co." will not invalidate it as the notice so addressed might well be received by the proper corporation.

Chandler v. People, 161 Ill. 41. A certificate of publication that the notice was published "five times" does not sufficiently show that the notice was published for "five successive days" as required by statute. See, also, Evans v. People, 139 Ill. 552, 28 N. E. 1111, as holding a statement that the notice of special assessment "has been published five times" in a daily newspaper is insufficient under the same statute, namely, Ill. Rev. St. c. 24, art. 9, § 27. Michael v. City of Mattoon, 172 Ill. 394. A defective affidavit may be amended at a subsequent term of court after judgment was entered upon due notice. See, also, the case of Hinkle v. City of Mattoon, 170 Ill. 316, holding that an affidavit of mailing a notice may upon due notice be amended after judgment where the rights of third parties acquired in good faith have not intervened. Hintze v. City of Elgin, 186 Ill. 251; Gage v. People, 188 Ill. 92; Holland v. People, 189 Ill. 348; Yaggy v. City of Chicago, 194 Ill. 88; Nelson v. City of Chicago, 196 Ill. 390; Dugger v. Hicks, 11 Ind. App. 374, 36 N. E. 1085; Grace v. Newton Board of Health, 135 Mass. 490; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524. Where the statute requires notice of a meeting to be given by the board of equalization, "for at least six days prior thereto," the board is without jurisdiction to act where the notice was first published on the 23rd of the month and the board convened on the 28th.

Poilion v. Borough of Rutherford, 65 N. J. Law, 538, 47 Atl. 439. When a notice is served March 24th and the hearing set for April 4th, the time given is insufficient under Public Laws of 1897, p. 285, § 58, requiring two weeks' notice. Bank of Columbia v. City of Portland, 41 Or. 1, 67 Pac. 1112. The filing of a remonstrance by a property owner will not be considered a waiver of notice. Buckley v. City of Tacoma, 9 Wash. 253. The notice as published, when required by law, should set out a literal copy of the resolution ordering the improvement and give not only the portion of the street to be improved but also the numbers of the lots to be charged with the improvement.

be carried to such an extent as to permit the giving of a legal notice to one who is not the actual owner.[455]

§ 366. Result of a failure to give notice.

A failure to follow the provisions of the law in respect to the giving of notice may result in either a material or immaterial error. The essential test of the efficiency of the notice is an answer in the affirmative to the question "did the owner receive notice of the pendency of the proceedings through the notice as attempted to be given?"[456] If the failure or defect affects no

[455] Uhl v. Moorhous, 137 Ind. 445, 37 N. E. 366; Mason v. City of Des Moines, 108 Iowa, 658, 79 N. W. 389, following Fisher v. Chaffee, 96 Iowa, 15; Chicago, R. I. & P. R. Co. v. City of Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763; Beals v. James, 173 Mass. 591, 54 N. E. 245; Morange v. Mix, 44 N. Y. 315. Proceedings against one who at the time of their commencement was the owner of property will be held valid against such property though its ownership subsequently changed.

Chamberlin v. Gleason, 163 N. Y. 214. A notice to a life tenant of property is not notice to the remaindermen and they will not be bound. Hawthorne v. City of East Portland, 13 Or. 271. It is not sufficient to describe the owner of land as "the estate of one deceased."

[456] Paulsen v. City of Portland, 149 U. S. 30; Schmidt v. Market St. & W. G. R. Co., 90 Cal. 37, 27 Pac. 61; Schmidt v. Market St. & W. G. R. Co., 90 Cal. 37; Hewes v. Village of Winnetka, 60 Ill. App. 654; Hinkle v. City of Mattoon, 170 Ill. 316. The voluntary appearance of a landowner is held in this case as curing the failure to give the statutory notice. Meadowcroft v. Kochersperger, 170 Ill. 356; Craft v. Kochersperger, 173 Ill. 617; Klein v. Tuhey, 13 Ind. App. 74, 40 N. E. 144; Beals v. James, 173 Mass. 591, 54 N. E. 245; Fairchild v. City of St. Paul, 46 Minn. 540. The notice is sufficient when published for more than the length of time required by statute.

McGavock v. City of Omaha, 40 Neb. 64, 58 N. W. 543; Central R. Co. v. City of Bayonne, 52 N. J. Law, 503, 20 Atl. 69; In re Delaware & H. Canal Co., 8 N. Y. Supp. 352. A notice relating to street improvements under laws of N. Y. 1871, c. 536, p. 1134, "inviting parties interested therein" to present objections, is insufficient if no time is stated when this can be done. In re Lexington Ave., 63 Hun, 629, 17 N. Y. Supp. 870, 872. A notice giving longer time than that required by statute is sufficient. Lyth v. City of Buffalo, 48 Hun (N. Y.) 175; People v. Coler, 31 Misc. 211, 65 N. Y. Supp. 44. Sufficiency of description in the notice involved.

City of Canton v. Wagner, 54 Ohio St. 329. Under Rev. St. Ohio, § 2304, a notice is sufficient defining the nature of the improvement and stating that the expenses will be charged to abutting land. Ladd v. Spencer, 23 Or. 193, 31 Pac. 474. A notice of a proposed improvement of a street "by building to the estab-

substantial rights[457] or if through some other provision of the statute the right is given to the property owner to test all of the questions which may have been raised at the time of the service of notice,[458] then such defect or failure will be regarded as an

lished grade an elevated roadway, thirty-six feet wide, and elevated sidewalks twelve feet wide," is not a sufficient compliance with the charter provision which requires that the notice "must specify with convenient certainty the street or part of street proposed to be improved * * * and the kind of improvement to be made."

Clinton v. City of Portland, 26 Or. 410. A notice sufficiently describes an improvement when by its own language and a reference to plans and specifications on file in the public office, the character and location of the improvement is definite and certain. Beaumont v. City of Wilkes-Barre, 142 Pa. 198; Armstrong v. Ogden City, 9 Utah, 255; Felker v. City of New Whatcom, 16 Wash. 178. A notice is sufficient which supplements itself by referring to diagrams and estimates previously filed with the city clerk as required by law. Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 983.

[457] Walker v. District of Columbia, 6 Mackey (D. C.) 352. The notice in this case held to affect only the question of delinquent interest; a failure to give such could not, therefore, invalidate the proceedings except as relating to the matter of interest.

Illinois Cent. R. Co. v. City of Decatur, 126 Ill. 92, 18 N. E. 315, 1 L. R. A. 613; Haley v. City of Alton, 152 Ill. 113. Irregularities in the giving of notice may be waived by a general appearance of the property owner. Clements v. Lee, 114 Ind. 397, 16 N. E. 799. The sufficiency of a notice cannot be questioned if the work has been done under color of proceedings and without objection by the landowners. Gilmore v. Hentig, 33 Kan. 156; Fehler v. Gosnell, 99 Ky. 380, 35 S. W. 1125. After the work has been performed under a contract for the improvement of a street, it is too late under § 2834, Rev. St., to hold that the notice given by the board of public works was insufficient.

Shimmons v. City of Saginaw, 104 Mich. 511, 62 N. W. 725; Townsend v. City of Manistee, 88 Mich. 408. Defective proceedings resulting from a failure to give notice may be cured by the making of a new assessment and the proceedings relating to it. Gilmore v. City of Utica, 61 Hun, 618, 15 N. Y. Supp. 274, affirmed in 131 N. Y. 26. Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; Village of Tonawanda v. Price, 171 N. Y. 415, reversing 57 App. Div. 635, 68 N. Y. Supp. 1150. A notice is not insufficient which designated "the usual" place of meeting of the village trustees instead of describing more accurately and specifically such place. The court said that in a country village persons would not be misled by the general character of such a notice.

[458] Goodrich v. City of Detroit, 184 U. S. 432, affirming judgment in 123 Mich. 559; Oskamp v. Lewis, 103 Fed. 906; Law v. Johnston, 118 Ind. 261, 20 N. E. 745, following Garvin v. Daussman, 114 Ind. 429, 16 N. E.

immaterial one and, therefore, not making illegal the assessment proceedings; but if otherwise a failure to give proper notice will be fatal.[459] The giving of notice required affecting a certain stage only of the proceedings will not cure a failure to give the required notice concerning the proceedings in other respects or at some other time.[460] On the other hand, a failure to give the no-

826; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; Nichols v. City of Salem, 80 Mass. (14 Gray) 490. A failure to give notice to one landowner is an error not available to other landowners upon whom notice has been properly served. Wilson v. State, 42 N. J. Law, 612.

[459] Bensinger v. District of Columbia, 6 Mackey (D. C.) 285; Harrison v. City of Chicago, 163 Ill. 129, 44 N. E. 395; Chandler v. People, 161 Ill. 41; Kiphart v. Pittsburgh, C., C. & St. L. R. Co., 7 Ind. App. 122, 34 N. E. 375; Grace v. Newton Board of Health, 135 Mass. 490; Mills v. City of Detroit, 95 Mich. 422, 54 N. W. 897; Security Sav. Trust Co. v. Donnell, 1 Mo. App. Rep'r 571; Leonard v. Sparks, 63 Mo. App. 585; Hegeman v. City of Passaic, 51 N. J. Law, 109; Bacon v. City of Elizabeth, 51 N. J. Law, 246; In re Ford, 6 Lans. (N. Y.) 92; In re Delaware & H. Canal Co., 8 N. Y. Supp. 352; People v. Village of New Rochelle, 83 Hun, 185, 31 N. Y. Supp. 592; Remsen v. Wheeler, 105 N. Y. 573; Baltimore & O. & C. R. Co. v. Wagner, 43 Ohio St. 75; Hawthorne v. City of East Portland, 13 Or. 271; Hershberger v. City of Pittsburgh, 115 Pa. 78, 8 Atl. 381. The provision for notice is considered mandatory.

Wilvert v. Sunbury Borough, 81½ Pa. 57; Buchanan v. Borough of Beaver, 171 Pa. 567; Violett v. City of Alexandria, 92 Va. 561, 23 S. E. 909, 31 L. R. A. 382. Provisions of a city charter authorizing assessments to be made on property for local improvements without requiring notice or hearing to the owners are unconstitutional and void as depriving a person of his property without due process of law. Wilson v. City of Seattle, 2 Wash. St. 543.

[460] People v. Gilon, 121 N. Y. 551, 24 N. E. 944, reversing People v. Asten, 47 Hun, 639. "The duties which the board was required to perform were essentially judicial in their nature and character. The power and duty to determine the amount of loss or injury which the owner of real estate had sustained involved the exercise of judgment and discretion and the hearing of such proof as the property owners had to offer and as was pertinent to the injury. These judicial functions could not be properly performed in contemplation of law without giving to the parties interested in the determination some notice of the time and place of the hearing, and an opportunity to be heard. In the amended return to the writ, the assessors state that they gave notice by advertising in the official journal on the 29th day of February, 1876, and again on the 30th day of April, 1876, in the following words: 'Public notice is hereby given to the owner or owners, occupant or occupants of all houses and lots, improved or unimproved lands affected thereby, that the following assessments have been completed, and are

tice required by law of the pendency of the proceedings at a particular time will not affect the validity of the proceedings in

lodged in the office of the board of assessors for examination by the persons interested. * * * All persons whose interests are affected by the above named assessments, and who are opposed to the same, or either of them, are requested to present their objections in writing to the board of assessors at their office within thirty days from the date of this notice.' This paper was signed by the four persons composing the board of assessors, and dated the 29th day of February, 1876. * * *

"It is quite plain that this notice applied to the assessment upon property within a certain district for benefits in consequence of the improvement, and the expenses of making the same, and not to the damages or loss sustained. All persons who were interested in assessments imposed for benefits, and who desired to have the amount imposed reduced, were notified to file objections in writing within a specified time; but there was no suggestion that property owners who had sustained loss or injury by the grading and regulating of the street could present proofs or be heard. The notice called for objections to an assessment made, not for proofs or argument in support of a claim for damages. We are informed by the return that the board determined the amount of damages that the real estate represented by the relator sustained, when he was not present, at $5,000 and that on the 29th day of March, 1876, they filed the certificate of the award with the comptroller of the city of New York and that they filed the assessment for expenses and benefits with the board of revision and correction of assessments on the 5th day of May, 1876. It appears further that the certificate awarding $5,000 damages to the relator signed by the assessors bears date March 27th, 1876, and consequently whatever proceedings the board of assessors took for the purpose of determining the amount of the relator's loss were prior to that date. There were two distinct and separate proceedings before the board, the result of which is expressed in two papers, namely, the certificate of award as to the damages and the assessment list as to the expenses and benefits. Notice was given of the latter by the publication of the advertisement above set forth; but no notice whatever was given of the former, unless the conversations had between the counsel for the relator and the members of the board is to be treated as such, and we think it is not. The notice published, cannot, as already observed, be treated as covering the relator's claim for damages or as affording him an opportunity to be heard on that subject; and, even if it could, the relator was not given the thirty days designated in the notice to present his case, as the award was completed as early as March 27th and filed March 29th. It follows that the board in making the award, failed to observe an essential requirement in all judicial proceedings, namely, notice to the party interested in the determination, and an opportunity to him to be heard, and for that reason no regular or legal

other respects or at other stages as to which the proper notice was given.[461]

§ 367. Variance of proceedings from notice given.

In a preceding section,[462] the principle has been stated that the local improvement as constructed or carried out and the assessment proceedings as levied must follow in detail the authority for the construction and levy. This same principle applies where the giving of notice to a property owner is an essential part of the proceedings; the improvement and the assessment based upon such notice must not vary in a material way from the notice given to the property owners.[463] This is the basis of the legality of subsequent proceedings. It is true, however, that a variance may affect no substantial rights,[464] or may be of such slight conse-

determination of the loss or injury to the real estate of Mrs. Smith has yet been made. The act of 1872 imposed this duty upon the board of assessors, without requiring it to be done within any particular time, or by any particular set of assessors. So long as the duty remains unperformed, it is competent for the board to act; and the fact that its membership has changed and is continually changing, does not affect the question. The act of the assessors of 1876 in filing with the comptroller what purports to be an award of damages, but in fact made without notice to the party interested, and hence irregular and erroneous, does not satisfy the requirement of the statute." In re De Pierris, 82 N. Y. 243, reversing 20 Hun, 305.

[461] Moffitt v. Jordan, 127 Cal. 622; California Imp. Co. v. Moran, 128 Cal. 373; Philadelphia, W. & B. R. Co. v. Shipley, 72 Md. 88, 19 Atl. 1; Foley v. City of Haverhill, 144 Mass. 352; City of Duluth v. Miles, 73 Minn. 509; In re Pennie, 19 Abb. N. C. (N. Y.) 117; Northwestern & P. Hypotheek Bank v. City of Spokane, 18 Wash. 456.

[462] See § 362.

[463] McBean v. Redick, 96 Cal. 191; Washburn v. Lyons, 97 Cal. 314; Owen v. City of Chicago, 53 Ill. 95; Stephenson v. Town of Salem, 14 Ind. App. 386, 42 N. E. 44, 943; Malone v. Jersey City, 27 N. J. Law (3 Dutch.) 536; City of Schenectady v. Furman, 78 Hun, 87, 29 N. Y. Supp. 269; Ladd v. Spencer, 23 Or. 193.

[464] Felker v. City of New Whatcom, 16 Wash. 178, distinguishing Buckley v. City of Tacoma, 9 Wash. 253. In the syllabus it is said: "The validity of a notice by a city of a street improvement is not affected as to property taxable therefor by the fact that in a second publication it includes an additional improvement not affecting such property," and also that "The assessment and sale of property by a city for a street improvement in the name of S. D. Henning, instead of S. W. Herring, who was the true owner, is not such an inaccuracy

quence as to be termed an immaterial one.[465] In this case, the principle clearly would not apply. The rule of strict construction will not be applied to an unreasonable degree or to such an extent as to prevent the construction of a local improvement where none of the rights of property owners have been jeopardized.[466]

§ 368. Benefits the basis of assessment.

In many jurisdictions a local assessment is legal because based upon a strict application of the doctrine of benefits or, as has been said, according to the benefits received.[467] In such jurisdictions the question has been raised that since the extent of the assessment for the construction of a local improvement is based upon and in proportion to the benefits received by specific property, that therefore, notice must be given to the property owners prior to the commencement of any proceedings looking eventually to the making of the improvement and the levy of the local assessment, and if there is no requirement either statutory or through ordinance for the giving of such notice that therefore, all subsequent proceedings will be held invalid; the claim being that the property owner should have an opportunity to contest the fact, for such it is conceded to be, of the reception of a benefit by his property.[468] The supreme court of the United States in a recent case,[469] in discussing generally the right of the legislature to arbitrarily provide a method for apportioning local assessments for the construction of local improvements, held that

as will render the proceedings invalid."

[465] Jersey City v. State, 30 N. J. Law, 521; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978.

[466] Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797, but see the dissenting opinion of Judge Baker.

[467] See § 347.

[468] Spencer v. Merchant, 125 U. S. 345.

[469] French v. Barber Asphalt Pav. Co., 181 U. S. 324. "It has been held by this court that the legislature has power to fix such a district for itself without any hearing as to benefits for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature when it fixes the district itself, is supposed to have made proper inquiry and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question." See, also, Paulson v. City of Portland, 149 U. S. 30.

this was within the discretionary powers of a legislative body and could be done without giving the property owner any notice of the pendency of the proceedings at any stage, and an opportunity to raise the question of benefits received by his property.[470] There will be found, however, decisions holding that, under the method of apportioning assessments based upon benefits received, the property owner is entitled as a jurisdictional right to notice of the pendency of preliminary proceedings and the opportunity of raising this question,[471] or the competency of a proposed tribunal.[472]

[470] Goodrich v. City of Detroit, 184 U. S. 432; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43; Works v. City of Lockport, 28 Hun (N. Y.) 9; Paulson v. City of Portland, 16 Or. 450, 19 Pac. 450, 1 L. R. A. 673.

[471] Scott v. City of Toledo, 36 Fed. 385; Chicago & N. W. R. Co. v. Village of Elmhurst, 165 Ill. 148. Where an owner has had the opportunity to raise the question of benefits, he cannot claim that the assessment deprived him of property without due process of law. Quill v. City of Indianapolis, 124 Ind. 292, 7 L. R. A. 681; Barber Asphalt Pav. Co. v. Edgerton, 125 Ind. 455. Property owners are entitled to notice and hearing under this question under act of Ind. March 8, 1889, §§ 6, 7. Adams v. City of Shelbyville, 154 Ind. 467, 49 L. R. A. 797; Philadelphia, W. & B. R. Co. v. Shipley, 72 Md. 88; State v. Otis, 53 Minn. 318, 55 N. W. 143.

[472] City of Greensboro v. McAdoo, 112 N. C. 359, 17 S. E. 178, reversing 110 N. C. 430, 14 S. E. 974. "In the case under consideration the power to order the improvement of the sidewalks and to levy assessments against the abutting owners to the extent of the special benefits conferred, is not denied; but it is insisted that there was, as applicable to the present assessment, a specific method prescribed by the plaintiff's charter, and that as this method was not pursued in several material particulars and as objection was taken in apt time, the assessment is invalid and cannot be enforced in this action. The improvements were ordered by the city in August, 1888, and the work was completed in June, 1889. In the charter of the city granted in 1870, there is no specific provision authorizing the levying of special assessments; but in respect to the improvements of sidewalks, it was amended by the act of 1875, c. 13, § 1, which provides as follows: 'The owner or owners of property in front of which the commissioners shall construct, pave or repair any sidewalks shall be chargeable and pay for any special benefit accruing to such property by reason of said improvement; and such property shall be bound for the value of such special benefit, to be ascertained in the same manner as herein prescribed for laying off streets, including the right of appeal.' In § 58 of the charter it is provided 'that when any land or right of way is required by said city of Greensborough for the purpose of opening new streets, or

§ 369. Presumption of validity.

When special assessment proceedings are attacked by a property owner because of alleged illegality, where, upon the face of the records and files, they appear regular, the presumption of law exists that all those acts required by statute to be done have been done and in the proper time and manner.[473] The burden of

for other objects allowed by its charter, and, for want of agreement as to the value thereof the same cannot be purchased, * * * the same may be taken at a valuation to be made by five freeholders of the city to be chosen jointly by the commissioners and the party owning the land; * * * and in making said valuation, said freeholders, after being duly sworn, * * * shall take into consideration the loss or damage which may accrue to the owner or owners in consequence of the land or right of way being surrendered, and also any special benefit or advantage such owner may receive,' etc. Thus it appears from the foregoing acts that a particular method was prescribed under which the owner was entitled to have the special benefits assessed by five freeholders to be chosen jointly by himself and the commissioners. It does not appear from the record that the persons who made the present assessment were freeholders. * * * As there is nothing which can be reasonably construed into a waiver of these particulars by the defendant, it must follow, that if the provisions of the charter as amended by the act of 1875, are applicable, the assessment is invalid, and cannot be sustained." City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330.

[473] Fanning v. Bohme, 76 Cal. 149, 18 Pac. 158. The presumption may arise through statutory provision. In this case, Code of Civ. Proc., § 1963, subdivision 15. Fanning v. Leviston (Cal.) 21 Pac. 121; Perine v. Lewis, 128 Cal. 236, 60 Pac. 772, modifying judgment in 128 Cal. 236, 60 Pac. 422 on rehearing; Escondido High School Dist. v. Escondido Seminary of University of Southern California, 130 Cal. 128, 62 Pac. 401; Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131; Bowman v. People, 137 Ill. 436, 27 N. E. 598; White v. City of Alton, 149 Ill. 626, 37 N. E. 96; Linck v. City of Litchfield, 141 Ill. 469; Derby v. West Chicago Park Com'rs, 154 Ill. 213; Cramer v. City of Charleston, 176 Ill. 507; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92; Town of Woodruff Place v. Raschig, 147 Ind. 517, 46 N. E. 990; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071; Jenkins v. Stetler, 118 Ind. 275; Anderson v. Bitzer, 20 Ky. L. R. 1450, 49 S. W. 442.

State v. Ramsey County Dist. Ct., 29 Minn. 62. But the record is prima facie evidence only of the facts therein recited. Scott County v. Hinds, 50 Minn. 204; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543; Day v. Borough of Fairview, 62 N. J. Law, 621, 43 Atl. 578. The authority for the signature of a corporate name will be presumed. Tifft v. City of Buffalo, 7 N. Y. Supp. 633; Chilcott v. City of Buffalo, 7 N. Y. Supp. 638; Providence Retreat v.

proof is upon the one attacking their correctness.[474] The rule does not apply where, upon the face of the record, there is a lack

City of Buffalo, 29 App. Div. 160, 51 N. Y. Supp. 654. In the absence of substantial injury, courts will not be over-zealous in finding technical reasons for declaring assessments for public improvements invalid. Rehearing denied in 31 App. Div. 635, 53 N. Y. Supp. 1113; Delaware & H. Canal Co. v. City of Buffalo, 167 N. Y. 589, 60 N. E. 1119, affirming 39 App. Div. 333, 56 N. Y. Supp. 976; Landon v. City of Syracuse, 163 N. Y. 562, 57 N. E. 1114, affirming 19 App. Div. 41, 46 N. Y. Supp. 1053, following Alvord v. City of Syracuse, 163 N. Y. 158.

Ladd v. Spencer, 23 Or. 193; Barkley v. Oregon City, 24 Or. 515, 33 Pac. 978; Phillips v. City of Sioux Falls, 5 S. D. 524, 59 N. W. 881. "In the absence of any allegation in the complaint to the contrary, the members of the city council, like all other public officers, are presumed to have performed their respective duties and to have complied with the requirements of the statutes and the charter by which the city of Sioux Falls was governed at the time the initiative steps were taken to pave and curb the street for which the special tax in question was attempted to be imposed, and the assessment of which, for reasons not specified in the complaint, was subsequently declared and adjudged to be irregular and void. In the absence of any knowledge on the subject, we must indulge all reasonable presumptions in favor of the legality and regularity of the steps taken prior to such assessment, by the city authorities. Assuming then as we must that all the required steps preceding the assessment had been regularly taken, and stood unimpeached and unquestioned, we are disposed to believe that a repetition of such proceedings would be necessary and was not contemplated by the framers of our statute authorizing a reassessment in cases like the present. When it is conceded that public improvements of the nature mentioned in the complaint and authorized to be made at the expense of abutting property owners, have been completed, and an action is instituted to defeat the collection of a tax reassessed therefor, the complaint should contain allegations which, if established on the trial, would be sufficient to overcome the presumption in favor of the tax; and, as the complaint in this case does not contain such averments, it fails to state a cause of action."

[474] McVerry v. Boyd, 89 Cal. 304, 26 Pac. 885; Hellman v. Shoulters, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057; San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; McAuley v. City of Chicago, 22 Ill. 563; McManus v. People, 183 Ill. 391; Auditor General v. Maier, 95 Mich. 127; Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543, 38 S. W. 458; Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862, citing Smith v. City of Omaha, 49 Neb. 883; Leavitt v. Bell, 55 Neb. 57, 75 N. W. 524; Equitable Trust Co. v. O'Brien, 55 Neb. 735, 76 N. W. 417.

Hooker v. City of Rochester, 30 N. Y. Supp. 297; City of Ithaca v. Babcock, 72 App. Div. 260, 76 N. Y. Supp. 49; In re Voorhis, 90 N. Y. 668; Beaumont v. City of Wilkes-

of jurisdictional facts, or where the statute requires the record to show affirmatively certain conditions or circumstances which do not appear.[475]

§ 370. Estoppel of public corporations.

A public corporation is estopped from alleging irregularities in assessment proceedings for the purpose of defeating its obligations in the hands of bona fide purchasers and for value.[476] Failure or neglect by a corporate official to properly perform an official duty will not, where the local improvement has been fully constructed, invalidate the proceedings and render the assessment void.[477]

Barre, 142 Pa. 198, 21 Atl. 888; Dickson v. City of Racine, 65 Wis. 306; Wright v. Forrestal, 65 Wis. 341.

[475] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500. But where the law provides that an official endorsement shall be prima facie evidence of certain facts, these will be presumed to exist although the document itself fails to affirmatively show them. Morrison v. City of Chicago, 142 Ill. 660; Derby v. West Chicago Park Com'rs, 154 Ill. 213; Dunne v. West Chicago Park Com'rs, 159 Ill. 60; Maxwell v. City of Chicago, 185 Ill. 18; City of Logansport v. Blakemore, 17 Ind. 318; Baker v. Tobin, 40 Ind. 310; Ball v. Balfe, 41 Ind. 221; Medland v. Linton, 60 Neb. 249, 82 N. W. 866; Hooker v. City of Rochester, 30 N. Y. Supp. 297; In re Bassford, 50 N. Y. 509.

[476] Town of Darlington v. Atlantic Trust Co. (C. C. A.) 68 Fed. 849. "The plaintiff in error insists that the assessment made by authority of provisions of the charter of the town of Darlington on which the levy of taxes for the year 1890 was based, was unlawful because not completed and filed within the time allowed by said charter, but we think that so far as the town itself is concerned, the contention is without merit. Those whose property was so assessed, who were required to pay the taxes and who were familiar with the mode of making and returning the assessment, made no complaint while the authorities of the town ratified the assessment, and confirmed the legality of the return by laying and collecting the tax. It would not be proper to now permit those who so made the assessment, and who imposed, collected and enjoyed the benefits of the tax levied by virtue of the same, to question the validity of their own act. There are many reasons why the town of Darlington should be compelled to respect its obligations in respect to the bonds mentioned and the coupons now in suit, and no good cause has been shown why it should be permitted to falsify its own representations, evade its liabilities and involve others who have made expenditures and investments on the faith of its repeated promises and presumed honesty."

[477] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; Williams v. Bergin, 116

§ 371. Form of reports, assessment rolls and other necessary papers.

Certain fundamental conditions suggested in the preceding sections must exist to render assessment proceedings valid, and the resulting charge a lien upon property, and the law recognizes the fact that municipal officers having charge of one or more of the steps in the making of local improvements and the levying of special assessments may not be well educated and may lack business methods and training. To prevent, therefore, the disastrous consequences that might result from the preparation of papers by such officials, the law may provide forms and modes of proceeding[478] with specific directions as to signatures,[479] authentication, certification and recording.[480] These provisions are

Cal. 56; Indiana Bond Co. v. Bruce, 13 Ind. App. 550, 41 N. E. 958.

[478] Walker v. District of Columbia, 6 Mackey (D. C.) 352. Where, by their connection, the value of figures as dollars and cents is clear, a failure to prefix the dollar mark is not fatal. See, also, as holding the same, People v. Empire Gold & Silver Min. Co., 33 Cal. 171, and State v. Hunt, 74 Minn. 496, 77 N. W. 301.

Kimball v. People, 160 Ill. 653, following Hertig v. People, 159 Ill. 237. The recital in a circular publication of a delinquent tax list of special assessments that "I, Frank S. Weighley, President of The Mail, a corporation publishing a newspaper known as The Chicago Mail," is a sufficient compliance with the statute which requires such certificate to be signed by the "printer, publisher, financial officer or agent."

Hull v. West Chicago Park Com'rs, 185 Ill. 150. Where the statutes provide that park commissioners shall make and certify the assessment roll, an additional order of court is not necessary. Lord v. Cooper, 19 App. Div. 535, 46 N. Y. Supp. 519; Hennessy v. Douglas County, 99 Wis. 129, 74 N. W. 985.

[479] Bensinger v. District of Columbia, 6 Mackey (D. C.) 285; People v. Lingle, 165 Ill. 65. A report signed J. F. Kenny is not invalid when the order appointed as one of the commissioners John F. Kenny it appearing that the same person who was appointed acted as commissioner. Brethold v. Village of Wilmette, 168 Ill. 162. An error in spelling the names of officers will not invalidate an assessment roll where the identity of the person is established. Larson v. City of Chicago, 172 Ill. 298. Where the law requires the joint action of an official body, a report or certificate signed by a less number than the whole is insufficient. Yaggy v. City of Chicago, 192 Ill. 104; Thompson v. Honey Creek Draining Co., 33 Ind. 268; Thompson v. City of Detroit, 114 Mich. 502, 72 N. W. 320; Eyerman v. Payne, 28 Mo. App. 72.

[480] Himmelman v. Danos, 35 Cal. 441; Dougherty v. Hitchcock, 35 Cal. 518; Witter v. Bachman, 117 Cal. 318, 49 Pac. 202. "The evidence jus-

usually considered mandatory in their nature and a failure to comply with them will be fatal to the validity of the proceedings unless the effect of such failure is immaterial and results in no substantial injury to property rights or the property owner is estopped to allege insufficiency or irregularity.[481]

tifies the finding that the record of the return upon the warrant was not signed by the superintendent of streets, and there is evidence to justify the finding that, although the contract of Pollard was left with the superintendent, it was not recorded or marked filed or recorded by him, or at all. Section 10 of the act of 1885 requires that the warrant shall be returned to the superintendent with a return indorsed thereon by the contractor, verified by oath, stating the nature and character of the demand, etc. 'Thereupon the superintendent of streets shall record the return so made, in the margin of the record of the warrant and assessment and also the original contract referred to therein, if it has not already been recorded, at full length in a book to be kept for that purpose in his office and shall sign the record.' The indorsement upon the return is as follows: 'Returned this 15th day of July, 1893, and return recorded. Supt. of Public Streets.' The transcript nowhere shows that the contract was recorded, although defendants introduced and read from the minutes of the council what appears to be the contract between Pollard and the street superintendent, which was recognized by all parties as the contract and which was the basis of the claim. If the decision of the case were to rest wholly on the failure of the plaintiff to show that the superintendent failed to record the contract, I should hesitate to hold this alone as fatal to plaintiff's lien, inasmuch as it appears affirmatively and by defendant's evidence that all parties knew of the contract and it was in fact spread at length upon the minutes but the superintendent of the streets failed to sign the record of the return. The title of his office is there but the name of the officer is wanting and there is the name of no deputy or other person acting for him. Among the prerequisites to the existence of a valid right of action in any case is this, to-wit: That 'the superintendent of streets shall record the return * * * and sign the record.' This was not done and the omission is fatal to plaintiff's cause of action."

[481] Lyon v. Alley, 130 U. S. 177; City & County of San Francisco v. Certain Real Estate, 50 Cal. 188. A duplicate copy of an assessment roll need not be prepared with the same formality as the original. Spring Valley Coal Co. v. People, 157 Ill. 543; Kimball v. People, 160 Ill. 653; Bradford v. City of Pontiac, 165 Ill. 612; McChesney v. People, 171 Ill. 267; City of Aurora v. Lamar, 59 Ind. 400; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; Huling v. Bandera Flag Stone Co., 87 Mo. App. 349; Dusenbury v. City of Newark, 25 N. J. Eq. (10 C. E. Green) 295; Simmons v. City of Passaic, 55 N. J. Law, 485, 27 Atl. 909; Wakeman v. Jersey City, 35 N. J. Law, 455; Provident Institution for Savings v. Jersey City, 52 N. J. Law, 490, 19 Atl. 1096; Frevert v. City of Bayonne, 63 N. J. Law, 202, 42 Atl.

§ 372. Opportunity for investigation and examination.

That the property owner have the fullest opportunity to detect errors and irregularities for the purpose of protecting his property rights, an investigation of all the records and proceedings in connection with the construction of the local improvements and the making of special assessments may be necessary. The right to examine such records and proceedings exists therefore and is available to the property owner independent of statutory provision, although the latter may be found.[482] This right

773. Laches, however, cannot be imputed where there are pending proceedings for the reassessment. Brewer v. City of Elizabeth, 66 N. J. Law, 547, 49 Atl. 480; People v. Kelly, 33 Hun (N. Y.) 389; Denise v. Village of Fairport, 11 Misc. 199, 32 N. Y. Supp. 97. The omission of an act not required by a village charter does not invalidate a local assessment. Dean v. City of Paterson, 67 N. J. Law, 199, 50 Atl. 620; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; Sorchan v. City of Brooklyn, 62 N. Y. 339. So held in case of the omission to sign the preliminary assessment list by the assessors. In re Upson, 89 N. Y. 67. The failure to file a map as required by N. Y. laws 1870, c. 626, § 2, held to be a mere irregularity. Harrell v. Storrie (Tex. Civ. App.) 47 S. W. 838. The provisions of a city charter prescribing the form of the engineer's certificate attached to a roll of ownership, the property affected by a local improvement is directory merely and not mandatory.

[482] People v. Reilly, 38 Hun (N. Y.) 429; People v. Cornell, 47 Barb. (N. Y.) 329; In re Lord, 34 Misc. 271, 68 N. Y. Supp. 873. In re Terry, 68 N. Y. Supp. 874, note. In this case the court giving the true doctrine which should prevail in such cases says: "I am not satisfied that this application is made for a legitimate purpose. Under section fifty of the consolidation act, a tax payer has the undoubted right to inspect books, but it must be under such proper rules and regulations as the commissioners of taxes may impose. The notice of motion in this case seems to contemplate a right to rove over all the books in the department of taxes and assessments for a general purpose of curiosity and without any definite object in view, unless it may be to find out facts which would enable an attorney to apply to persons assessed to retain him as a lawyer to set aside or reduce their assessments. Proper and reasonable rules and regulations for the inspection of books or the procurement of information from departments of the city government must be made, otherwise it would be impossible to carry on business in them; and I think the commissioner of taxes who refused the application of the petitioner, was perfectly right in doing so, as there was no special designation of any book or books the applicant desired to see, nor any purpose stated other than to examine generally the books of the department for the two years mentioned in the notice of motion. What particular tax or assessment the applicant had in mind is not

of examination is granted liberally, and, where it is given by law, the statute is never strictly construed. Records of public proceedings, public files and papers should be always open for the inspection, under reasonable restrictions and at reasonable hours, of those whose rights may be affected or protected by them.

§ 373. The right of correction and review.

The right of review or appeal does not belong as an absolute one to the property owner;[483] he is protected in his property rights by federal and state constitutions, but it is possible that steps in special assessment proceedings may not, where notice is given to the owner of their pendency, affect his rights to such an extent or in such a manner as to bring him within protecting clauses.[484] The question of the necessity for and man-

stated; and if he wished simply to find names and amounts of assessments on which to base proceedings and to stir up strife and to find matters of controversy from which he could make a fee, the motion, of course, could not prevail."

[483] Hart v. West Chicago Park Com'rs, 186 Ill. 464; Graham v. City of Chicago, 187 Ill. 411; Hughes v. Parker, 148 Ind. 692; People v. Myers, 65 Hun, 14, 19 N. Y. Supp. 723; In re Munn, 165 N. Y. 149; Nottage v. City of Portland, 35 Or. 539.

[484] Davidson v. City of New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist. No. 108, 111 U. S. 708; Gillette v. City of Denver, 21 Fed. 822. "Now, in this case, the tax is levied by the area; no question of value, no matter of judgment,—a mere mathematical calculation; and of what earthly profit could it be to a tax payer to have notice of that calculation? He can make it himself. He cannot correct by testimony the judgment of anybody; it is as exact and settled as anything can be. In the proceedings to assess this tax and to do the work there are three steps: First, there is the making of the contract for the building of the sewer; second, there is the building of the sewer; the performing of the work; and third, the mere mathematical calculation,—the apportionment of the cost; as to the latter, no notice can be required because notice would be of no avail; as to the first, the statute provides that the city council may not act except upon the petition of a majority of the property holders or a recommendation of the board of health; it acts only by ordinance; the contract can be let only on advertisement. Every citizen is bound to take notice of the ordinances of the city; so that anterior to the making of the contract he has all the notice which can be required; and the statute also provides in reference to the doing of the work, that while the work is proceeding, on the complaint of any citizen, or tax payer that any public work is being

ner of making the improvement is held to be a legislative one and an appeal or the right of review does not exist from affirmative action in these respects by a legislative body.[485] The manner of assessment and basis of apportioning the cost of the improvement are also considered legislative questions and in the determination of which according to benefits received or the frontage rule, the court will not interfere.[486] Neither can the power of the municipality to contract for the construction of a local improvement be raised on an appeal from a special assessment tax.[487]

done contrary to contract, or the work or material used is imperfect or different from what was stipulated to be furnished or done, the council shall examine into the complaint, may appoint three commissioners, etc., so that in reference to the making of the contract, the performing of the contract, there is provision for notice; and as to the mere apportionment of the tax, it is one of those things as to which in the nature of things no notice can be required because no notice would be of value." Brown v. Drain, 112 Fed. 582.

[485] Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339; Harper v. City of Grand Rapids, 105 Mich. 551, 63 N. W. 517; Davies v. City of Saginaw, 87 Mich. 439; Powers v. City of Grand Rapids, 98 Mich. 393; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Warren v. Barber Asphalt Pav. Co., 115 Mo. 572, 22 S. W. 490; In re Sackett, Douglas & De Graw Streets, 74 N. Y. 95; Mason v. City of Sioux Falls, 2 S. D. 640, 51 N. W. 770. But the power of local improvement cannot be carried on in a different manner from that authorized by resolution after the time for appeal from or review of such resolution by property owners has passed. See, also, §§ 341, 342.

[486] District of Columbia v. Burgdorf, 6 App. D. C. 465; Pike v. City of Chicago, 155 Ill. 656; In re County Com'rs of Hampshire, 143 Mass. 424, 9 N. E. 756; Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642; Sweet v. West Chicago Park Com'rs, 177 Ill. 492; Middaugh v. City of Chicago, 187 Ill. 230; Davis v. City of Newark, 54 N. J. Law, 144, 23 Atl. 276; Schneider v. City of Rochester, 33 App. Div. 458, 53 N. Y. Supp. 931; In re Sackett, Douglas & De Graw Streets, 74 N. Y. 95. The validity of the assessment is not affected by the fact that on specific lots it is greater than their tax valuation. City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; Teegarden v. City of Racine, 56 Wis. 545. See, also, authorities cited § 337, supra.

[487] Hellenkamp v. City of Lafayette, 30 Ind. 192. "It is provided by section 69 of the act 'for the incorporation of cities' in force when this contract was made, that upon appeal 'no question of fact shall be tried which may arise prior to the making of the contract for the said improvement, under the order of council * * * and in case the

§ 374. Parties to appeal proceedings.

Special assessment proceedings are usually considered proceedings in rem only and their illegality, therefore, cannot be questioned by property owners because of irregularities which affect only the property of others,[488] and ordinarily orders on appeal cannot be made affecting the property of those not objecting or appearing in the appeal proceedings or property not involved in the proceedings.[489] Where a contractor is dependent upon the proceeds of a special assessment for his compensation, he is a proper party defendant in a proceeding to vacate a special assessment levied to pay the cost of such improvement.[490]

court or jury shall find, upon trial, that the proceedings of said officers, subsequent to said order directing the work to be done, are regular, that a contract has been made, that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon, then said court shall direct the said property to be sold, * * * Provided that nothing herein shall be so construed as to prevent any person from obtaining an injunction upon the proceedings prior to the making of any such improvements.' This prevents any question being made on appeal involving the power of the council to make the contract under an order to that effect."

[488] Bidwell v. Huff, 103 Fed. 362. A mortgage creditor has standing as a complainant in a court of equity. Gibler v. City of Mattoon, 167 Ill. 18, 47 N. E. 319; Jones v. Town of Lake View, 151 Ill. 663; Philadelphia & R. Coal & Iron Co. v. City of Chicago, 158 Ill. 9. The allowance of a joint appeal by numerous objectors to a special assessment is a discretionary matter with a trial court.

People v. Green, 158 Ill. 594; Hewes v. Glos, 170 Ill. 436. Ownership of property is essential to the right of appeal. Birket v. City of Peoria, 185 Ill. 369; Thompson v. City of Keokuk, 61 Iowa, 187; Hampton v. Hamsher, 46 Hun (N. Y.) 144; Moore v. City of Albany, 98 N. Y. 396.

[489] McSherry v. Wood, 102 Cal. 647; Pease v. City of Chicago, 21 Ill. 500; Leman v. City of Lake View, 131 Ill. 388, 23 N. E. 346; Davis v. City of Litchfield, 155 Ill. 384; Title Guarantee & Trust Co. v. City of Chicago, 162 Ill. 505; Hart v. West Chicago Park Com'rs, 186 Ill. 464; Berry v. City of Des Moines, 115 Iowa, 44, 87 N. W. 747; Towne v. City Council of Newton, 169 Mass. 240; Robinson v. City of St. Paul, 40 Minn. 228; State v. Ensign, 55 Minn. 278; State v. St. Louis County Dist. Ct., 68 Minn. 147, 70 N. W. 1088; Coward v. City of North Plainfield, 63 N. J. Law, 61, 42 Atl. 805; In re Feust, 55 Hun, 607, 8 N. Y. Supp. 420, affirmed in 121 N. Y. 299, 24 N. E. 479; In re Delancey, 52 N. Y. 81; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; In re Rosenbaum, 119 N. Y. 24; Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 22 L. R. A. 713; City of Pittsburg v. Maxwell, 179 Pa. 553.

[490] In re Bridgford, 65 Hun, 227,

§ 375. Review by the courts.

The law in granting the right may designate a judicial organization as the body to pass upon the appeal. When within its jurisdiction, all proceedings are governed by the usual rules controlling the action of and proceedings before it.[491] This rule applies to the weight and introduction of evidence, appearance of parties and trial of cases.[492] In proceedings on appeal the court is limited in its authority to such questions as it may be given by law the right to pass upon.[493]

§ 376. Review by other bodies.

The right of review or appeal may be granted to some other official body, generally a municipal council, instead of to the ju-

20 N. Y. Supp. 281. "We are also of the opinion that the contractor whose interests were to be affected by these proceedings was a necessary and proper party to the record. He could look only to this assessment, and the collection of this tax, for his compensation, and when it was proposed to cut off his source of supply he had a right to be in court to defend his interest." In re Alexander, 65 Hun (N. Y.) 622.

[491] Brown v. City of Grand Rapids, 83 Mich. 101; City of Philadelphia v. Unknown Owner, 148 Pa. 536, 24 Atl. 65.

[492] Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557; Gilbert v. City of New Haven, 39 Conn. 467; Bowditch v. City of New Haven, 40 Conn. 503. An appellant must particularize the ground upon which he asks relief. Goodwillie v. City of Lake View (Ill.) 21 N. E. 817; Green v. City of Springfield, 130 Ill. 515, 22 N. E. 602; Boyd v. Murphy, 127 Ind. 174, 25 N. E. 702; Chytraus v. City of Chicago, 160 Ill. 18; Ewart v. Village of Western Springs, 180 Ill. 318; Mock v. City of Muncie (Ind.) 32 N. E. 718; Moberry v. City of Jeffersonville, 38 Ind. 198; Sims v. Hines, 121 Ind. 534; Wilkins v. City of Detroit, 46 Mich. 120. See as to the admissibility of specific evidence: Tripler v. City of New York, 53 Hun, 36, 6 N. Y. Supp. 48.

[493] Lasbury v. McCague, 56 Neb. 220; Blume v. Bowes, 65 N. J. Law, 470, 47 Atl. 487. The same rule also holds where the city council passes upon questions on appeal. In re Southworth, 5 Hun (N. Y.) 55. Same rule applies to municipal council as an appellate body. In re Chesebrough, 63 Hun, 631, 17 N. Y. Supp. 791; In re Grand Boulevard & Concourse, 33 App. Div. 210, 53 N. Y. Supp. 331; In re New York Cent. & H. R. R. Co., 163 N. Y. 604, 57 N. E. 1119, affirming 49 App. Div. 281, 63 N. Y. Supp. 52; In re Hermance, 71 N. Y. 481; In re Lange, 85 N. Y. 307; Walsh v. Sims, 65 Ohio St. 211, 62 N. E. 120; Lucas' Petition, 128 Pa. 214, 18 Atl. 338; Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393; Kersten v. City of Milwaukee, 106 Wis. 200, 81 N. W. 948, 1103, 48 L. R. A. 851.

dicial organization suggested in the preceding section; in this case, the proceedings are governed either by the special provisions of law granting the appeal or right of review or by the common usage and custom and rules of procedure before such bodies.[494]

§ 377. The right of appeal or review; manner and time of exercise.

As the right of appeal and review is a statutory one, the provisions requiring or providing for its exercise within a certain specified time,[495] or in a designated manner,[496] are generally con-

[494] Williams v. Viselich, 121 Cal. 314, 53 Pac. 807. On appeal, notice of time and place of hearing need not mention the names of persons affected. Dyer v. Scalmanini, 69 Cal. 637; Frick v. Morford, 87 Cal. 576; Partridge v. Lucas, 99 Cal. 519; Belser v. Hoffschneider, 104 Cal. 455; De Koven v. City of Lake View, 131 Ill. 541; City of Louisville v. Selvage, 21 Ky. L. R. 349, 51 S. W. 447; Board of Liquidation of City Debt v. Thoman, 42 La. Ann. 605; Griswold v. Union School Dist. of Bay City, 24 Mich. 262; White v. City of Saginaw, 67 Mich. 33, 34 N. W. 255; Aldridge v. Essex Public Road Board (N. J. Law) 17 Atl. 776; Norris v. City of Elizabeth, 51 N. J. Law, 485, 18 Atl. 302; Protestant Foster Home v. City of Newark, 52 N. J. Law, 138, 18 Atl. 572; Skinkle v. Essex Public Road Board, 47 N. J. Law, 93; Butler v. Town of Montclair, 67 N. J. Law, 426, 51 Atl. 494; Hoffman v. City of New York, 58 Hun, 611, 13 N. Y. Supp. 137; People v. City of Buffalo, 147 N. Y. 675, 42 N. E. 344; In re Beechwood Ave. Sewer, 179 Pa. 494; Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393; Kersten v. City of Milwaukee, 106 Wis. 200, 81 N. W. 948, 1103; 48 L. R. A. 851. The property owner may have a choice of remedies; Milwaukee city charter, subc. 7, § 11 (Laws 1874) is not exclusive.

[495] Warren v. Riddell, 106 Cal. 352; State v. Norton, 63 Minn. 497. The syllabus written by the court follows: "Gen. St. 1894, § 1337, authorizes certain municipal corporations to levy assessments for local improvements upon the property fronting upon such improvements, or upon the property to be benefited by such improvements without regard to cash valuation. Pursuant to this power, the municipal authorities of the village of West Duluth levied an assessment against certain property therein situate, for the purpose of making improvements and gave due notice of the time and place when such assessment would be confirmed and also that it was proposed to issue bonds, chargeable to the real estate to be benefited by such improvement to pay such assessment and that the property owners affected by such assessment might then and there appear and file their objections thereto. None of them filed objections nor did they appeal from such con-

sidered mandatory and if the right is not so exercised by the property owner it is forfeited or lost.[497] The time for appeal

firmation to the district court as provided by law. Gen. St. 1894, § 1343 reads in part, as follows: 'At the time and place mentioned in such notice, or at such time and place as they may adjourn to, said village council shall meet and review and confirm such assessment which confirmation shall be final, except as hereinafter provided. And no omission, informality or irregularity in or preliminary to the making of any special assessment for any local improvement shall, after such confirmation, affect the validity of such assessment unless objection specifying the grounds thereof shall have been made in writing and duly filed with the village recorder on or before the date of such confirmation.' Gen. St. 1894, § 1346, reads as follows: 'No action shall be maintained to avoid any of the special assessments of taxes levied pursuant to this chapter after bonds have been issued covering such special assessments, and said bonds shall be conclusive proof of all the proceedings on which the same are based.' The bonds covering such assessment were duly issued and no action was commenced to avoid the assessment. When the county auditor applied for judgment against the property under Gen. St. 1894, c. 11, more than two years after the issuance of the bonds, the defendants interposed various objections to the validity of the assessment and to the confirmation thereof. Held, that as the property owners had failed to interpose their objections within the time allowed by law, they were concluded by the proceedings had against them."

City of St. Louis v. Lang, 131 Mo. 412; In re Delaware & H. Canal Co., 129 N. Y. 105; Strout v. City of Portland, 26 Or. 294; Clinton v. City of Portland, 26 Or. 410; Garrison v. Dougherty, 18 S. C. 486; Potter v. Black, 15 Wash. 186, 45 Pac. 787.

[496] City of Montgomery v. Townsend, 84 Ala. 478; Conklin v. City of Keokuk, 73 Iowa, 343; Frost v. Board of Review of Oskaloosa, 113 Iowa, 547, 85 N. W. 770; People v. Myers, 65 Hun, 14, 19 N. Y. Supp. 723; People v. Feitner, 65 App. Div. 224, 72 N. Y. Supp. 641.

[497] Perine v. Forbush, 97 Cal. 305, 32 Pac. 226. Where the assessment is invalid on jurisdictional grounds, the failure of a property owner to appeal will not validate an assessment. See, also, Warren v. Chandos, 115 Cal. 382; McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010.

Manning v. Den, 90 Cal. 610. Where the objections are jurisdictional they are not waived by a failure to appeal to the city council under act of California, March 18, 1885, § 11. Hornung v. McCarthy, 126 Cal. 17; Ferguson v. Borough of Stamford, 60 Conn. 432; Chicago & E. R. Co. v. City of Huntington, 149 Ind. 518, 49 N. E. 379. An appeal is also ineffectual if made before the time provided by law. Meadowcroft v. Kochersperger, 170 Ill. 356; Alley v. City of Lebanon, 146 Ind. 125, 44 N. E. 1003; Boyd v. Murphy, 127 Ind. 174; Berry v. City of Des Moines, 115 Iowa, 44, 87 N. W. 747; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78; Town of Bellevue v. Pea-

when based upon specific action commences to run from the time when such action is legally taken.[498]

§ 378. Conclusiveness of decision.

The conclusiveness of the decision of a board of appeal may depend upon the extent of its original power or, again, upon the existence of the right of appeal or review as a statutory grant or an original right. If an official body possesses the original power to pass upon the questions raised by the appeal, its decisions may be deemed conclusive and their action binding upon the property owner without further right of appeal by him to other and different bodies.[499] If, as generally the case, the right of appeal or review is a granted favor to the property owner, the authority granting it may provide for an appeal or the right of review to a designated official body without the further right of appeal from its decisions by the property owner.[500]

cock, 89 Ky. 495; Brown v. City of Grand Rapids, 83 Mich. 101; Eno v. City of New York, 68 N. Y. 214.

[498] Halstead v. Attica, 28 Ind. 378; Bowditch v. Superintendent of Streets, 168 Mass. 239; Brown v. City of Saginaw, 107 Mich. 643; Madison County v. Frazier, 78 Miss. 880, 29 So. 765; In re Duffy, 133 N. Y. 512, 31 N. E. 517; Garrison v. Dougherty, 18 S. C. 486; Bellingham Bay Imp. Co. v. City of New Whatcom, 17 Wash. 496.

[499] Hadley v. Dague, 130 Cal. 207, 62 Pac. 500; California Imp. Co. v. Moran, 128 Cal. 373; Leeds v. Defrees, 157 Ind. 392, 61 N. E. 930; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Central R. Co. v. Mutchler, 41 N. J. Law, 96; Morris v. City of Bayonne, 62 N. J. Law, 385, 41 Atl. 924; Patterson v. City of New York, 1 Paige (N. Y.) 114; Le Roy v. City of New York, 4 Johns. Ch. (N. Y.) 352.

[500] Dowling v. Altschul (Cal.) 33 Pac. 495; Houghton's Appeal, 42 Cal. 35; Jennings v. Le Breton, 80 Cal. 8; Frick v. Morford, 87 Cal. 576; Frenna v. Sunnyside Land Co., 124 Cal. 437. The rule will not apply to jurisdictional defects. Fenwick Hall Co. v. Town of Old Saybrook, 69 Conn. 32; Creote v. City of Chicago, 56 Ill. 422; Mead v. City of Chicago, 186 Ill. 54; Mercy Hospital v. City of Chicago, 187 Ill. 400; City of Jacksonville v. Hamill, 178 Ill. 235; Bickerdike v. City of Chicago, 185 Ill. 280.

Middaugh v. City of Chicago, 187 Ill. 230. But in the case of Sherwood v. City of Duluth, 40 Minn. 22, it was held that assessment proceedings may be reviewed on certiorari in spite of the charter provision that an order confirming a special assessment and all things contained therein shall be res adjudicata. Graham v. City of Chicago, 187 Ill. 411; Erisman v. Chosen Freeholders of Burlington County, 64 N. J. Law, 516, 45 Atl. 998. Though act of March 22nd, 1895

§ 379. Review and correction.

The power of review and correction at some time and in some official body is essential to the ends of justice. In assessment proceedings, which are generally complicated in their calculations and character, may be found unintentional errors or irregularities and it is necessary from the position both of the property owner and the governmental organization that such should be corrected.[501] The property owner should not be deprived of

(Pub. Laws, p. 424), provides that assessments when confirmed by the circuit court shall be final and conclusive, yet when the right to impose any assessment is questioned this can be determined by a writ of certiorari. Quinn v. James, 174 Mass. 23; Brown's Estate v. Town of Union, 62 N. J. Law, 142, 40 Atl. 632; Hayday v. Ocean City, 67 N. J. Law, 155, 50 Atl. 584; Day v. Borough of Fairview, 62 N. J. Law, 621; People v. Gilon, 126 N. Y. 147, 27 N. E. 282, reversing 58 Hun, 603, 11 N. Y. Supp. 512; Voght v. City of Buffalo, 133 N. Y. 463; Southard v. Stephens, 27 Ohio St. 649; In re Sheridan Ave., 138 Pa. 264; White v. City of Tacoma, 20 Wash. 361.

[501] City of Springfield v. Green, 120 Ill. 269, 11 N. E. 261; Thompson v. City of Highland Park, 187 Ill. 265; People v. Chicago, B. & Q. R. Co., 189 Ill. 397; Craig v. People, 193 Ill. 199. The right of correction exists through statutory provisions, 3 Starr & C. Ann. St. 1896, p. 3470, § 191; Ball v. Balfe, 41 Ind. 221; Becker v. Baltimore & O. S. W. R. Co., 17 Ind. App. 324, 46 N. E. 685; Gosnell v. City of Louisville, 20 Ky. L. R. 519, 46 S. W. 722; City of Louisville v. Clark, 20 Ky. L. R. 1265, 49 S. W. 18; Gleason v. Barnett, 20 Ky. L. R. 1694, 50 S. W. 67; City of Louisville v. Selvage, 21 Ky. L. R. 349, 51 S. W. 447; Board of Liquidation of City Debt v. Thoman, 42 La. Ann. 605; Mayall v. City of St. Paul, 30 Minn. 294; Armstrong v. City of St. Paul, 30 Minn. 299. An assessment made in an unauthorized proceeding is not conclusive and the property owner is entitled to equitable relief. Kelly v. City of Minneapolis, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; Stow v. Common Council of Kingston, 25 Misc. 580, 54 N. Y. Supp. 1044; Alvord v. City of Syracuse, 27 Misc. 392, 58 N. Y. Supp. 854; Potter v. Black, 15 Wash. 186.

The following cases hold that a writ of certiorari is a proper remedy as warranted by either charter or statutory provisions or general practice. Foley v. City of Haverhill, 144 Mass. 352, 11 N. E. 554. The remedy of a tax payer is through certiorari. Weed v. City of Boston, 172 Mass. 28, 51 N. E. 204, 42 L. R. A. 642. Questions touching the illegality of the assessment are properly tested by certiorari. Meday v. City of Rutherford, 52 N. J. Law, 499, 19 Atl. 972. A right to a writ is lost after the public improvement has been fully completed. Walls v. Jersey City, 55 N. J. Law, 511, 26 Atl. 828. Certiorari the proper remedy. Van Anglen v. City of Bayonne, 56 N. J. Law, 463, 29 Atl.

his property without due process of law; on the other hand, the municipal organization should not be impeded in the legitimate exercise of a granted right.[502]

(a) Review by certiorari. The usual remedy open to the property owner in the making of local assessments by public corporations is a review by writ of certiorari of the proceedings or such of them as may be especially designated by statute,[503]

168; Wakeman v. Jersey City, 35 N. J. Law, 455. The property owner may lose his right to a writ of certiorari through laches. People v. Lohnas, 54 Hun, 604, 8 N. Y. Supp. 104. Certiorari is the proper remedy where the relief afforded in an ordinary action is adequate. Heiser v. City of New York, 104 N. Y. 68, 9 N. E. 866. Certiorari the proper remedy. People v. City of Buffalo, 86 Hun, 618, 36 N. Y. Supp. 191; Keller v. City of Mt. Vernon, 23 App. Div. 46, 48 N. Y. Supp. 370. Certiorari is not available where the invalidity of an assessment does not appear upon its face. Niver v. Village of Bath on the Hudson, 27 Misc. 605, 58 N. Y. Supp. 270. Certiorari held in this case not the proper remedy. People v. Morgan, 65 Barb. (N. Y.) 473. Certiorari the proper remedy. Wilson v. City of Seattle, 2 Wash. St. 543. In the absence of other relief the proceedings of the council can be levied on writ of certiorari by one who is aggrieved by a street assessment.

[502] Walker v. District of Columbia, 6 Mackey (D. C.) 352. The illegal portion of an assessment only will be quashed. See, also, People v. City of Buffalo, 86 Hun, 618, 36 N. Y. Supp. 191; Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345.

In re Feust, 121 N. Y. 299, 24 N. E. 479. In an appeal on account of fraud or substantial error, the entire assessment will not be vacated but reduced to the extent that it is shown to be the result of the fraud or error.

[503] State v. District Ct. of Hennepin County, 33 Minn. 235; Sherwood v. City of Duluth, 40 Minn. 22. Even where a statute makes an order of a district court confirming an assessment for local improvements, and the matters in connection therewith, res adjudicata, and provides for no appeal, yet the proceedings may be reviewed under certiorari. Ashley v. City of Newark, 25 N. J. Law (1 Dutch.) 399; Vanderbeck v. Jersey City, 29 N. J. Law (5 Dutch.) 441; Walls v. Jersey City, 55 N. J. Law, 511; Heywood v. City of Buffalo, 14 N. Y. (4 Kern.) 534; People v. Village of Rochelle, 83 Hun, 185, 31 N. Y. Supp. 592; People v. Board of Assessors, 51 Hun (N. Y.) 644; Kennedy v. City of Troy, 77 N. Y. 493; People v. City of Buffalo, 86 Hun (N. Y.) 618.

People v. Gilon, 126 N. Y. 147, reversing 58 Hun, 76, 11 N. Y. Supp. 439. Errors of law in local assessment proceedings alone can be reviewed by certiorari. Wilson v. City of Seattle, 2 Wash. St. 543; State v. Common Council of Ashland, 71 Wis. 502.

But the following cases hold that

although special remedies may be afforded by particular charters, statutes or rules of practice.[504]

(b) Time of issuing writ. The proper issuing of the writ may depend upon statutory or charter provisions limiting the time within which it can be granted. A delay on the part of the property owner beyond such time will be sufficient ground to deny the application or dismiss the writ. The remedy being a charter or statutory one, the property owner in order to avail himself of its benefits must comply strictly with those provisions of the law granting the relief.[505]

(c) Proceedings to vacate. One of the special remedies suggested in a preceding paragraph may be termed, for the want of a better term, general proceedings to vacate. These will depend for their availability, the manner of their exercise, their efficacy, the time when they can be used and the jurisdiction of the tribunal, upon special charter or statutory provisions. A more extended reference to them in view of their diversity and the fact of their continually being changed is useless.[506]

a writ of certiorari is not the proper remedy under the circumstances noted: Whitbeck v. Common Council of Hudson, 50 Mich. 86. The proceedings of a common council in ordering streets to be paved cannot be reviewed under certiorari. State v. District Ct. of Ramsey County, 44 Minn. 244; Wilson v. City of Hudson, 32 N. J. Law, 365. The office of a writ of certiorari is to correct errors of law; not to settle disputed facts. People v. Common Council of Dunkirk, 38 Hun (N. Y.) 7; People v. Myers, 135 N. Y. 465.

[504] Grace v. Newton Board of Health, 135 Mass. 490; Dousman v. City of St. Paul, 22 Minn. 387. Writ of certiorari not allowed where other remedies are open to the property owner. See, also, as holding the same, State v. Board of Public Works, 27 Minn. 442, construing special provisions of St. Paul City charter Sp. Laws 1874, c. 1, as amended by Sp. Laws 1875, c. 1, § 25. People v. City of New York, 2 Hill (N. Y.) 9; People v. Lohnas, 54 Hun (N. Y.) 604.

[505] Rentz v. City of Detroit, 48 Mich. 544; Wilkinson v. Inhabitants of Trenton, 36 N. J. Law, 499; Bogart v. City of Passaic, 38 N. J. Law, 57; Traphagen v. West Hoboken Tp., 39 N. J. Law, 232; Evans v. Inhabitants of North Bergen Tp., 39 N. J. Law, 456; Wetmore v. City of Elizabeth, 41 N. J. Law, 152; Kirpatrick v. New Brunswick S. & S. Com'rs, 42 N. J. Law, 510; Bergen County Sav. Bank v. Inhabitants of Union Tp., 44 N. J. Law, 599; Schulting v. City of Passaic, 47 N. J. Law, 273; Stewart v. City of Hoboken, 57 N. J. Law, 330; Stockton v. City of Newark, 58 N. J. Law, 116.

[506] In re Buhler, 32 Barb. (N. Y.) 79; In re McCormack, 60 Barb. (N.

§ 380. What questions raised on appeal and review.

Generally all questions affecting the legality and regularity of pending proceedings can be raised on the appeal.[507] The rule,

Y.) 128; In re Arnold, 60 N. Y. 26; In re Bridgford, 65 Hun (N. Y.) 227. A contractor is a proper party in proceedings to vacate a street assessment since he is dependent upon it for his compensation.

In re Mead, 74 N. Y. 216; In re New York Protestant Episcopal Public School, 75 N. Y. 324; In re Walter, 75 N. Y. 354. A mortgagee is a party aggrieved with the right of moving to vacate local assessments. In re Lima, 77 N. Y. 170. A payment of the assessment destroys the right to move for its vacation. In re Lord, 78 N. Y. 109; In re Manhattan Sav. Inst., 82 N. Y. 142; In re Cruger, 84 N. Y. 619. In proceedings to vacate an assessment, under Laws of 1858, the objection that the assessors acted under an erroneous principle in apportioning the benefits and assessments cannot be raised. Knapp v. City of Brooklyn, 97 N. Y. 520; In re Mehrbach, 97 N. Y. 601. A payment of the assessment while proceedings are pending to vacate will not deprive the court of jurisdiction to vacate. In re Smith, 99 N. Y. 424.

See, also, the following cases dealing with questions of pleading, practice and proof in connection with proceedings to vacate: In re Delancey, 52 N. Y. 80. A proceeding to vacate is limited to the lands described in such proceedings; it will not include all that may have been affected by the original assessments. In re Ingraham, 64 N. Y. 310; In re Willett, 70 N. Y. 490. In proceedings to vacate on the ground of a prior payment of the local assessment, no presumption of such payment exists arising from a lapse of time; there must be proof of actual payment.

In re Metropolitan Gaslight Co., 85 N. Y. 526; In re Leake & Watts Orphan Home, 92 N. Y. 116. An assessment for a street improvement will not be wholly void where that part which is based upon fraudulent charges can be eliminated and the valid portion allowed to stand. In re Hughes, 93 N. Y. 512; In re Wheelock, 121 N. Y. 664; People v. City of Buffalo, 147 N. Y. 675.

[507] The following cases pass upon the competency of the tribunal. Shreve v. Town of Cicero, 129 Ill. 226, 21 N. E. 815; Pearce v. Village of Hyde Park, 126 Ill. 287; O'Reilley v. City of Kingston, 114 N. Y. 439. New York statutes providing that the judge shall not sit as such or take any part in the decision of a cause if he is related by consanguinity or affinity to any of the members does not apply to quasi judicial officers such as assessors.

Miller v. Mayo, 88 Cal. 568. The failure of a city supervisor to approve a contractor's bond is not a tenable objection to the validity of the assessment. Holmes v. Village of Hyde Park, 121 Ill. 128, 13 N. E. 540. The question of title to land upon which a local improvement or portion of it is constructed cannot be raised on an appeal from a special assessment. Mason v. City of Chicago, 48 Ill. 420. A payment not under protest of a spe-

however, does not apply in cases where the law provides that certain questions can be raised only in a specific manner and be-

cial assessment or under a misrepresentation of the fact is conclusive upon the owner. See, also, Diefenthaler v. City of New York, 111 N. Y. 331; and In re Hazleton, 58 Hun, 112, 11 N. Y. Supp. 557. Payment under protest, however, does not deprive the property owner of his right to appeal.

Delamater v. City of Chicago, 158 Ill. 575. Objections should be specific and full and where they are insufficient, questions not coming within them by a reasonable construction cannot be raised.

Dickey v. City of Chicago, 164 Ill. 37. Under objections covering a specific tract of land on appeal, questions relating to other tracts cannot be raised. People v. McWethy, 177 Ill. 334. A property owner can raise at any time the question of whether the assessment is to be in whole or in part applied to the cost of the improvement as authorized by the ordinance.

Hellenkamp v. City of Lafayette, 30 Ind. 192. Under § 69 of the Ind. act for the incorporation of cities, the power of the municipality to contract, however, cannot be raised but merely the question of whether the work has been done according to the contract and whether the assessment has been properly proportioned. Jenkins v. Stetler, 118 Ind. 275. Objections cannot be urged based upon questions of fact arising before the making of the local improvement contract. McHenry v. Selvage, 19 Ky. L. R. 473, 35 S. W. 645. The objection to a method of apportionment that it was based upon an erroneous assumption will not be sustained where it does not appear that the objector would have had to pay the loss if a different method had been employed.

Mansur v. Aroostook County Com'rs, 83 Me. 514. Where the statute prescribes a particular time for official action, such action, if taken at a later time, will not be valid. Beals v. Inhabitants of Brookline, 174 Mass. 1, 54 N. E. 339. The burden of proof is upon the petitioner attempting to show his assessment unjust. State v. District Ct. of St. Louis County, 61 Minn. 542. Section 1341 of the Minn. Gen. St. 1894, is not repugnant to the constitutional rule requiring uniformity of taxation because it permits an assessment of 85 per cent. of the estimated cost before it is completed but after the contract for its construction is let.

Barber Asphalt Pav. Co. v. Ullman, 137 Mo. 543, 38 S. W. 458. The objection that work was not done in a good and substantial manner as required by the contract can only be raised when accompanied by a tender of an equitable proportion of the special tax. In re Cullen, 53 Hun, 534, 6 N. Y. Supp. 625; In re Stephens, 26 Hun (N. Y.) 22; In re Livingston, 121 N. Y. 94, 24 N. E. 290. The inclusion of extravagant or fictitious items in the cost of an improvement amounts to a fraud which, under the N. Y. statutes, entitles the property owner to have the assessment vacated. In re Rosenbaum, 119 N. Y. 24; Earle v. City of Henrietta, 91 Tex. 301, 43 S. W. 15. Proof of a levy of taxes by a city must be made through the or-

fore a time which has already elapsed,[508] and it is also true that only such questions can be raised as by fair construction come within objections properly filed.[509] In any judicial or quasi judicial proceeding in the absence of fraud or manifest abuse of authority, the official court or body of appeal or review cannot inquire into the expediency or the necessity for the local improvement as directed by the proper public officials. Under the decisions with the exceptions noted, the determination of the necessity for a local improvement in all respects is a legislative question to be determined by that branch or body to whom the power is legally granted.[510]

§ 381. Estoppel of property owner.

(a) By laches. In section 377 the principle was stated that as the right of appeal or review is a matter of favor, statutory provisions granting its exercise within a certain specified time were mandatory in their nature and upon a failure of a property

dinance on the tax rolls. Gilman v. City of Milwaukee, 55 Wis. 328. A diversion of property obtained through special assessments will not render such assessments invalid.

[508] Goodwillie v. City of Lake View (Ill.) 21 N. E. 817; Huneberg v. Village of Hyde Park, 130 Ill. 156, 22 N. E. 486; Thorn v. West Chicago Park Com'rs, 130 Ill. 594, 22 N. E. 520; City of Chicago v. Nicholes, 192 Ill. 489, 61 N. E. 434; Bradford v. City of Pontiac, 165 Ill. 612; People v. Whidden, 191 Ill. 374, 56 L. R. A. 905; Berry v. City of Chicago, 192 Ill. 154; Balfe v. Lammers, 109 Ind. 347, 10 N. E. 92.

[509] Rich v. City of Chicago, 152 Ill. 18; Gross v. Village of Grossdale, 176 Ill. 572. The question as to the validity of a required oath cannot be raised on appeal. Auditor General v. Maier, 95 Mich. 127, 54 N. W. 640; Davies v. City of Saginaw, 87 Mich. 439; Simmons v. City of Passaic, 55 N. J. Law, 485, 27 Atl. 909; Weldon v. Town of West Hoboken (N. J. Law) 43 Atl. 535; In re Livingston, 121 N. Y. 94, 24 N. E. 290. A petition alleging "that certain frauds and specific errors have been committed in the proceedings" is sufficient in the absence of objection. Potter v. City of New Whatcom, 25 Wash. 207, 65 Pac. 197.

[510] Speer v. City of Athens, 85 Ga. 49, 9 L. R. A. 402; Elliott v. City of Chicago, 48 Ill. 293; Blanchet v. Municipality No. 2, 13 La. (O. S.) 322; City of Baltimore v. Johns Hopkins Hospital, 56 Md. 1; Powers v. City of Grand Rapids, 98 Mich. 395; Le Roy v. City of New York, 4 Johns. Ch. (N. Y.) 352; In re Livingston, 121 N. Y. 94; City of Raleigh v. Peace, 110 N. C. 32, 17 L. R. A. 330; King v. City of Portland, 2 Or. 146; Paulson v. City of Portland, 16 Or. 450, 1 L. R. A. 673; Allen v. Drew, 44 Vt. 174.

owner to do the acts required within the time thus specified, the right was forfeited or lost. The property owner may, therefore, be prevented through the lapse of time from exercising his right of appeal or review,[511] and his failure to exercise the right will be considered a waiver by him of such objections as might have been raised.[512]

(b) By course of action. The property owner may also be estopped from asserting a right of appeal or review through his action or lack of action. To permit the completion of the

[511] See, also, authorities cited under § 377. Ross v. City of Portland, 105 Fed. 682; Minnesota & M. Land & Imp. Co. v. City of Billings, 111 Fed. 972; Mietzsch v. Berkhout (Cal.) 35 Pac. 321; Warren v. Russell, 129 Cal. 381; Vandersyde v. People (Ill.) 61 N. E. 1050; Goudy's Estate v. People, 173 Ill. 107; Lingle v. People, 173 Ill. 121; Thomson v. People, 184 Ill. 17; Fischback v. People, 191 Ill. 171; City of Greensburg v. Zoller, 28 Ind. App. 126, 60 N. E. 1007; Gorman v. State, 157 Ind. 205, 60 N. E. 1083.

Keyes v. City of Neodesha, 64 Kan. 681, 68 Pac. 625. The rule will not apply where prior to the construction of a local improvement written notice was served in the manner provided by law protesting against its construction. Sims v. Hines, 121 Ind. 534, overruling Moberry v. City of Jeffersonville, 38 Ind. 198, and cases following and reaffirming. Palmer v. Stumph, 29 Ind. 329, and cases following.

Simpson v. Kansas City, 52 Kan. 88; Tuller v. City of Detroit, 126 Mich. 605, 85 N. W. 1080; Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983; City of Greenville v. Harvie, 79 Miss. 754, 31 So. 425; City of St. Louis v. Weber, 140 Mo. 515, 41 S. W. 965. The laches of the property owner may, however, be waived by the municipal authorities. Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Stewart v. City of Hoboken, 57 N. J. Law, 330, 31 Atl. 278; Chilcott v. City of Buffalo, 7 N. Y. Supp. 638; City of Ithaca v. Babcock, 36 Misc. 49, 72 N. Y. Supp. 519; In re Sewer on 28th St., 158 Pa. 464, distinguishing Travers' Appeal, 152 Pa. 129; Kuhn v. City of Port Townsend, 12 Wash. 605, 29 L. R. A. 445; Town of Tumwater v. Pix, 18 Wash. 153; City of New Whatcom v. Bellingham Bay Imp. Co., 18 Wash. 181; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444.

[512] Dowling v. Conniff, 103 Cal. 75, 36 Pac. 1034; Fanning v. Leviston, 93 Cal. 186; City of Ottawa v. Chicago & R. I. R. Co., 25 Ill. 43; People v. Ryan, 156 Ill. 620, 41 N. E. 180. The objection that an assessment was excessive must be made before the application for judgment upon a special assessment. Quick v. Village of River Forest, 130 Ill. 323; Pells v. People, 159 Ill. 580; Walker v. People, 170 Ill. 410; McManus v. People, 183 Ill. 391; Richcreek v. Moorman, 14 Ind. App. 370, 42 N. E. 943. Original waiver of objections estops the owner from afterwards asserting them. Cleveland, C., C. & St. L. R. Co. v. Edward C. Jones Co., 20 Ind. App. 87, 50 N. E. 319. A waiver

work,[513] knowing of irregularities or fraud, forfeits his right as well as the voluntary payment of the whole or any part of his special tax.[514] This rule, however, does not hold where the pay-

by one co-defendant of all defenses will not affect the rights of the co-defendants.

[513] Ede v. Knight, 93 Cal. 159; Powers v. Town of New Haven, 120 Ind. 185, 21 N. E. 1083; City of Evansville v. Pfisterer, 34 Ind. 36; Cluggish v. Koons, 15 Ind. App. 599, 43 N. E. 158; City of Valparaiso v. Parker, 148 Ind. 379, 47 N. E. 330; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071; Busenbark v. Clements, 22 Ind. App. 557, 53 N. E. 665. Where a street is illegally opened, the owner of the land through which it runs is estopped to urge this as a defense in an action to collect a special assessment for its improvement.

Willard v. Albertson, 23 Ind. App. 162, 53 N. E. 1076, 54 N. E. 446; Smyth v. State, 158 Ind. 332, 62 N. E. 449; Jenkins v. Stetler, 118 Ind. 275; City of Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909; Tuttle v. Polk, 92 Iowa, 433; Ritchie v. City of South Topeka, 38 Kan. 368, 16 Pac. 332; Towne v. City Council of Newton, 169 Mass. 240; Fitzhugh v. Bay City, 109 Mich. 581, 67 N. W. 904.

Cass Farm Co. v. City of Detroit, 124 Mich. 433, 83 N. W. 108. A provision in a contract fixing liquidated damages for delay does not affect the validity of the assessment, the penalty having no relation to the assessment. Tuller v. City of Detroit, 126 Mich. 605, 85 N. W. 1089; Lundbom v. City of Manistee, 93 Mich. 170; Johnson v. Duer, 115 Mo. 366, 21 S. W. 800; Gibson v. Owens, 115 Mo. 258, 21 S. W. 1107; Heman v. Ring, 85 Mo. App. 231; Hutchinson v. City of Omaha, 52 Neb. 345; Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847; Ryerson v. City of Passaic, 38 N. J. Law, 171; Borton v. City of Camden, 65 N. J. Law, 511, 47 Atl. 436; Lord v. City of Bayonne, 65 N. J. Law, 686, 48 Atl. 1118, affirming 65 N. J. Law, 127, 46 Atl. 701; Brewer v. City of Elizabeth, 66 N. J. Law, 547, 49 Atl. 480; Conde v. City of Schenectady, 164 N. Y. 258, reversing 29 App. Div. 604, 51 N. Y. Supp. 854; People v. Many, 89 Hun, 138, 35 N. Y. Supp. 78; In re Pennie, 45 Hun (N. Y.) 391. But a different rule applies to the purchaser of property subject to the tax. Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; Wilson v. City of Salem, 24 Or. 504, 34 Pac. 9, 691; Clinton v. City of Portland, 26 Or. 410, 38 Pac. 407; Wingate v. City of Astoria, 39 Or. 603, 65 Pac. 982; Bennison v. City of Galveston, 18 Tex. Civ. App. 20; McKnight v. City of Pittsburgh, 91 Pa. 273; City of Seattle v. Hill, 23 Wash. 92, 62 Pac. 446; State v. City of La Crosse, 101 Wis. 208, 77 N. W. 167. See to the contrary Kerr v. City of Corsicana (Tex. Civ. App.) 35 S. W. 694.

[514] McSherry v. Wood, 102 Cal. 647, 36 Pac. 1010; Freeport St. R. Co. v. City of Freeport, 151 Ill. 451; Seward v. Rheiner, 2 Kan. App. 95, 43 Pac. 423; Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511. But the rule will not apply to an assessment utterly void. Speir v. Town of Utrecht, 121 N. Y. 420, 24

ment is made under protest[515] or where there are pending proceedings brought for the purpose of testing the validity in some respect of the special assessment or its levy. The property owner further is estopped to allege irregularities for the purpose of defeating a special assessment after the work of local improvement has been partially or wholly completed and accepted by the proper authorities[516] in complying either with the provi-

N. E. 692. The fact that other property owners have paid their assessments will not estop those not paying from maintaining an action to enjoin the collection of special assessments. In re Wood, 33 Hun (N. Y.) 4; In re Mehrbach, 97 N. Y. 601; Walsh v. Sims, 65 Ohio St. 211, 62 N. E. 120. The recital in a deed that the purchaser assumes the payment of all taxes and penalties including street and sewer assessments does not estop him from contesting their legality. See, however, to the contrary, Markley v. City of Chicago, 167 Ill. 626.

[515] Miller v. City of Mobile, 47 Ala. 163; Phelan v. City & County of San Francisco, 120 Cal. 1; Tallant v. City of Burlington, 39 Iowa, 543; Gardner v. City of Boston, 106 Mass. 549; Pell v. City of New York, 31 Misc. 664, 65 N. Y. Supp. 34. "Where an illegal assessment is levied, and the property offered for sale thereunder, and the owner, by reason of this compulsion, pays the assessment, such special legislation cannot deprive him of the common law remedy to recover back the money illegally exacted from him. In such case he asks no favor but demands a right. * * * Where the assessment is wholly void, because none could be legally levied, the owner is neither legally nor equitably bound to pay anything. In this respect the distinction between a total want of jurisdiction in a particular case, and an error in its exercise in another, where power exists, is apparent." Murtland v. City of Pittsburg, 189 Pa. 371.

[516] Heft v. Payne, 97 Cal. 108, 31 Pac. 844. The action to foreclose a lien for a street assessment not being one to enforce a personal liability, the defendant is not estopped from setting up that the work was not completed within the contract time although this objection had previously been waived. Diggins v. Hartshorne, 108 Cal. 154; Smith v. Hazard, 110 Cal. 145; White v. City of Alton, 149 Ill. 626, 37 N. E. 96; Haley v. City of Alton, 152 Ill. 113; Fisher v. People, 157 Ill. 85; Callister v. Kochersperger, 168 Ill. 334; Dugger v. Hicks, 11 Ind. App. 374; Ross v. Stackhouse, 114 Ind. 200, 16 N. E. 501; Robinson v. City of Valparaiso, 136 Ind. 616, 36 N. E. 644; Holloran v. Morman, 27 Ind. App. 309, 59 N. E. 869; Arnold v. City of Ft. Dodge, 111 Iowa, 152, 82 N. W. 495; Nevin v. Roach, 86 Ky. 492, 5 S. W. 546. Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957. The rule clearly applies where there is no showing that the defendants were prejudiced. Dixon v. City of Detroit, 86 Mich. 516; City of Philadelphia v. Brooke, 81 Pa. 23; Fell v. City of Philadelphia, 81 Pa. 58; Haisch v. City of Seattle, 10 Wash. 435. Prop-

sions of the law or the contract calling for its construction, and also from setting up other reasons for the illegality of the assessment than those already urged in prior objections made at the time and in the manner required by law.[517] He may also be estopped by his written waivers of irregularities or agreements in open court concerning them.[518]

erty owners are not estopped when there has been a substantial failure to comply with the provisions of the contract. Wright v. City of Tacoma, 3 Wash. T. 410, 19 Pac. 42.

[517] Pepper v. City of Philadelphia, 114 Pa. 96. But, see, to the contrary, City of Bardford v. Fox, 171 Pa. 343.

[518] Shepard v. McNeil, 38 Cal. 72; Hewetson v. City of Chicago, 172 Ill. 112; Sheridan v. City of Chicago, 175 Ill. 421. "It appears that on January 18, 1897, plaintiff in error with others, entered his motion to set aside the order of confirmation entered by the county court, and, as abstracted, the following judgment and order were entered: 'On January 18, 1897, an order was entered on behalf of certain parties stating that said parties by their attorney, severally consent and agree in open court that the judgment of confirmation heretofore entered herein against their property may be vacated and set aside and stand for naught; that a trial by jury may be waived and that said cause may be submitted to the court for trial without the intervention of a jury; and it is orderd that judgment of confirmation heretofore entered against the several lots, pieces or parcels of land hereinafter described, be, and the same is hereby vacated and set aside. And the court being fully advised in the premises finds that the contract for the improvement mentioned has been let, and that there is a difference between the contract price or cost of constructing said improvement and the assignment levied therefor of not less than 44.6 per cent; and the court further finds that the first installment was in collection this year; that said first installment has either been paid or judgment and order of sale entered against the lands upon which it remains unpaid, and this order shall not affect said first installment. It is therefore ordered that the said assessment be, and the same is hereby, reduced 44.6 per cent as to the unpaid installments upon the lands described below, to-wit (Here follows description of property with amounts of assessment); and that judgment of confirmation be, and is hereby, entered against each and all the lots, blocks, tracts and parcels of land, described above for the amount set opposite the same as reduced.' The plaintiff in error by this motion, appeared in court and so far as shown by the record, consented and agreed that the judgment of confirmation should be set aside and waived a jury and submitted to the court for trial the question of the confirmation of the assessment without, in any manner, before or at the time, presenting any objection to the proceedings or to entering judgment The plaintiff in error cannot complain of any defect which might exist in these orders, which were en-

§ 382. The same subject; propositions negatively stated.

The property owner on the other hand is not estopped from testing or objecting to the levy and collection of a special assessment where he is given the right to make such objection irrespective of the fact that charter or statutory provisions may provide for the service of notice upon him at other stages of the proceedings.[519] Neither does the doctrine of estoppel apply

tered pursuant to his request, and with his express consent, for there is no principle of law more familiar than that a party shall not be permitted to assign for error that which he has requested the court to do." Dempster v. City of Chicago, 175 Ill. 278. But such agreement can be enforced by the proper owner.

[519] City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522. "Section twenty-six of the charter bestows on the city council the power to pass ordinances for the assessment and levy of taxes upon all property subject to taxation by the laws of the state. This levy and assessment for governmental purposes, is referred to in the charter and made a part thereof as assisting the same in providing the same machinery for the assessments and collections for street and sidewalk purposes. Said section twenty-six further provides that assessments when made, 'shall be returned to the mayor and by him laid before the city council and the mayor shall cause at least ten days' public notice that such assessments have been made and the time when the city council will proceed to hear and determine upon all complaints which may be made against such assessment and it shall be their duty to correct the errors and supply omissions and when the same have been passed upon by the city council, the said assessments against persons and property shall have the force and effect of judgments,' etc. It is insisted by the city, in that the defendant has not shown that she appeared before the council, 'to correct the errors and supply omissions,' in the assessment against her property, not for general municipal taxation, but for street and sidewalk improvement, she is now estopped to raise any question touching the assessment or questioning the constitutionality of the law by which such assessment is sought to be justified, and that the finding of the city council is final and conclusive on her. Perhaps we cannot in this connection say anything more helpful to a correct understanding and determination of this contention, than to quote the words of the learned judge below, who, in his opinion in the case touching this question said: 'The reply to this on the part of the defendant is, that notwithstanding the provision giving assessment by the city council the effect of a judgment, yet, the same charter requires that the property owner be cited to appear in this court, and clearly recognizes his right to show cause in this proceeding why a decree should not be rendered for the sale of his property. I see no way of escape from the face

where there is a failure of jurisdictional facts,[520] the right of the municipality, for example, to construct the work of local improvement in question, lack of authority for its action,[521]

of this. To hold here that those provisions of the charter which require notice in this court and an opportunity to show cause mean nothing, would be to eliminate, by judicial decision, from the act, by virtue of which alone this proceeding is being carried on, its leading and essential features. Yet such would be the effect of holding the defendant to be estopped by the assessment of the city council.'"

[520] San Jose Imp. Co. v. Auzerais, 106 Cal. 286, 39 Pac. 859; Perine v. Lewis, 128 Cal. 236, 60 Pac. 422, 772; Pacific Pav. Co. v. Geary, 136 Cal. 373, 68 Pac. 1028; California Imp. Co. v. Moran, 128 Cal. 373; People v. Eggers, 164 Ill. 515; Hull v. People, 170 Ill. 246; Upton v. People, 176 Ill. 632; Crawfordsville Music Hall Ass'n v. Clements, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752, reversing 38 N. E. 226; Powers v. Town of New Haven, 120 Ind. 185; Coggeshall v. City of Des Moines, 78 Iowa, 235, 41 N. W. 617, 42 N. W. 650; City of Leavenworth v. Laing, 6 Kan. 274; Petter v. Allen, 21 Ky. L. R. 1122, 54 S. W. 174; Perkinson v. McGrath, 9 Mo. App. 26; City of Kansas v. Ratekin, 30 Mo. App. 416; Forbis v. Bradbury, 58 Mo. App. 506; City of Springfield v. Davis, 80 Mo. App. 574; New Brunswick Rubber Co. v. Commissioners of Streets & Sewers, 38 N. J. Law, 190; Traphagen v. West Hoboken Tp., 39 N. J. Law, 232; Id., 40 N. J. Law, 193; App v. Town of Stockton, 61 N. J. Law, 520, 39 Atl. 921; Kirkpatrick v. Commissioners of Streets & Sewers, 42 N. J. Law, 510; Meredith v. City of Perth Amboy, 63 N. J. Law, 520, 44 Atl. 971; Pardee v. City of Perth Amboy, 57 N. J. Law, 106; Miller v. City of Amsterdam, 149 N. Y. 288; City of Cincinnati v. Manss, 54 Ohio St. 257, 43 N. E. 687; Smith v. Minto, 30 Or. 351, 48 Pac. 166; City of Meadville v. Dickson, 129 Pa. 1; Borough of Beltzhoover v. Maple, 130 Pa. 335; City of Alleghany v. McCaffrey, 131 Pa. 137; Alford v. City of Dallas (Tex. Civ. App.) 35 S. W. 816.

Wingate v. City of Tacoma, 13 Wash. 603, following Barlow v. City of Tacoma, 12 Wash. 32, 40 Pac. 382. A property owner who knowing of the lack of jurisdiction consents to the improvement is estopped from questioning the validity of the proceedings. Tacoma Land Co. v. City of Tacoma, 14 Wash. 700; Id., 15 Wash. 133. This case sustains the rule given in the text, but with the modification that if the property owner knowing the assessment to be illegal signs a release of damages and petitions the city to go on with the improvement, he is estopped afterwards to allege its illegality.

[521] Union Pav. & Contracting Co. v. McGovern, 127 Cal. 638; Keese v. City of Denver, 10 Colo. 112; Ritchie v. City of South Topeka, 38 Kan. 368; Fox v. Middlesborough Town Co., 96 Ky. 262. "It seems to us it would be extremely technical to hold that the council in failing to designate the manner of apportionment, or when designating the mode, did nothing to mislead the owner of the realty fronting the improvement as to the nature of the improvement, or the manner of his liability, has released

or the manner of apportionment of its cost.[522] The doctrine also does not apply where the petition for improvement has been signed by the property owner. He can avail himself of the charter or statutory right in spite of this fact if there are irregu-

any lien the contractor would otherwise have had for his work and labor, leaving him altogether remediless, as the charter forbids the assertion of any claim against the city, however erroneous the proceedings of the council may be. The council had ordered this improvement to be made, and provided the costs should be apportioned as provided by the charter as to two of the streets, following the provisions of the charter as to Englewood road, but as to Nineteenth street providing the property fronting the street should pay for that improvement. There was no necessity for the ordinance designating what property was liable to be subjected to the cost of this work, for the charter, of which the citizens of the city were required to take notice, fixed the liability for the cost of this original construction, and each ordinance in effect, said to the property owners, 'These improvements have been ordered, and your liability is fixed by the laws empowering the council to have these improvements made.' It was not essential that the council should say in the ordinance who was liable and the mode of enforcing the liability, and, when undertaking to do so, if they have not misled the parties who are to be charged with the expenditure, they cannot for such a reason, claim exemption from payment. This court has held * * * that where this power given to such bodies is purely statutory, it must be strictly followed in order to create such a lien as is asked to be enforced here; and therefore when publication is to be made, or notice given, and the statute is not at least substantially complied with, no lien can be enforced; and the question of publication raised in these cases is entitled to more consideration than any other presented. The lot owner upon whom this burden is attempted to be placed must have some notice of the intention to charge him, and when publication is required in a newspaper for a fixed period of time, the notice must be given in that mode, and the mere fact that he has witnessed the progress of the work from its beginning to its completion cannot work an estoppel, but the charter, in this respect, must be complied with."

[522] Cowley v. City of Spokane, 99 Fed. 840, citing Village of Norwood v. Baker, 172 U. S. 269. See this latter case as distinguished in French v. Barber Asphalt Pav. Co., 181 U. S. 324.

Kenny v. Kelly, 113 Cal. 364, 45 Pac. 699; Spaulding v. Baxter, 25 Ind. App. 485, 58 N. E. 551; City of Indianapolis v. Holt, 155 Ind. 222; Grant v. Bartholomew, 58 Neb. 839, modifying judgment in 57 Neb. 673, 78 N. W. 314; In re Livingston, 121 N. Y. 94, 24 N. E. 290, distinguishing In re McCready, 90 N. Y. 652.

Hutcheson v. Storrie, 92 Tex. 685, reversing (Tex. Civ. App.) 48 S. W. 785, 45 L. R. A. 289; City of New Whatcom v. Bellingham Bay Imp. Co., 10 Wash. 378; State v. City of La Crosse, 101 Wis. 208.

larities sufficient to warrant his action.[523] Again, if the work is different in character, extent or cost of construction from that authorized,[524] or if the form of proceedings in some respect are

[523] Watkins v. Griffith, 59 Ark. 344; McSherry v. Wood, 102 Cal. 647; McLauren v. City of Grand Forks, 6 Dak. 397, 43 N. W. 710; Wakeley v. City of Omaha, 58 Neb. 245, 78 N. W. 511; Batty v. City of Hastings, 63 Neb. 26, 88 N. W. 139; Birdseye v. Village of Clyde, 61 Ohio St. 27. The rule in this case applies only to that portion of the assessment regarded as excessive. Wilson v. City of Salem, 24 Or. 504; Strout v. City of Portland, 26 Or. 294; City of Dallas v. Ellison, 10 Tex. Civ. App. 28, 30 S. W. 1128; City of Dallas v. Atkins (Tex. Civ. App.) 32 S. W. 780; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726.

But see the following cases as holding to the contrary: City of Burlington v. Gilbert, 31 Iowa, 356; Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; Conde v. City of Schenectady, 164 N. Y. 258; and In re Broad St., 165 Pa. 475.

[524] Watkins v. Griffith, 59 Ark. 344, 27 S. W. 234. In this case the work petitioned for was to cost $750. The work as done cost $5,359 and the council levied an assessment to cover the extra cost. Speaking of the point mentioned in the text the court said: "There is much plausibility in the argument that the owners of property having seen the improvement made, and enjoying its benefits without active steps to prevent it are now estopped by their acquiescence. If the defects were mere irregularities in the exercise of a power conferred, this contention in a proper case might be maintained; but this rule has no application in a case like the present, where there is an absolute failure on the part of the board to secure the power to act, through the essential prerequisite—the petition of the property owners for the improvement to be made. * * * But independent of this proposition of law, which precludes the defense of equitable estoppel in this case, we think the facts fairly considered, furnished no grounds of estoppel. The appellants were not silent. On the other hand as soon as they learned of the illegal action of the board in entering upon the changed work they at once filed with them their earnest remonstrance and advised the board and the contractor that they would not be bound by it and would resist any assessment to pay for it. It will hardly be contended that the public meeting called by the board would have any material effect to validate the proceedings. The statute under which the board was acting has no place in it for procuring the assent of a majority of property owners by the vote of a mass meeting. If the board was proceeding as we have seen, without legal authority or power, an appeal to such source was a vain and futile thing to do. * * * The 'remonstrance' put the board and all persons dealing with it upon full notice that the property owners proposed to stand squarely on their legal rights. That they did not afterwards make further objection to the effort to impose the additional seven per cent assessment was consistent with their attitude of de-

indefinite and uncertain in some particular affecting specific property,[525] the property owner can make objections based upon

clared opposition. They could not prevent the progress of the work upon the public streets. They had made their protest in distinct and definite terms and could only await developments; and when the time came as indicated in their protest, they are found making very earnest and continued opposition all along the line to the imposition of any assessment beyond the one per cent which had been, as conceded, legally made * * * and its payment furnished no ground for equitable estoppel as to the seven per cent assessment, which all parties had express notice they would resist. The power of taxation, especially for local improvements, is the highest attribute of sovereignty. It involves the right to take the private property of the citizen without his consent, and without any other consideration than that of the public good. Such statutes must be construed with the greatest strictness, and he who would by these proceedings, force his unwilling and perhaps more prudent neighbor into such an enterprise, must see to it that he strictly complies with all the substantial requirements of the law which he invokes." Citing Zottman v. City & County of San Francisco, 20 Cal. 98; McLauren v. City of Grand Forks, 6 Dak. 397, 43 N. W. 710; City of Kankakee v. Potter, 119 Ill. 324; Motz v. City of Detroit, 18 Mich. 495; and Tone v. City of Columbus, 39 Ohio St. 299.

Stephenson v. Town of Salem, 14 Ind. App. 386, 42 N. E. 44, 943. Galbreath v. Newton, 30 Mo. App. 380. If, however, the landowners have actual knowledge of the character of the work done under the contract, they will be estopped to allege the variation in the construction of the improvement from the contract provisions. City of Philadelphia v. Meighan, 159 Pa. 495.

[525] Keifer v. City of Bridgeport, 68 Conn. 401. In this case the assessor reported the plaintiff's damages and benefits as equal. No amount was mentioned specifically and the plaintiff did not appeal from the award. The claim is made that by the failure to appeal he is estopped to question the assessment. The court said: "But further the defendant contends that the plaintiff is estopped 'because in law, a judgment has been rendered him by the assessors of benefits and damages and been accepted by him.' It is said: 'The assessment of benefits and damages to the plaintiff is a judgment holding him to have suffered damages by reason of said layout, the amount of which damages is held by them to be equal in amount to the benefits by him received therefrom. This judgment is in effect, that the plaintiff has suffered and been paid an unnamed sum of money as damages, which sum has been by him paid back to the city for benefits received for the purposes of distribution by the city to other persons damaged by the layout in question.' The defendant cites in support of this proposition Monagle v. Bristol County Com'rs, 62 Mass. (8 Cush.) 360; Hildreth v. City of Lowell, 77 Mass. (11 Gray) 345; Inhabitants of Howland v. Penobscot County Com'rs, 49

such facts, and he will not be estopped by his previous action or inaction. The failure of public officials to record or file objections will not prejudice the one making them.[526]

§ 383. Right of appeal as based on omission to tax other property.

As a rule the fact that other property is not taxed to a proportionate extent[527] or at all[528] is no ground for relief by one

Me. 143; Mills, Eminent Domain, §§ 329, 330. But none of these authorities bear upon the question further than in recognizing and applying two propositions: First, 'After receiving damages, parties cannot be heard against the validity of proceedings.' * * * Second, Failure by a competent tribunal, acting properly, to find damages, is in effect a judgment that no damage has been sustained. * * * But neither of these propositions reaches the vital point of the present claim. Here on the one hand, was no estoppel by actual receipt of money, and, on the other, no action in the premises by competent authority, to determine. How could there be competent authority to determine the benefits and damages sustained from the layout, if such a layout was itself illegal and void, and therefore none? Whether under these circumstances the plaintiff ought to have appealed thus testing the validity of the layout itself, and whether his only remedy was to be found in that direction, we will consider presently as a separate question. Whether he was estopped from any remedy, by appeal or otherwise, by what took place, as he would have been by the actual receipt of money awarded, is the present subject of inquiry. It seems to us very clearly, that he should not be so estopped. The very ground of the estoppel exists either in act or silence. He has done no act. Silence amounts to nothing, unless it is that of one upon whom rests a duty to speak. In what way was that duty imposed upon the plaintiff? He had requested the city to take action in reference to Chapel street. But no such action as he desired was had. No action whatever, of which he is shown to have had any knowledge, was had. * * * Whatever may be regarded as the proper function of fictions in the law at the present time, we cannot agree to the proposition that the plaintiff should be held to have received what he had not received, accepted a sum which never existed, paid it back when he never had it and thereby acknowledged both damage and benefit resulting to him from an act to which he never assented, and of which it cannot be conclusively presumed he ever knew,—all this for the purpose of invoking against him that which, at least sometimes, has been appropriately called 'the equitable doctrine of estoppel.'"

[526] Delaware & H. Canal Co. v. City of Buffalo, 39 App. Div. 333, 56 N. Y. Supp. 976.

[527] Regenstein v. City of Atlanta, 98 Ga. 167; Green v. City of Springfield, 130 Ill. 515; Thomson v. People, 184 Ill. 17; Lincoln v. Street Com'rs of Boston, 176 Mass. 210;

not the owner, although in some jurisdictions it is held that the right exists because a failure to equitably tax other property increases the burden upon that taxed.[529]

§ 384. Excessive assessment.

The property owner cannot avail himself, as a ground for relief, of the fact that the assessment as actually made may be in excess of the amount required to construct a local improvement; such excess usually belongs to the property owner and should be returned to him.[530] Where the assessment is ex-

Humphreys v. City of Bayonne, 60 N. J. Law, 406. If, however, the result is to increase the assessment of the complaining party, this question can be raised. County of Monroe v. City of Rochester, 88 Hun, 164, 34 N. Y. Supp. 533. Where the assessment is grossly disproportioned it will be set aside. See, also, as holding the same, In re Townsend Ave., 35 Misc. 65, 71 N. Y. Supp. 201.

[528] Buckman v. Landers, 111 Cal. 347, 43 Pac. 1125; Phelan v. City & County of San Francisco, 120 Cal. 1, 52 Pac. 38; Bowditch v. City of New Haven, 40 Conn. 503; Balfe v. Bell, 40 Ind. 337; Powell v. City of Greensburg, 150 Ind. 148, 49 N. E. 955; In re Voorhis, 3 Hun (N. Y.) 212; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; In re Churchill, 82 N. Y. 288.

[529] Gilkerson v. Scott, 76 Ill. 509; Johnson v. People, 177 Ill. 64; Drake v. Grout, 21 Ind. App. 534, 52 N. E. 775; In re Thirty-Ninth St., 1 Hill (N. Y.) 191; Coles v. Trustees of Williamsburgh, 10 Wend. (N. Y.) 659; In re Appleby, 26 Hun (N. Y.) 427; In re Klock, 30 App. Div. 24, 51 N. Y. Supp. 897; J. & A. McKechnie Brew. Co. v. Trustees of Canandaigua, 162 N. Y. 631, 57 N. E. 1113; Masters v. City of Portland, 24 Or. 161, 33 Pac. 540; City of Scranton v. Levers, 200 Pa. 56, 49 Atl. 980.

[530] Danenhower v. District of Columbia, 7 Mackey (D. C.) 99. The power of revision and correction of errors or excessive assessments confers no authority under act of Congress June 19th, 1878 (20 Stat. 166), to impose a larger levy. Davies v. City of Los Angeles, 86 Cal. 37; Wells v. Wood, 114 Cal. 255. The failure to appeal from an excessive assessment is a waiver of the error. People v. McWethy, 165 Ill. 222; Billings v. City of Chicago, 167 Ill. 337; Danforth v. Village of Hinsdale, 177 Ill. 579; Gross v. People, 193 Ill. 260; James v. City of Louisville, 19 Ky. L. R. 447, 40 S. W. 912. If the assessment, however, is grossly in excess of the value of the work it will not be enforced. Bullitt v. Selvage, 20 Ky. L. R. 599, 47 S. W. 255. The fact that a street assessment equals the value of certain lots sought to be charged does not render it void as amounting to confiscation.

Germania Bank v. City of St. Paul, 79 Minn. 29, 81 N. W. 542. The rule also holds where the assessment has been paid in full but the improvement abandoned upon its partial completion. City of Cincin-

cessive, to obtain relief it is not necessary for the property owner to tender or pay the amount which is legally a charge upon his property or which he thinks should be justly apportioned upon it.[531] But this action may be dependent upon statutory provisions and necessary;[532] ordinarily, where the assessment is excessive, this fact does not invalidate the entire proceedings but only so much of the assessment as is in excess of the legal amount.[533]

nati v. James, 55 Ohio St. 180, 44 N. E. 925. The collection of an excessive assessment may be enjoined. City of Spokane Falls v. Browne, 3 Wash. St. 84.

[531] Village of Norwood v. Baker, 172 U. S. 269; Steckert v. City of East Saginaw, 22 Mich. 104; Howell v. City of Tacoma, 3 Wash. St. 711; Griggs v. City of Tacoma, 3 Wash. St. 785; Yates v. City of Milwaukee, 92 Wis. 352; Hayes v. Douglas County, 92 Wis. 429, 31 L. R. A. 213. See to the contrary, City of Ottawa v. Barney, 10 Kan. 270; Redick v. City of Omaha, 35 Neb. 125, 52 N. W. 847; and Wells v. Western Pav. & Supply Co., 96 Wis. 116, 70 N. W. 1071.

[532] McDonald v. Mezes, 107 Cal. 492; City of Elkhart v. Wickwire, 121 Ind. 331; Lynde v. City of Malden, 166 Mass. 244, 44 N. E. 227; City of St. Joseph v. Dillon, 61 Mo. App. 317; In re Upson, 89 N. Y. 67; Annie Wright Seminary v. City of Tacoma, 23 Wash. 109, 62 Pac. 444.

[533] Farr v. West Chicago Park Com'rs, 167 Ill. 355, 46 N. E. 893; Greeley v. Town of Cicero, 148 Ill. 632; Connecticut Mut. Life Ins. Co. v. People, 172 Ill. 31; Kerfoot v. City of Chicago, 195 Ill. 229; City of Elkhart v. Wickwire, 121 Ind. 331, 22 N. E. 342; Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454. The amount held for attorney's fees by § 9 of the Barrett Law, so called, is not a part of the assessment in the sense that its addition to the amount to be recovered will make it excessive. Barber Asphalt Pav. Co. v. Watt, 51 La. Ann. 1345; In re Brainerd, 1 N. Y. Supp. 78; In re Hudson Ave., 2 Hun (N. Y.) 580; Smith v. City of New York, 4 N. Y. Supp. 449; Hubbard v. Norton, 28 Ohio St. 116; Pike v. Cummings, 36 Ohio St. 213. If some of the installments of an excessive assessment have been paid, the excess should be deducted from subsequent installments in the order in which they mature.

Pell v. City of New York, 31 Misc. 664, 65 N. Y. Supp. 34; In re Phœnix, 53 App. Div. 636, 65 N. Y. Supp. 719; People v. Coler, 31 Misc. 211, 65 N. Y. Supp. 44; In re Mead, 74 N. Y. 216; In re Leake & Watts Orphan Home, 92 N. Y. 116. Where rock work which should have cost $4.00 per cubic yard was charged for at the rate of $14.00 per cubic yard with other items in proportion, the facts justify a finding of such fraud and irregularity as to justify a reduction of the assessment. Hays v. City of Cincinnati, 62 Ohio St. 116; In re Park Ave. Sewers, 169 Pa. 433. The difference in cost between a ten-inch local sewer and a fifteen-inch main sewer should be paid by the municipality. It cannot be recovered from benefited property.

§ 385. Judicial confirmation of an assessment roll.

Upon a petition for confirmation of a special assessment, especially under the laws of Illinois, the opportunity is given the property owner to raise all questions relating to or affecting the legality of the proceedings,[534] and the further rule obtains, in that state as well as elsewhere, that upon a failure to raise specific questions at that time, the property owner loses his right to thereafter make objections based upon the same grounds or depending upon such irregularities.[535] Upon confirmation, separate judgments may be entered confirming the assessment and charging different tracts of land.[536] Statutory provisions

[534] Dempster v. People, 158 Ill. 36; Springer v. City of Chicago, 159 Ill. 515; Culver v. People, 161 Ill. 89; People v. Markley, 166 Ill. 48; Bass v. South Park Com'rs, 171 Ill. 370. The legality of the steps by which park commissioners acquire control of a street need not be shown on an application by them for confirmation of an assessment for improvements. See, also, as holding the same, Aldis v. South Park Com'rs, 171 Ill. 424. See Young v. People, 171 Ill. 299, as to the conclusiveness of judgment of confirmation on jurisdictional facts; in this case insufficient notice. Michael v. City of Mattoon, 172 Ill. 394; City of Bloomington v. Reeves, 177 Ill. 161; Phelps v. City of Mattoon, 177 Ill. 169.

Shannon v. Village of Hinsdale, 180 Ill. 202. But the question of compliance with the ordinance in the character of the work cannot be raised. People v. Chicago, B. & Q. R. Co., 189 Ill. 397; City of Chicago v. Holden, 194 Ill. 213; Markley v. City of Chicago, 190 Ill. 276; Kerfoot v. City of Chicago, 195 Ill. 229.

Gage v. City of Chicago, 196 Ill. 512. The cost of making and collecting a street improvement assessment should not be included in the assessment. Topliff v. City of Chicago, 196 Ill. 215; Myers v. City of Chicago, 196 Ill. 591. The question of benefit to property assessed may be raised on application for confirmation.

As to the sufficiency of the petition see Adams County v. City of Quincy, 130 Ill. 566, 22 N. E. 624; McChesney v. City of Chicago (Ill.) 45 N. E. 226; White v. City of Alton, 149 Ill. 626; Haley v. City of Alton, 152 Ill. 113; Clark v. City of Chicago, 155 Ill. 223; Hull v. City of Chicago, 156 Ill. 381; Wadlow v. City of Chicago, 159 Ill. 176; Ferris v. City of Chicago, 162 Ill. 111; Dickey v. City of Chicago, 164 Ill. 37; Adcock v. City of Chicago, 172 Ill. 24; Leitch v. People, 183 Ill. 569; Yaggy v. City of Chicago, 192 Ill. 104.

[535] Murphy v. People, 120 Ill. 234, 11 N. E. 202; Hewes v. Village of Winnetka, 60 Ill. App. 654; Schertz v. People, 105 Ill. 27; Le Moyne v. West Chicago Park Com'rs, 116 Ill. 41; Hinkle v. City of Mattoon, 170 Ill. 316. But see Markley v. City of Chicago, 170 Ill. 358.

[536] Browning v. City of Chicago, 155 Ill. 314; Zeigler v. People, 156 Ill. 133; Beach v. People, 157 Ill.

sufficiency[543] or excess[544] in amount realized as compared with the actual cost of the public improvement. In common with

ment in Cummings v. West Chicago Park Com'rs, 181 Ill. 136. Rector v. Board of Improvement, 50 Ark. 116; Gray v. Richardson (Cal.) 55 Pac. 603; Ede v. Cuneo, 126 Cal. 167; Philadelphia & R. Coal & Iron Co. v. City of Chicago, 158 Ill. 9. If payments have been made upon an assessment vacated, they should be credited upon the amount determined to be due by the reassessment or new proceedings. Bowen v. City of Chicago, 61 Ill. 268; and Workman v. City of Chicago, 61 Ill. 463. Both hold that a reassessment based upon a void original assessment is also void.

City of Alton v. Foster, 74 Ill. App. 511. A reassessment may be ordered upon the ground of irregularities in the former proceedings where between the dates of the inception of the two proceedings the work has been completed. Browning v. City of Chicago, 155 Ill. 314. A reassessment may be directed only against that property in respect to which in the former proceedings the owners have filed objections.

West Chicago Park Com'rs v. Farber, 171 Ill. 146; West Chicago Park om'rs v. Metropolitan West Side El. R. Co., 182 Ill. 246; People v. City of Pontiac, 185 Ill. 437; Thompson v. City of Chicago, 197 Ill. 599; People v. Common Council of Lansing, 27 Mich. 131; Bogert v. Jackson Circuit Judge, 118 Mich. 457, 76 N. W. 983; Townsend v. City of Manistee, 88 Mich. 408; Smith v. City of Detroit, 120 Mich, 572; State v. Ramsey County Dist. Ct., 68 Minn. 242; State v. Ramsey County Dist. Ct., 77 Minn. 248, 79 N. W. 971. A reassessment may be directed against a part only of the property affected by the original proceedings.

Aldridge v. Essex Public Road Board, 51 N. J. Law, 166, 16 Atl. 695; Howard Sav. Inst. v. City of Newark, 52 N. J. Law, 1, 18 Atl. 672. Where an assessment has been set aside because made under an unconstitutional law, the city can make a reassessment under subsequent valid legislation. City of Bayonne v. Morris, 61 N. J. Law, 127, 38 Atl. 819. If the invalid assessment has been paid by the property owner, the reassessment cannot be collected until the former payments have been refunded by the city. Righter v. City of Newark, 45 N. J. Law, 104; Hoetzel v. Inhabitants of East Orange, 50 N. J. Law, 354; Frederick v. City of Seattle, 13 Wash. 428; and Tacoma Land Co. v. City of Tacoma, 14 Wash. 700, 44 Pac. 106.

Soule v. City of Seattle, 6 Wash. 315, 33 Pac. 384, 1080. A change in the manner of assessment does not defeat the right of reassessment. Phillips v. City of Olympia, 21 Wash. 153, 57 Pac. 347. A city is estopped to deny the invalidity of prior assessment proceedings where it has passed an ordinance providing for a reassessment and declaring the former assessment defective.

[543] Dyer v. Scalmanini, 69 Cal. 637; Gill v. City of Oakland, 124 Cal. 335. If necessary, a second supplemental assessment can be made. Goodwin v. Warren County Com'rs, 146 Ind. 164, 44 N. E. 1110; Kline v. Huntington County Com'rs, 152 Ind. 321, 51 N. E. 476. Wickett v. Town of Cicero, 152 Ill. 575. Under a sup-

all such statutory rights, the rule of strict compliance applies, and the character of these provisions is usually regarded as mandatory.[545] On reassessment proceedings, the provisions of the law authorizing them or the laws or ordinances existing at the time of the reassessment will control.[546]

§ 387. Curative legislation.

The general principles defining and controlling the power of a legislative body to pass curative legislation are well established. Laws passed or action taken for the purpose of curing defects in special assessment proceedings cannot validate assessments void because made by a body or official, not having such authority,[547] in an unauthorized manner,[548] or because of a

plementary assessment a property owner can show that his property was assessed its fair proportion of the expense of the improvement in the original proceedings. Thayer v. City of Grand Rapids, 82 Mich. 298, 46 N. W. 228; Butler v. City of Toledo, 5 Ohio St. 225; Philadelphia Mortg. & Trust Co. v. City of New Whatcom, 19 Wash. 225, 52 Pac. 1063. Where a reassessment still leaves a deficiency in the amount realized, under Laws 1893, p. 229, § 6, a second reassessment cannot be made and such deficiency must, therefore, be paid out of the general fund of the city.

[544] Himmelmann v. Cofran, 36 Cal. 411; City of Emporia v. Bates, 16 Kan. 495; Butler v. City of Toledo, 5 Ohio St. 225.

[545] Lyon v. Alley, 130 U. S. 177, 9 Sup. Ct. 480; Wood v. Strother, 76 Cal. 545, 18 Pac. 766; Johnson v. People, 177 Ill. 64; City of St. Louis v. Clemens, 52 Mo. 133; Dean v. Charlton, 27 Wis. 522; Dill v. Roberts, 30 Wis. 178. A reassessment law cannot authorize a municipality to impose a tax void because levied for purposes not within the taxing power of the legislature.

[546] Harris v. City of Ansonia, 73 Conn. 359, 47 Atl. 672; State v. Norton, 63 Minn. 497; Culver v. Town of Bergen, 29 N. J. Law (5 Dutch.) 266; Town of Bergen v. Van Horne, 32 N. J. Law, 490; Cline v. City of Seattle, 13 Wash. 444; City of New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131. The principle applies to appeals by a landowner from a reassessment. White v. City of Tacoma, 20 Wash. 361, 55 Pac. 319; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432; City of Port Angeles v. Lauridsen, 26 Wash. 153, 66 Pac. 403; Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393. Accrued interest on the cost of the improvement may be included in the amount of the reassessment.

[547] Bates v. District of Columbia, 7 Mackey (D. C.) 76; Windsor v. District of Columbia, 7 Mackey (D. C.) 96; People v. Lynch, 51 Cal. 15; 21 Am. Rep. 677; City of Red Wing v. Chicago, M. & St. P. R. Co., 72 Minn. 240.

[548] People v. Wilson, 50 Hun, 606,

failure of jurisdictional conditions.[549] They can only cure irregularities in the exercise of a power already legally possessed.[550] As said by Judge Cooley: "They (such proceedings) cannot be cured when there was a lack of jurisdiction to take them. This is a rule applicable to every species of legal proceeding. Curative laws may heal irregularities in action but they cannot cure a want of authority to act at all." Neither can such laws affect rights of parties that may have already accrued[551] or in respect to pending proceedings require acts that were not required by the original legislation or dispense with those required

3 N. Y. Supp. 326; Poth v. City of New York, 151 N. Y. 16; In re Omeaga St., 152 Pa. 129; Bingaman v. City of Pittsburgh, 147 Pa. 353, 23 Atl. 395.

[549] Great Falls Ice Co. v. District of Columbia, 19 D. C. 327; Springer v. City of Chicago, 159 Ill. 515; Chicago & N. P. R. Co. v. City of Chicago, 174 Ill. 439; Cleveland, C., C. & St. L. R. Co. v. O'Brien, 24 Ind. App. 547, 57 N. E. 47; City of Baltimore v. Porter, 18 Md. 284; Matter of Buhler, 32 Barb. (N. Y.) 79; People v. Thirty-First Ward Sup'r, 89 Hun, 241, 35 N. Y. Supp. 91; Conde v. City of Schenectady, 29 App. Div. 604, 51 N. Y. Supp. 854. A declaration in the curative law that prior proceedings shall be valid in spite of jurisdictional irregularities does not cure such defect. Hopkins v. Mason, 61 Barb. (N. Y.) 469; Savage v. City of Buffalo, 131 N. Y. 568; City of Reading v. Savage, 120 Pa. 198, 13 Atl. 919; Kimball v. Town of Rosendale, 42 Wis. 407.

[550] Shawnee County Com'rs v. Carter, 2 Kan. 115; Atchison & N. R. Co. v. Maquilkin, 12 Kan. 301. "The taxes complained of were levied in 1872, for the year 1872. This suit was commenced February 7, 1873, to enjoin their collection. The said application for a temporary injunction was heard and decided February 19, 1873; and the case was brought to this court March 10, 1873. On March 6, 1873, an act of the legislature was passed, which took effect March 20, 1873 (Laws 1873, p. 135), after this case had been brought to this court, which act it is claimed makes said city tax valid. This cannot be so. The annexation of said property to said city was void, not for any irregularity merely in the annexation proceedings, but void because the city had no power to annex it. The tax levied on said property was void, not for any irregularity merely in the tax proceedings, but void because the city had no power to tax it. Both the annexation of said property, and the taxing of it, were void for the want of jurisdiction over the subject-matter thereof. Retrospective statutes of a remedial nature, curing the defective execution of some power really possessed by the person, tribunal, or officer attempting to exercise it, have often been held valid. But a retrospective statute attempting to create a power, or to cure a defect of jurisdiction, we believe, has never been held valid."

[551] Lockart v. City of Troy, 48 Ala. 579; Atchison & N. R. Co. v. Maquilkin, 12 Kan. 301.

in the first instance.[552] In connection with this subject there is a substantial difference between curative legislation intended to operate retrospectively or prospectively. In respect to legislation of the latter class, the power of a legislative body is more extensive and effective,[553] especially if it possesses the original power to pass legislation requiring or dispensing with certain acts in connection with the levy and collection of special assessments.[554] Legislation can, however, be passed curing mere irregularities in action so long as it does not come within the principles stated above.[555]

§ 388. Collateral attack.

Where assessment proceedings are void because of a failure of jurisdictional conditions or facts, these may be raised and shown when collaterally attacked.[556] The other rule is as universally held that mere irregularities, or a failure to comply with immaterial technicalities or the exercise of discretionary powers, cannot be so inquired into and that the judgment of confirmation or other final action in the matter is conclusive upon all parties[557] except in direct proceedings brought within the

[552] City of Emporia v. Norton, 13 Kan. 560.

[553] Reis v. Graff, 51 Cal. 86, followed in People v. Kinsman, 51 Cal. 92; Ziegler v. Flack, 54 N. Y. Super. Ct. (22 J. & S.) 69.

[554] City of Clinton v. Walliker, 98 Iowa, 655, 68 N. W. 431; Doyle v. City of Newark, 34 N. J. Law, 236.

[555] City of Alton v. Foster, 74 Ill. App. 511; Tuttle v. Polk, 84 Iowa, 12, 50 N. W. 38; Manley v. Emlen, 46 Kan. 655; Bowditch v. Superintendent of Streets, 168 Mass. 239; Towne v. City Council of Newton, 169 Mass. 240; Nelson v. City of Saginaw, 106 Mich. 659; In re Marsh, 21 Hun (N. Y.) 582; Smith v. City of Buffalo, 159 N. Y. 427, affirming 90 Hun, 118, 35 N. Y. Supp. 635; Nottage v. City of Portland, 35 Or. 539; Borough of New Brighton v. Biddell, 14 Pa. Super. Ct. 207.

[556] Keifer v. City of Bridgeport, 68 Conn. 401; Keeler v. People, 160 Ill. 179; Hull v. People, 170 Ill. 246; City of Ithaca v. Babcock, 72 App. Div. 260, 76 N. Y. Supp. 49; Kline v. City of Tacoma, 11 Wash. 193, 39 Pac. 453.

[557] Glover v. People, 188 Ill. 576, 59 N. E. 429; Illinois Cent. R. Co. v. People, 189 Ill. 119, 59 N. E. 609; Jebb v. Sexton, 84 Ill. App. 45; Clark v. People, 146 Ill. 348; Meadowcroft v. People, 154 Ill. 416; West Chicago St. R. Co. v. People, 155 Ill. 299; Dickey v. People, 160 Ill. 633; Doremus v. People, 161 Ill. 26; Gage v. People, 163 Ill. 39; People v. Markley, 166 Ill. 48; Walker v. People, 169 Ill. 473; Larson v. People, 170

statutory time for the express purpose of testing such questions.[558]

§ 389. Lien and priority of special assessments.

Although a special assessment is based upon the doctrine of benefits, so called, yet, as already stated, it is a tax within the strict meaning of that word and the result of the exercise of the power of taxation.[559] It follows from this that independent of

Ill. 93; Young v. People, 171 Ill. 299; Kunst v. People, 173 Ill. 79; Blount v. People, 188 Ill. 538; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431; City of Bloomington v. Phelps, 149 Ind. 596, 49 N. E. 581; Layman v. Hughes, 152 Ind. 484, 51 N. E. 1058; Green v. Shanklin, 24 Ind. App. 608, 57 N. E. 269; Brimmer v. City of Boston, 102 Mass. 19; Scotten v. City of Detroit, 65 Mich. 564, 64 N. W. 579; Michael v. City of St. Louis, 112 Mo. 610, following City of St. Louis v. Ranken, 96 Mo. 497; and City of St. Louis v. Excelsior Brewing Co., 96 Mo. 677. City of Girardeau v. Houck, 129 Mo. 607; Moore v. Perry, 13 Tex. Civ. App. 204.

The following cases hold that the exercise of discretionary matters cannot be inquired into collaterally. Hull v. People, 170 Ill. 246; Hewes v. Glos, 170 Ill. 436; Pfeiffer v. People, 170 Ill. 347; De Puy v. City of Wabash, 133 Ind. 336, 32 N. E. 1016; Gaslight & Coke Co. v. City of New Albany, 158 Ind. 268, 63 N. E. 458; Cason v. City of Lebanon, 153 Ind. 567; State v. City of Neodesha, 3 Kan. App. 319, 45 Pac. 122; Brown v. City of Saginaw, 107 Mich. 643, 65 N. W. 601; Borgman v. City of Detroit, 102 Mich. 261; City of Moberly v. Hogan, 131 Mo. 19; Poillon v. Brunner, 66 N. J. Law, 116, 48 Atl. 541; Hooker v. City of Rochester, 30 N. Y. Supp. 297; Mansfield v. City of Lockport, 24 Misc. 25, 52 N. Y. Supp. 571; Hunt v. Gorton, 20 R. I. 163, 37 Atl. 706; Eddy v. Wilson, 43 Vt. 362.

[558] Conlin v. People, 190 Ill. 400, 60 N. E. 55; Pfeiffer v. People, 170 Ill. 347; Johnson v. People, 177 Ill. 64; McKee Land & Imp. Co. v. Swikehard, 23 Misc. 21, 51 N. Y. Supp. 399; Hoffeld v. City of Buffalo, 130 N. Y. 387; Monroe County v. City of Rochester, 154 N. Y. 570, affirming 90 Hun, 607, 35 N. Y. Supp. 1105; McNamee v. City of Tacoma, 24 Wash. 591, 64 Pac. 791.

[559] Sargent v. Tuttle, 67 Conn. 162, 32 L. R. A. 822; City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 58; City of Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909. "It is insisted that this provision authorizes an assessment upon the lot and that the tax assessed is a lien thereon, but no remedy is contemplated against the lot owner. But the provision expressly declares that the assessment shall have the effect of a tax. The ordinance of the city enacted pursuant to this provision of the charter provides for the collection of the special paving tax in this language: 'Section nine. Any and all paving done by the city under the provisions of this ordi-

statutory or charter provisions the special assessment may have a lien upon the property against which it is charged and possess the usual priority of liens of such a nature.[560] Its rights and priorities are usually prescribed by statute and its relative priority and superiority as a lien depend upon such provisions.[561] Where a priority is attempted to be given by statute, its character must be clearly and plainly stated before it will be held to exist.[562] As a lien, special assessments are usually superior to all

nance shall, if the assessment therefor be not paid by the party or parties chargeable therewith, as herein required, become and be levied as a special tax on the property liable for such assessments; and all the provisions of law relating to special assessments, and for the enforcement and collection of the same, shall apply to the assessments levied under the provisions of this ordinance.' It will be observed that the assessments having this effect of a tax under the provision of the charter, may, under the ordinance, be enforced, if collected by virtue of the provisions of the law applicable to special taxes. The assessment in question is a tax. The tax is a debt, for the recovery whereof an action may be maintained. * * * The property becomes bound by a lien for the taxes for which the owner is liable."

[560] Barfield v. Gleason, 111 Ky. 491, 63 S. W. 964. Where the assessment through compliance with the statutory provisions has become a lien upon property, the failure to comply with the provision of an ordinance will not affect its validity. Allegheny City's Appeal, 41 Pa. 60.

[561] Bauman v. Ross, 167 U. S. 548. The Supreme Court of the United States in this case holds that it is within the power of the legislature to make the cost of a local improvement and assessed upon real estate, a lien upon it and payable immediately. City of Pittsburg v. Murphy (C. C. A.) 95 Fed. 57. By statutory provision, property is not subject to sale for taxes or other liable claims excepting in the name of the registered owner.

Guardians of Tendring Union v. Dowton, 45 Ch. Div. 583; City Council of Montgomery v. Birdsong, 126 Ala. 632, 28 So. 522; Sanders v. Brown, 65 Ark. 498, 47 S. W. 461; Durrell v. Dooner, 119 Cal. 411; Burke v. Lukens, 12 Ind. App. 648, 40 N. E. 641; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77; Richardson v. Mehler, 111 Ky. 408, 63 S. W. 957; Auditor General v. Maier, 95 Mich. 127; City of Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566; Clemens v. Knox, 31 Mo. App. 185; Barber Asphalt Pav. Co. v. Young, 94 Mo. App. 204, 68 S. W. 107, 1115; In re Pequest River Drainage, 42 N. J. Law, 553. A statutory lien is not divested by the foreclosure of a prior mortgage. Village of Little Falls v. Cobb, 80 Hun, 20, 29 N. Y. Supp. 855; Borough of New Brighton v. Biddell, 14 Pa. Super. Ct. 207; Borough of Beltzhoover v. Maple, 130 Pa. 335, 18 Atl. 650; Borough of Youngsville v. Siggins, 110 Pa. 291; City of Chester v. Eyre, 181 Pa. 642.

[562] Borough of Mauch Chunk v.

others except those for prior delinquent taxes or assessments upon the same property.[563]

§ 390. The same subject continued.

A special assessment by whatever method it may be given the character and priority suggested in the preceding section, that it have such will depend upon the validity of the assessment proceedings. The collection of the special assessment itself is but one step in the process of securing from the owner his proportion of the cost of a local improvement. Each subsequent step depends upon the legality of the preceding ones. Whether a local assessment, therefore, may become a lien upon the property against which it is levied and have the priority to which it is entitled by its character depends upon the strictness with which the provisions of the law have been followed.[564] The omission or defective performance of necessary acts will result in a loss of its status.[565] The necessary acts and the manner of their per-

Shortz, 61 Pa. 399; Wilson v. Allegheny City, 79 Pa. 272. A municipal lien is an adverse right granted by law against the will of the citizen and unless plainly given cannot take his property or money. City of Philadelphia v. Greble, 38 Pa. 339.

[563] See authorities cited under preceding note. Ramish v. Hartwell, 126 Cal. 443; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307; Dressman v. Farmers' & Traders' Nat. Bank, 100 Ky. 571, 38 S. W. 1052, 36 L. R. A. 121; Dressman v. Semonin, 20 Ky. L. R. 868, 47 S. W. 767; Kelly v. Mendelsohn, 105 La. 490; Morey v. City of Duluth, 75 Minn. 221, 77 N. W. 829. The fact that the assessment is paramount to previous liens may follow by necessary implication. White v. Knowlton, 84 Minn. 141, 86 N. W. 755; Hand v. Jersey City, 41 N. J. Eq. 663, 7 Atl. 565; Trustees of Public Schools v. Shotwell, 45 N. J. Eq. 106; Fisher v. City of New York, 6 T. & C. (N. Y.) 100; Bell v. City of New York, 66 App. Div. 578, 73 N. Y. Supp. 298; Makley v. Whitmore, 61 Ohio St. 587, 56 N. E. 461; City of Philadelphia v. Meager, 67 Pa. 345; Bryant's Appeal, 104 Pa. 372; City of Seattle v. Hill, 14 Wash. 487, 45 Pac. 17, 35 L. R. A. 372; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771; McMillan v. City of Tacoma, 26 Wash. 358, 67 Pac. 68. A special assessment lien is subordinate to the lien of delinquent general taxes.

[564] Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025; Williams v. Bergin, 129 Cal. 461, 62 Pac. 59; Joyce v. Falls City Artificial Stone Co., 23 Ky. L. R. 1201, 64 S. W. 912; Berghaus v. City of Harrisburg, 122 Pa. 289; Hutcheson v. Storrie (Tex. Civ. App.) 48 S. W. 785.

[565] Dorland v. Bergson, 78 Cal. 637; Frenna v. Sunnyside Land Co., 124 Cal. 437; Wilson v. Poole, 33 Ind. 443; Brookbank v. City of Jeffersonville, 41 Ind. 406; Galbreath

formance have been particularly emphasized in the preceding sections.[566]

(a) Description of property. A special assessment is a charge against property, not an individual. The description of the land charged must, therefore, be sufficiently accurate and definite to render its identity certain, and a failure to do this will destroy any lien which may exist.[567]

(b) Unauthorized improvement. Again, if the special assessment is levied to pay the cost in whole or in part of an unauthorized improvement or the excess of cost beyond that authorized, the assessment will lose its rights as such, or, stated in another way, its lien and priority will be wholly or partially destroyed.[568]

v. Newton, 30 Mo. App. 380; Risley v. City of St. Louis, 34 Mo. 404; Keith v. Bingham, 100 Mo. 300. But it is not necessary to show that every prerequisite step has been taken. Equitable Trust Co. v. O'Brien, 55 Neb. 735, 76 N. W. 417. The burden of proof is upon the person asserting the validity of a lien. Penwarden v. Dunellen, 50 N. J. Law, 565, 15 Atl. 529; McCarthy v. Jersey City, 44 N. J. Law, 136; People v. Suffern, 68 N. Y. 321; Ardrey v. City of Dallas, 13 Tex. Civ. App. 442, 35 S. W. 726; City of Spokane Falls v. Browne, 3 Wash. St. 84.

[566] Murphy v. Beard, 138 Ind. 560, 38 N. E. 33. Such an assessment is a first lien on the land. Hibben v. Smith, 158 Ind. 206, 62 N. E. 447.

[567] Ede v. Knight, 93 Cal. 159; Nicholes v. People, 165 Ill. 502; Adkins v. Quest, 79 Mo. App. 36. But see Borough of McKeesport v. Busch, 166 Pa. 46.

[568] Donnelly v. Howard, 60 Cal. 291; Dorathy v. City of Chicago, 53 Ill. 79; Gage v. People, 163 Ill. 39; Smith v. Kochersperger, 173 Ill. 201; McManus v. People, 183 Ill. 391; Grey v. People, 194 Ill. 486; Naltner v. Blake, 56 Ind. 127; Kansas City Grading Co. v. Holden, 107 Mo. 305, 17 S. W. 798; Brennan v. City of Buffalo, 162 N. Y. 491. The rule also applies to an unauthorized or excessive amount.

Stone v. Viele, 38 Ohio St. 314; Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 35 Pac. 452, 22 L. R. A. 713. The rule also applies to an unnecessary improvement and one which actually damaged instead of benefited the property assessed. City of Pittsburgh v. MacConnell, 130 Pa. 463, 18 Atl. 645. But specific allegations are necessary on behalf of the property owner to avail himself of this principle. Watson v. City of Philadelphia, 93 Pa. 111. The rule does not apply where there has been a substantial compliance with the ordinance authorizing the work. City of Allegheny v. McCaffrey, 131 Pa. 137; City of Chester v. Eyre, 167 Pa. 308; Sanderson v. Herman, 108 Wis. 662, 84 N. W. 890, 85 N. W. 141. A wrong recital of authority will not, however, make the assessment invalid.

§ 391. Collection of special assessments.

(a) By an individual. In some states upon the construction of a local improvement, the contractor is given a warrant or other evidence of his right to collect in the proportion established by law from each property owner who may be charged with the whole or any part of its cost.[569] The collection of the special assessment rests, then, in the individual, and he is governed in his proceedings entirely by local charter or statutory provisions, reference to some of which is made in the notes.[570]

(b) By the state. In the majority of public jurisdictions, the public authorities are vested with the power to collect special assessments, and the moneys pass through the regular channels and are disbursed by public officials.[571]

[569] Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 65 Pac. 329. A materialman or laborer supplying commodities at the request of a property owner in the construction of a local improvement has a lien upon the property for his claim. See, also, as holding the same, Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421, denying a rehearing; Moffitt v. Jordan, 127 Cal. 622.

[570] Buckman v. Cuneo, 103 Cal. 62, 36 Pac. 1025; Palmer v. Burnham, 120 Cal. 364, 52 Pac. 664; Engelbret v. McElwel, 122 Cal. 284; Sloan v. Faurot, 11 Ind. App. 689, 39 N. E. 539. A previous demand on the property owner for the payment of a street assessment is not a condition precedent to exercise the right. Clements v. Lee, 114 Ind. 397, 16 N. E. 799; Myers v. Indianapolis Union R. Co., 12 Ind. App. 170, 39 N. E. 907; City of Connersville v. Merrill, 14 Ind. App. 303, 42 N. E. 1112; Bozarth v. McGillicuddy, 19 Ind. App. 26, 47 N. E. 397, 48 N. E. 1042; Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071.

Jessen v. Pierce, 25 Ind. App. 222, 57 N. E. 941. The holder of a bond issued for the street improvement given the right under Burns' Rev. St. 1894, § 4297 to collect the same and foreclose its lien. Tuttle v. Polk, 92 Iowa, 433, 60 N. W. 733; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 307, 79 N. W. 77; Dashiell v. City of Baltimore, 45 Md. 615; Schneider Granite Co. v. Taylor, 64 Mo. App. 37; Gest v. City of Cincinnati, 26 Ohio St. 275. The action may be brought by the municipality in its name for the benefit of the contractor. State v. Hobe, 106 Wis. 411. Although the right to collect may not rest in an individual, yet special assessments collected by public officials belong to the owner of certificates representing such assessment.

[571] Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; City of Highlands v. Johnson, 24 Colo. 371, 51 Pac. 1004; City of Greencastle v. Allen, 43 Ind. 347. If city authorities neglect to take the proper steps to levy and collect a street improvement assessment, the street contractor can compel by mandamus the perform-

§ 392. Manner and amount of collection.

The usual method for the collection of special assessments is through an action at law[572] in which the ordinary rules apply in respect to the jurisdiction of the court,[573] parties plaintiff[574] and defendant,[575] the pleadings in the case,[576] the introduction of evidence[577] and the final judgment.[578] If an action is necessary

ance of their duties. Martin v. Wills, 157 Ind. 153, 60 N. E. 1021. The state has a choice of remedies either to collect by foreclosure of the assessment lien, a sale of the property or by precept issued by order of the city council. State v. Laughlin, 101 Ind. 29; Morgan v. City of Dubuque, 28 Iowa, 575. The obligation rests upon public officials to collect special assessments within a reasonable time after the work is done for which they are levied.

Shaw v. Des Moines County, 74 Iowa, 679, 39 N. W. 101; City of Leavenworth v. Stille, 13 Kan. 539; Slack v. Ray, 26 La. Ann. 674; Roebling v. Inhabitants of Trenton, 58 N. J. Law, 40, 32 Atl. 685; Commercial Nat. Bank v. City of Portland, 24 Or. 188, 33 Pac. 532. The city officials may so unreasonably delay the collection of special assessments as to charge them with neglect of duty. McEwan v. City of Spokane, 16 Wash. 212; State v. Hobe, 106 Wis. 411; Allen v. City of Galveston, 51 Tex. 302.

[572] City of Santa Barbara v. Huse, 51 Cal. 217; Huff v. City of Jacksonville, 39 Fla. 1, 21 So. 776. The amount of the lien may be enforced in equity. Crowell v. Jaqua, 114 Ind. 246, 15 N. E. 242, withdrawing opinion in 14 N. E. 559; Bennison v. City of Galveston, 18 Tex. Civ. App. 20, 44 S. W. 613.

[573] Williams v. Mecartney, 69 Cal. 556.

[574] Sullivan v. Mier, 67 Cal. 264; First Presbyterian Church v. City of Lafayette, 42 Ind. 115.

[575] Hancock v. Bowman, 49 Cal. 413; Wood v. Brady, 68 Cal. 78; Robinson v. Merrill, 87 Cal. 11. In such an action the burden of proof is upon the plaintiff to show that defendants were the owners of property. City of Chicago v. Rosenfeld, 24 Ill. 495. All parties may contest an assessment under § 43 of the amended charter of Chicago. Barber Asphalt Pav. Co. v. Young, 94 Mo. App. 204, 68 S. W. 107, 1115.

[576] Doane v. Houghton, 75 Cal. 360, 17 Pac. 426. Want of jurisdiction it is held in this case, is a matter of defense, and the complaint need not state any of the proceedings prior to the issuance of the assessment. Himmelman v. Danos, 35 Cal. 441; Himmelmann v. Spanagel, 39 Cal. 389; City of Santa Barbara v. Huse, 51 Cal. 217. It is necessary to allege in such an action that the defendant owns the lot, and, if it is denied, prove it. California Imp. Co. v. Reynolds, 123 Cal. 88; Spades v. Phillips, 9 Ind. App. 487, 37 N. E. 297. The proper qualifications of a board of public works need not be alleged. Lewis v. Albertson, 23 Ind. App. 147, 53 N. E. 1071; Clark v. City of Worcester, 167 Mass. 81; City of Philadelphia v. Stevenson, 132 Pa. 103; Bennison v. City of Galveston, 18 Tex. Civ. App. 20.

[577] Manning v. Den (Cal.) 24 Pac.

to collect a delinquent assessment, it is generally proper to include all necessary expenses, including an attorney's fee, in the amount made a lien upon the property,[579] and where an assessment is a general lien upon specific property, the payment of less than the full amount will not release any portion of or interest in said property from the lien.[580]

§ 393. Same subject; summary proceedings.

A special assessment is usually made, by statute, a statutory lien upon the property charged. No action is then necessary in the ordinary sense of the word and as used in the

1092. The admission of unnecessary evidence is harmless error. King v. Lamb, 117 Cal. 401, 49 Pac. 561; Harney v. McLeran, 66 Cal. 34; Buckman v. Landers, 111 Cal. 347; Bernstein v. Downs, 112 Cal. 197; Kenny v. Kelly, 113 Cal. 364; Gage v. People, 163 Ill. 39. If the improvement is of a different character from that ordered to be made, this can be shown. Darnell v. Keller, 18 Ind. App. 103, 45 N. E. 676. That work was not done according to the contract is a matter of defense in an action to enforce the lien of a municipal assessment for a local improvement. Bozarth v. McGillicuddy, 19 Ind. App. 20, 47 N. E. 397, 448 N. E. 1042; Barrett v. Falls City Artificial Stone Co., 21 Ky. L. R. 669, 52 S. W. 947; Caldwell v. Cornell, 21 Ky. L. R. 812, 53 S. W. 35; Richardson v. Mehler, 23 Ky. L. R. 917, 63 S. W. 957; City of Nevada v. Morris, 43 Mo. App. 586; Smith v. Allegheny, 92 Pa. 110; City of Philadelphia v. Eddleman, 169 Pa. 452; City of Altoona v. Bowman, 171 Pa. 307; Breath v. City of Galveston (Tex. Civ. App.) 46 S. W. 903. The admission of unnecessary evidence is harmless error.

[578] Brady v. Kelly, 52 Cal. 371; Diggins v. Reay, 54 Cal. 525; Driscoll v. Howard, 63 Cal. 438; City Street Imp. Co. v. Babcock (Cal.) 68 Pac. 584; Brown v. City of Joliet, 22 Ill. 123. A general judgment for the assessment cannot be enforced; it should be special and directed against the specific lots or lands assessed. Bitzer v. O'Bryan, 21 Ky. L. R. 1307, 54 S. W. 951; City of Hannibal v. Richards, 35 Mo. App. 15; State v. City of La Crosse, 101 Wis. 208, 77 N. W. 167. The city of La Crosse is the moving party in proceedings for laying a sewer and is bound to maintain the validity of an assessment levied to pay its cost.

[579] Reid v. Clay, 134 Cal. 207, 66 Pac. 262; Gillis v. Cleveland, 87 Cal. 214; Palmer v. Nolting, 13 Ind. App. 581, 41 N. E. 1045; Indiana Bond Co. v. Jameson, 24 Ind. App. 8, 56 N. E. 37; City of Seattle v. Whitworth, 18 Wash. 126.

[580] Williams v. Bergin, 127 Cal. 578; Hoke v. City of Atlanta, 107 Ga. 416; City Council of Augusta v. Murphey, 79 Ga. 101; Rosenberg v. Freeman, 53 Hun, 629, 5 N. Y. Supp. 891; Penwarden v. Dunellen Borough Com'rs, 50 N. J. Law, 565; Heath v. McCrea, 20 Wash. 342.

preceding section; but upon the special assessment, or any installment becoming delinquent, the state or the individual, if given the right of collection, has the power, upon complying with the provisions of the statute in respect to publication and other conditions, to enforce the statutory lien by a sale of the premises against which the special assessment is a charge.[581] The statute of limitations may by special provision operate as against the enforcement of this right when not exercised within a specific time,[582] or the right may be included under other statutory conditions described in the ordinary statutes of limitation.[583] In either case the statute commences to run only from the time a valid assessment for street improvements has been made,[584] and not during the pendency of such proceedings.[585] The general principles of the law of taxation applying to the enforcement of a

[581] School Dist. of Ft. Smith v. Board of Improvement, 65 Ark. 343, 46 S. W. 418; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Ramish v. Hartwell, 126 Cal. 443; Noonan v. People, 183 Ill. 52; O'Brien v. Bradley, 28 Ind. App. 487, 61 N. E. 942; Sanger v. Rice, 43 Kan. 580; City of Covington v. Worthington, 11 Ky. L. R. 141, 10 S. W. 790, 11 S. W. 1038; City of Baltimore v. Ulman, 79 Md. 469, 30 Atl. 43; City of Clinton v. Henry County, 115 Mo. 557; State v. Irey, 42 Neb. 186; Poillon v. Brunner, 66 N. J. Law, 116, 48 Atl. 531; City of Bonham v. Preston (Tex. Civ. App.) 23 S. W. 391. A municipality may have a choice of remedies. Lockhart v. City of Houston, 45 Tex. 317.

[582] Dougherty v. Henarie, 47 Cal. 9; Williams v. Bergin, 116 Cal. 56; Lewis v. City of Seattle, 28 Wash. 639, 69 Pac. 393; Eagle Mfg. Co. v. City of Davenport, 101 Iowa, 493, 38 L. R. A. 480; Folks v. Yost, 54 Mo. App. 55; Adkins v. Case, 81 Mo. App. 104; Security Sav. Trust Co. v. Donnell, 81 Mo. App. 147; West v. Porter, 89 Mo. App. 150; Bonte v. Taylor, 24 Ohio St. 628; State v. City of Columbia (Tenn. Ch. App.) 52 S. W. 511.

[583] Kansas City v. Gray, 62 Kan. 198, 61 Pac. 746; Kirwin v. Nevin, 23 Ky. L. R. 947, 64 S. W. 647; Eyssell v. City of St. Louis, 168 Mo. 607, 68 S. W. 893; Adkins v. Case, 81 Mo. App. 104; Council v. Moyamensing, 2 Pa. 224; City of Ballard v. West Coast Imp. Co., 15 Wash. 572; Krutz v. Gardner, 25 Wash. 396, 65 Pac. 771; Levy v. Wilcox, 96 Wis. 127, 70 N. W. 1109.

[584] Perine v. Forbush, 97 Cal. 305; Steinmuller v. Kansas City, 3 Kan. App. 45, 44 Pac. 600; Cooper v. Nevin, 90 Ky. 85; Redick v. City of Omaha, 35 Neb. 125; City of Philadelphia v. Unknown Owner, 149 Pa. 22; State v. City of Ballard, 16 Wash. 418; Bowman v. City of Colfax, 17 Wash. 344, 49 Pac. 551; Fogg v. Town of Hoquiam, 23 Wash. 340, 63 Pac. 234.

[585] In re Brown, 14 Daly (N. Y.) 103; Pardridge v. Village of Hyde Park, 131 Ill. 537, 23 N. E. 345.

statutory lien for delinquent taxes as to notice,[586] the manner of publication,[587] the time and manner of sale, apply here.[588] Rights and remedies given in connection with the statutory lien or the collection of a special assessment through summary proceedings are construed with greater strictness than those which relate to the collection through an action where the owner of property is afforded a greater degree of protection.[589] Provisions for redemption, however, are liberally construed.[590]

[586] Greenstreet v. Thornton, 60 Ark. 369, 27 L. R. A. 735. In the foreclosure of an assessment lien, general notice is only authorized where the owner of property is unknown and this fact alleged in the complaint. Hellman v. Shoulters, 114 Cal. 136; Montford v. Allen, 111 Ga. 18; Illinois Cent. R. Co. v. People, 189 Ill. 119, 59 N. E. 609; Boynton v. People, 166 Ill. 64; London & N. W. American Mortg. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777; Ferguson v. Quinn, 123 Pa. 337.

[587] Barnett v. Wolf, 70 Ill. 76; Harris v. Lester, 80 Ill. 307; Hertig v. People, 159 Ill. 237. "Appellant claims that the matters set forth in the certificate of publication filed in the confirmation proceedings are false and the certificate therefore insufficient. At the hearing of this cause he called one B. McWilliams, in order to prove by him that between the dates, February 3 and February 9, 1893, the dates within which the certificate of publication alleged the notice to have been published, no notice appeared in the files of the Chicago Mail. The court on appellee's objection refused to hear such testimony. In this the court did not err. The proper time to have tendered such testimony was at the hearing of the confirmation proceeding. As it was, the offer came too late; for this is a collateral proceeding in which it is sought to attack the jurisdiction of the court to render the judgment. In the record of the confirmation proceeding there appeared a certificate which was sufficient if true; and the judgment recited that the facts alleged in such certificate were true. Consequently, it will be assumed that the court had sufficient evidence before it to warrant the rendering of judgment. Even were the certificate in fact insufficient, appellant could take no advantage of it, in this, a collateral proceeding; for in such a case the presumption would be that the court heard and acted upon other and sufficient evidence to sustain the finding."

[588] Brumby v. Harris, 107 Ga. 257, 33 S. E. 49. A sale can be had only of the property upon which the assessment is charged. City of Lawrence v. Killam, 11 Kan. 499. The fact that the contract was improperly let to a partnership composed of a member of the city council and authorities is not a sufficient reason to have the sale set aside and a tax deed enjoined. State v. Taylor, 59 Md. 338; Whittaker v. City of Deadwood, 12 S. D. 608; Felker v. City of New Whatcom, 16 Wash. 178.

[589] Lyon v. Alley, 130 U. S. 177; Hills v. City of Chicago, 60 Ill. 86; Nicholes v. People, 171 Ill. 376;

§ 394. Time of collection.

The right of the public corporation or an individual to collect a special assessment is usually dependent upon the completion of the work; the reason for the rule being self-evident.[591] Statutory or charter provisions may direct the payment of the assessment in equal installments distributed over a term of years,[592] this being done to lighten the burden of the property owner, as the cost of a local improvement is usually heavy in proportion to the value of property.

Buell v. Ball, 20 Iowa, 282; Waln v. Common Council of Beverly, 53 N. J. Law, 560; Merchants' Realty Co. v. City of St. Paul, 77 Minn. 343, 79 N. W. 1040.

[590] Martin's Ex'x v. Slaughter, 20 Ky. L. R. 1743, 50 S. W. 27. The rule especially relates to provisions for redemption by the property owner from sale. See, also, as holding the same, Johnston v. City of Louisville, 74 Ky. (11 Bush) 527.

People v. Bleckwenn, 126 N. Y. 310, 27 N. E. 376, affirming 58 Hun, 609, 13 N. Y. Supp. 487; Nelson v. Bleckwenn, 137 N. Y. 565; Gault's Appeal, 33 Pa. 94; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496.

[591] Sargent v. Tuttle, 67 Conn. 162, 32 L. R. A. 822; Jones v. Schulmeyer, 39 Ind. 119; Adams v. City of Shelbyville, 154 Ind. 467, 57 N. E. 114, 49 L. R. A. 797. Under the Barrett Law, the assessment after being ascertained by the method prescribed in §§ 6 and 7, its lien relates back to the time of ordering the improvement. Hibben v. Smith, 158 Ind. 206, 62 N. E. 447; Felker v. City of New Whatcom, 16 Wash. 178. The completion of a street improvement is not necessary to a valid sale in the absence of a charter provision requiring it. But see Lawrence v. People, 188 Ill. 407, 58 N. E. 991, as holding to the contrary.

[592] Sanders v. Brown, 65 Ark. 498, 47 S. W. 461. The full amount of the improvement assessment, however, becomes a lien upon the property which can only be satisfied by a payment of the full amount. English v. City of Danville, 150 Ill. 92, 36 N. E. 994; Lightner v. City of Peoria, 150 Ill. 80, 37 N. E. 69; People v. City of Chicago, 152 Ill. 546; Merriam v. People, 160 Ill. 555; Culver v. People, 161 Ill. 89; City of Charleston v. Cadle, 166 Ill. 487; Andrews v. People, 173 Ill. 123; Murray v. City of Chicago, 175 Ill. 340; Gross v. Village of Grossdale, 176 Ill. 572; Phelps v. City of Mattoon, 177 Ill. 169; Wayne County Sav. Bank v. Gas City Land Co., 156 Ind. 662, 59 N. E. 1048; Talcott v. Noel, 107 Iowa, 470, 78 N. W. 39; District of Clifton v. Schneider, 21 Ky. L. R. 212, 51 S. W. 13; State v. District Ct. of St. Louis County, 68 Minn. 147; Makley v. Whitmore, 61 Ohio St. 587, 56 N. E. 461; German-American Sav. Bank v. City of Spokane, 17 Wash. 315, 47 Pac. 1103, 49 Pac. 542, 38 L. R. A. 259. But an arrangement for a payment in installments cannot be made when the contract calls for immediate payment of the amount due to the contractor.

§ 395. The rights of property owners.

The property owner has the right, either through an appeal in a court of law,[593] or through the aid of a court of equity,[594]

[593] Dodd v. City of Hartford, 25 Conn. 232; Trustees of Hazelgreen v. McNabb, 23 Ky. L. R. 811, 64 S. W. 431; Bagg v. City of Detroit, 5 Mich. 336; Bergen County Sav. Bank v. Inhabitants of Union, 44 N. J. Law, 599. Laches in bringing a writ of certiorari to review an assessment will result in its dismissal. Meier v. Kelly, 20 Or. 86, 25 Pac. 73.

[594] Ogden City v. Armstrong, 168 U. S. 224. In a suit to restrain the collection of a special assessment the affirmative finding of jurisdictional facts by a city council is not conclusive. Lyon v. Town of Tonawanda, 98 Fed. 361; Byrne v. Drain, 127 Cal. 663. The ground of multiplicity of suits is not available in an application for an injunction to restrain the collection of a city street assessment, and the court also holds that since a sale under a void city street assessment causes no cloud on the title neither is this ground available.

Fenwick Hall Co. v. Town of Old Saybrook, 69 Conn. 32; Murphey v. City of Wilmington, 5 Del. Ch. 281; Wilson v. Boise City, 7 Idaho, 69, 60 Pac. 84. An injunction will not issue to restrain a sale where it has already taken place. McBride v. City of Chicago, 22 Ill. 574; City of Bloomington v. Blodgett, 24 Ill. App. 650. An injunction will not be granted where there is an adequate remedy at law. Hewes v. Village of Winnetka, 60 Ill. App. 654. To warrant an injunction to restrain the collection of a special assessment, it is necessary to show not only lack of notice to, but no knowledge of the improvement by, the property owner.

City of Indianapolis v. Gilmore, 30 Ind. 414. A sufficient cause of action for trespass is not available in an application for an injunction to restrain the collection of a street assessment. De Puy v. City of Wabash, 133 Ind. 336. The manner in which work was performed is not a jurisdictional question and therefore cannot be considered in an action to enjoin the levy of an assessment made for street improvements. City of Topeka v. Gage, 44 Kan. 87, 24 Pac. 82. But the right of the property owner will be lost if no action is taken by him within the time fixed by law. The same is held in Lynch v. Kansas City, 44 Kan. 452.

Hammerslough v. Kansas City, 46 Kan. 37, 26 Pac. 496; Kansas City v. Kimball, 60 Kan. 224, 56 Pac. 78; Andrews v. Love, 50 Kan. 701; Holland v. City of Baltimore, 11 Md. 186; City of Baltimore v. Porter, 18 Md. 284; Minnesota Linseed Oil Co. v. Palmer, 20 Minn. 468 (Gil. 424); Harmon v. City of Omaha, 53 Neb. 164, 73 N. W. 671; Liebstein v. City of Newark, 24 N. J. Eq. (9 C. E. Green) 200. Equity will entertain an application for relief against an erroneous assessment where its enforcement would lead to a multiplicity of suits, would produce irreparable injury, or where on the face of the proceedings it is valid and intrinsic evidence is required to show its invalidity.

Van Doren v. City of New York, 9 Paige (N. Y.) 388; In re Bridgford, 65 Hun, 227, 20 N. Y. Supp. 281;

to have restrained the collection of a void assessment. A distinction in this respect must be made between such a right based upon an assessment utterly void for want of jurisdictional conditions[595] or one irregularly made. As to the latter, the courts

Masterson v. Hoyt, 55 Barb. (N. Y.) 520; Hassan v. City of Rochester, 67 N. Y. 528; Boyle v. City of Brooklyn, 71 N. Y. 1; Dederer v. Voorhies, 81 N. Y. 153; Tifft v. City of Buffalo, 130 N. Y. 695; Hilliard v. City of Asheville, 118 N. C. 845, 24 S. E. 738; Oregon & C. R. Co. v. City of Portland, 25 Or. 229, 22 L. R. A. 713; Haisch v. City of Seattle, 10 Wash. 435; Kline v. City of Tacoma, 11 Wash. 193. Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553. An illegal assessment is not such a cloud on the title of a lot as to confer equitable jurisdiction to restrain its collection. Jenkins v. Rock County Sup'rs, 15 Wis. 11; Cook v. City of Racine, 49 Wis. 243.

But see the following cases as holding that a court of equity will not interfere to restrain by injunction the collection of an assessment for street improvements levied by a city within the authority granted by its charter: City of Peoria v. Kidder, 26 Ill. 351; Jackson v. City of Detroit, 10 Mich. 248; Motz v. City of Detroit, 18 Mich. 495; Harper v. City of Grand Rapids, 105 Mich. 551; Buddecke v. Ziegenhein, 122 Mo. 239; Wilson v. City of Auburn, 27 Neb. 435; Jones v. City of Newark, 11 N. J. Eq. (3 Stockt.) 452; Hoffeld v. City of Buffalo, 130 N. Y. 387; Warner v. Knox, 50 Wis. 429.

Equity will also afford a property owner relief against an assessment practically valid on its face and because of this constituting a cloud on his title. Bolton v. Gilleran, 105 Cal. 244; Ankeny v. Palmer, 20 Minn. 477 (Gil. 413); Touzalin v. City of Omaha, 25 Neb. 817; Town of Albuquerque v. Zeiger, 5 N. M. 674; Guest v. City of Brooklyn, 69 N. Y. 506; Tifft v. City of Buffalo, 130 N. Y. 695; Alvord v. City of Syracuse, 163 N. Y. 158.

[595] Zehnder v. Barber Asphalt Pav. Co., 106 Fed. 103; Pittsburgh, C., C. & St. L. R. Co. v. Fish, 158 Ind. 525, 63 N. E. 454; City of Ft. Wayne v. Shoaff, 106 Ind. 66; City of Terre Haute v. Mack, 139 Ind. 99; Chicago, M. & St. P. R. Co. v. Phillips, 111 Iowa, 377, 82 N. W. 787; Bouldin v. City of Baltimore, 15 Md. 18; City of Manistee v. Harley, 79 Mich. 238, 44 N. W. 603; Kelly v. City of Minneapolis, 57 Minn. 294, 26 L. R. A. 92; Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983. A failure to object on jurisdictional grounds within the time limited by law renders void the assessment. Leslie v. City of St. Louis, 47 Mo. 474; Ives v. Irey, 51 Neb. 136; Town of Albuquerque v. Zeiger, 5 N. M. 674, 27 Pac. 315; Providence Retreat v. City of Buffalo, 29 App. Div. 160, 51 N. Y. Supp. 654; Culbertson v. City of Cincinnati, 16 Ohio, 574; Gaston v. City of Portland, 41 Or. 373, 69 Pac. 34, 445; Phillips v. City of Sioux Falls, 5 S. D. 524; Kerr v. City of Corsicana (Tex. Civ. App.) 35 S. W. 694; Foote v. City of Milwaukee, 18 Wis. 270; Hayes v. Douglas County, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213; Dietz v. City of Neenah, 91 Wis. 422, distinguishing Hixon v. Oneida County, 82 Wis. 515.

usually hold that the property owner's right to a review and correction is limited both as to manner and time by statutory provisions, and as stated in sections 377 and 381, if action is not taken by him within the time and in the manner thus prescribed, his rights are lost.[596]

§ 396. Personal liability.

It has been repeatedly held that a special assessment is a charge upon property not upon the individual, and this principle has given rise to a great degree of elasticity in construing and exercising various provisions of the law relative to the property affected by a special assessment.[597] The reason for this rule is well stated in the authorities cited in the note and need not be repeated.[598] It is within the power of the legislature, however, to

[596] Parsons v. District of Columbia, 170 U. S. 45; Williams v. Eggleston, 170 U. S. 304; Village of Norwood v. Baker, 172 U. S. 269; Strenna v. City Council of Montgomery, 86 Ala. 340, 5 So. 115; City of Little Rock v. Katzenstein, 52 Ark. 107; Crane v. City of Siloam Springs, 67 Ark. 30; Williams v. Bergen (Cal.) 57 Pac. 1072; Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301; Chase v. City Treasurer of Los Angeles, 122 Cal. 540; State v. Williams, 68 Conn. 131, 48 L. R. A. 465; Village of Morgan Park v. Wiswall, 155 Ill. 262; Kirchman v. People, 159 Ill. 265; Boynton v. People, 159 Ill. 553; Smith v. Kochersperger, 180 Ill. 527; Fiske v. People, 188 Ill. 206, 52 L. R. A. 291; Jackson v. Smith, 120 Ind. 520, 22 N. E. 431; Taber v. Ferguson, 109 Ind. 227; Balfe v. Lammers, 109 Ind. 347; Bowen v. Hester, 143 Ind. 511; Wahlgren v. Kansas City, 42 Kan. 243; Marshall v. City of Leavenworth, 44 Kan. 459; Doran v. Barnes, 54 Kan. 238; Kansas City v. Gray, 62 Kan. 198, 61 Pac. 746; Inhabitants of Leominster v. Conant, 139 Mass. 384; People v. Common Council of Detroit, 28 Mich. 228; Rogers v. City of St. Paul, 22 Minn. 494; Town of Macon v. Patty, 57 Miss. 378; City of Omaha v. Kountze, 25 Neb. 60; Ives v. Frey, 51 Neb. 136; In re Hazleton, 58 Hun, 112, 11 N. Y. Supp. 557; Brennan v. City of Buffalo, 8 Misc. 178, 29 N. Y. Supp. 750; Loomis v. City of Little Falls, 66 App. Div. 299, 72 N. Y. Supp. 774; City of Cincinnati v. James, 55 Ohio St. 180; Steffin v. Hill, 16 Or. 232; Wingate v. City of Astoria, 39 Or. 603, 65 Pac. 982; Wilson v. Town of Philippi, 39 W. Va. 75, 19 S. E. 553; Warner v. Knox, 50 Wis. 429; Gleason v. Waukesha County, 103 Wis. 225, 79 N. W. 249; Pratt v. City of Milwaukee, 93 Wis. 658.

[597] See authorities cited under §§ 354 and 365; Escondido High School Dist. v. Escondido Seminary, 130 Cal. 128, 62 Pac. 401; Kelly v. Mendelsohn, 105 La. 490.

[598] Cooley, Taxation (2d Ed.) p. 674 et seq.; Neenan v. Smith, 50 Mo. 528, Bliss, J.: "There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of gen-

make an assessment for local improvement a personal charge, and it might be said that the weight of authority in the absence of restrictive legislation permits this to be done.[599]

eral taxation for governmental purposes, and that which supports the right of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other. All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and his property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvements are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvement. Upon no other ground will such partial taxation for a moment stand. Other property held by the owner is affected by this improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not equally apply to that of all others. The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. The latter, indeed, is not what is understood by local or special assessment, but the very term would confine it to the property in the locality; for, if the owner be personally liable, it is not only a local assessment, but also a general one as against the owner. The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomaly—the monstrous injustice—of not only wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property. I greatly doubt whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property within the municipality are equally charged. As to all property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interests, and should be subject to no greater burdens."

Randolph v. Bayue, 44 Cal. 366; Dempster v. People, 158 Ill. 36; Illinois Cent. R. Co. v. People, 170 Ill. 224; Gaslight & Coke Co. v. City of New Albany, 158 Ind. 268, 63 N. E. 458; Buell v. Ball, 20 Iowa, 282; Royce v. Town of Aplington, 90 Iowa, 352, 57 N. W. 868; Chicago, R. I. & P. R. Co. v. City of Ottumwa, 112 Iowa, 300, 83 N. W. 1074, 51 L. R. A. 763; Meyer v. City of Covington, 20 Ky. L. R. 239, 45 S. W. 769; Barker v. Southern Const. Co., 20 Ky. L. R. 796, 47 S. W. 608; Wood-

§ 397. Recovery of invalid assessments.

A property owner may have paid the whole or a part of an invalid assessment, and the question then arises of his right to recover.[600] That this right exist it is necessary that the payment

ward v. Collett, 20 Ky. L. R. 1066, 48 S. W. 164; Fehler v. Gosnell, 99 Ky. 380.

Rosetta Gravel, Pav. & Imp. Co. v. Jollisaint, 51 La. Ann. 804. The enforcement of a lien of a special assessment is a proceeding in rem. City of Shreveport v. Prescott, 51 La. Ann. 1895, 46 L. R. A. 193; S. D. Moody & Co. v. Chadwick, 52 La. Ann. 1888; Wolff v. City of Baltimore, 49 Md. 446; Moale v. City of Baltimore, 61 Md. 224; City of St. Louis v. De Noue, 44 Mo. 136; Village of Houstonia v. Grubbs, 80 Mo. App. 433.

Security Trust Co. v. Von Heyderstaedt, 64 Minn. 409, 67 N. W. 219. A sale should be had of the property charged and for an amount not less than the full amount of the judgment as appears in the process. Trustees of Public Schools v. Shotwell, 45 N. J. Eq. (18 Stew.) 106; Brown's Estate v. Town of Union, 62 N. J. Law, 142; Little v. City of Rochester, 87 Hun (N. Y.) 493; Dreake v. Beasley, 26 Ohio St. 315; Nottage v. City of Portland, 35 Or. 539; Pennell's Appeal, 2 Pa. 216; Council v. Moyamensing, 2 Pa. 224; Higgins v. Bordages (Tex. Civ. App.) 28 S. W. 350; Green v. Ward, 82 Va. 324.

[599] Davidson v. City of New Orleans, 96 U. S. 97. See, also, authorities cited in Cooley, Taxation (2d Ed.) p. 672, note 2. Dodd v. City of Hartford, 25 Conn. 232; Pittsburgh, C., C. & St. L. R. Co. v. Hays, 17 Ind. App. 261, 44 N. E. 375, 45 N. E. 675, 46 N. E. 597; Edward C. Jones Co. v. Perry, 26 Ind. App. 554, 57 N. E. 583; City of Muscatine v. Chicago, R. I. & P. R. Co., 79 Iowa, 645, 44 N. W. 909; Tuttle v. Polk, 92 Iowa, 433, 60 N. W. 733; Dewey v. City of Des Moines, 101 Iowa, 416, 70 N. W. 605; Atchison, T. & S. F. R. Co. v. Peterson, 5 Kan. App. 103, 48 Pac. 877; Bagg v. City of Detroit, 5 Mich. 336; Jaicks v. Sullivan, 128 Mo. 177, 30 S. W. 890; Lincoln St. R. Co. v. City of Lincoln, 61 Neb. 109, 84 N. W. 802; Lake Shore & M. S. R. Co. v. City of Dunkirk, 65 Hun, 494, 20 N. Y. Supp. 596; Hutchinson v. City of Rochester, 92 Hun, 393, 36 N. Y. Supp. 766.

De Peyster v. Murphy, 39 N. Y. Super. Ct. (7 J. & S.) 255. Resort may be had to the land primarily charged with the special assessment or to its owner. Upon an election by the municipality the right to follow the other remedy to collect a deficiency does not exist. City of Ithaca v. Babcock, 72 App. Div. 260, 76 N. Y. Supp. 49; Ivanhoe v. City of Enterprise, 29 Or. 245, 35 L. R. A. 58; Lovenberg v. City of Galveston, 17 Tex. Civ. App. 162, 42 S. W. 1024; City of San Antonio v. Berry, 92 Tex. 319, 48 S. W. 496, modifying judgment in (Tex. Civ. App.) 46 S. W. 273.

[600] Dexter v. City of Boston, 176 Mass. 247. The right to recover is not affected by the fact that the special assessments were added in with and collected at the same time as the general taxes. Strickland v. City of Stillwater, 63 Minn. 43; McConville v. City of St. Paul, 75 Minn.

should have been made under protest[601] or while equivalent proceedings are pending to determine the validity of the tax.[602] Payments made under mistake of law cannot usually be recovered,[603] but this rule does not apply to those made under a

383, 77 N. W. 993, 43 L. R. A. 584; Rogers v. City of St. Paul, 79 Minn. 5, 81 N. W. 539, 47 L. R. A. 537; Burchell v. City of New York, 56 Hun, 640, 9 N. Y. Supp. 196; Trimmer v. City of Rochester, 130 N. Y. 401, 29 N. E. 746, affirming 56 Hun, 643, 9 N. Y. Supp. 695. The money paid cannot be recovered until the assessment is set aside. Landon v. City of Syracuse, 19 App. Div. 41, 46 N. Y. Supp. 1053; Striker v. Striker, 31 App. Div. 129, 52 N. Y. Supp. 729. Moneys refunded should go to the parties originally paying them, not to the owner of the property upon which they were a charge. Wallace v. City of New York, 53 App. Div. 187, 65 N. Y. Supp. 855, affirmed in 165 N. Y. 658, 59 N. E. 1132; People v. Molloy, 161 N. Y. 621. City of San Antonio v. Peters (Tex. Civ. App.) 40 S. W. 827. The right to recover an assessment already paid exists where the improvement to pay the cost of which it is levied is abandoned.

[601] Phelan v. City & County of San Francisco, 120 Cal. 1, 52 Pac. 38; Gill v. City of Oakland, 124 Cal. 335; Hoke v. City of Atlanta, 107 Ga. 416, 33 S. E. 412. A voluntary payment though under protest cannot be recovered. Hawkeye Loan & Brokerage Co. v. City of Marion, 110 Iowa, 468, 81 N. W. 718; City of Omaha v. Kountz, 25 Neb. 60, 40 N. W. 597. The following protest held insufficient: "Truman Buck, Treasurer: I this day pay you, under protest, $2,181.23, for special grading tax on property fronting on Fifteenth street, south of Williams street. This is paid to save penalty; and, as it is believed that the tax is illegal, I shall collect the same back. Augustus Kountz." Chase v. City of New York, 23 App. Div. 322, 48 N. Y. Supp. 333; Palmer v. City of Syracuse, 26 Misc. 561, 57 N. Y. Supp. 600; In re Hughes, 93 N. Y. 512; Phelps v. City of New York, 112 N. Y. 216, 2 L. R. A. 626; Peebles v. City of Pittsburgh, 101 Pa. 304.

[602] Keehn v. McGillicuddy, 19 Ind. App. 427, 49 N. E. 609. The syllabus epitomizing the decision follows: "Where a lot has been sold on foreclosure of an assessment lien for street improvements, and the owner redeems the property to avoid losing title pending a suit by him to have such judgment declared void, the payment of the money necessary to redeem is not voluntary and he may recover it back on the judgment being adjudged void." Citing Lafayette & I. R. Co. v. Pattison, 41 Ind. 312; Gable v. Seiben, 137 Ind. 155.

Jersey City v. Green, 42 N. J. Law, 627; Brehm v. City of New York, 104 N. Y. 186.

[603] Brands v. City of Louisville, 23 Ky. L. R. 442, 63 S. W. 2. "Reduced to its last analysis, the case comes to this: The city assessed against the appellants' property for the improvement of the street in front of it an amount larger by ten per cent than it should have assessed. If a recovery can be had in this case, then one may be had in every case where the burden is wrongfully apportioned although the assessment has been voluntarily

misapprehension of facts.[604] And it is also true that the property owner may be estopped by laches[605] or his conduct[606] from asserting his right. An action for this purpose must be brought against the proper public organization, namely, that one receiving the moneys in the first instance and later distributing them.[607] One brought against the officials or organization, hav-

paid. Such a rule would involve the city government in inextricable confusion. The council could not know what liabilities might be anticipated or what taxes should be levied. Under the constitution the levy of taxes must specify the purpose for which the tax is to be used, and a tax levied for one purpose cannot be applied to another. The reason for the rule denying a recovery of taxes voluntarily paid is, after all, the security and efficiency of the city government; and every reason which forbids the recovery of municipal taxes that have been voluntarily paid seems to us to apply with equal force to assessments for municipal improvements. The city is required to make the apportionment. If an error is made it is the duty of the property owner, no less than the city officials to detect and correct it. If, instead of doing this, he voluntarily pays the assessment, and the city makes other contracts and assumed other obligations on the idea that these matters are all settled, it seems to us that sound public policy requires the loss to fall on the taxpayer who has acquiesced in the assessment and voluntarily paid the money rather than litigate the right." McCann v. City of Louisville, 23 Ky. L. R. 558, 63 S. W. 446; Palmer v. City of Syracuse, 26 Misc. 561, 57 N. Y. Supp. 600; Hubbard v. City of Hickman, 67 Ky. (4 Bush) 204; Moore v. Bath County Ct., 70 Ky. (7 Bush) 177.

[604] City of Indianapolis v. Patterson, 112 Ind. 344, 14 N. E. 551.

[605] Ritchie v. City of South Topeka, 38 Kan. 368; Byram v. City of Detroit, 50 Mich. 56; Lundbom v. City of Manistee, 93 Mich. 170, 53 N. W. 161.

[606] Jackson v. City of Detroit, 10 Mich. 248; State v. Ramsey County Dist. Ct., 40 Minn. 5. "In this instance the relator with actual notice of the assessment, voluntarily paid it, thereby expressing her satisfaction with and acquiescence in it. Having done this and the city having subsequently gone on and improved her property, * * * she cannot now be heard to resist the assessment. * * * It is fallacious to say that because the board assessed her damages at nothing, therefore there was only an assessment of benefits and that this was all that she acquiesced in. It was immaterial whether they assessed the damages at nothing and the benefits at $40 or the damages at, say, $50 and the benefits at $90. Equally in either case there would be an assessment of both damages and benefits, and the difference would be the amount payable; and by voluntarily paying the balance the relator as fully assented to the assessment of her damages at nothing as she did to the assessment of her benefits at $40.

[607] Davis v. City & County of San Francisco, 115 Cal. 67; Gill v. City of Oakland, 124 Cal. 335; Hawkeye Loan & Brokerage Co. v. City of

ing in possession at that time the moneys in question, will be insufficient if the principle stated in the preceding sentence is recognized.[608] The mere fact that the property owner may have been benefited by the improvement as constructed will not defeat his right to recover a void assessment if other required conditions exist.[609] The right to recover an assessment void because of jurisdictional conditions exists independent of the requirements suggested in this section.[610]

Marion, 110 Iowa, 468, 81 N. W. 718; Anderson v. Hill, 54 Mich. 477; Tripler v. City of New York, 63 Hun, 630, 17 N. Y. Supp. 750. The burden of proof is upon the plaintiff in such case to prove the illegality of the assessment. Fish v. Higbee, 22 R. I. 223, 47 Atl. 212.

[608] Easterbrook v. City & County of San Francisco (Cal.) 44 Pac. 800, citing Liebman v. City & County of San Francisco, 11 Sawy. 147, 24 Fed. 705; Elberg v. San Luis Obispo County, 112 Cal. 316, 41 Pac. 475, 44 Pac. 572; Pacific Mut. L. Ins. Co. v. San Diego County, 112 Cal. 314, 41 Pac. 423, 44 Pac. 571.

[609] Havens v. City of New York, 67 App. Div. 90, 73 N. Y. Supp. 678. "This action was brought to recover from the city the amount thus paid by the plaintiffs, they claiming that the payment was of an assessment apparently valid and regular upon its face; that it was in fact illegal and void; that the board of assessors of New York had no jurisdiction to levy the assessment, or the board of revision and correction of assessment lists to confirm the same; that the facts constituting the illegality and want of jurisdiction did not appear by the assessment list nor in the record of the proceedings relative to said assessment; and that payment was made in ignorance of the facts constituting the invalidity and illegality of the assessment. On the trial of the action, * * * the complaint was dismissed. * * * Some of the expressions of the trial judge in rendering his decision would indicate that the dismissal of the complaint was based upon an equitable consideration alone. The single circumstance that the plaintiffs had received benefit from the improvement cannot be effective to defeat an action of this character, which is one at law, brought by the property owner to recover from the city, money paid by him upon an illegal assessment under alleged compulsion of law, and to prevent a sale of his property. In such an action, on a proper showing, a recovery may be had of the amount of assessment so paid. * * * Such an action is for money had and received, governed, it is true, by equitable considerations; but the one isolated fact that a person has been benefited by the work or improvement for which the assessment is imposed is not sufficient, under the authorities, to prevent a recovery."

[610] Ogden City v. Armstrong, 168 U. S. 224; City of Baltimore v. Hughes' Adm'r, 1 Gill & J. (Md.) 480; Pooley v. City of Buffalo, 122 N. Y. 592, 4 N. Y. Supp. 450; Poth v. City of New York, 77 Hun, 225, 28 N. Y. Supp. 365; Strusburgh v. City of New York, 87 N. Y. 452; Union Steamboat Co. v. City of Buffalo, 82 N. Y. 351.

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